BRB No. 07-0561

A.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS-TITAN CORPORATION	)	DATE ISSUED: 03/19/2008
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ AIG WORLDSOURCE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Francis X. Duda (Anderson & Gilbert), St. Louis, Missouri, for claimant.

Michael W. Thomas and Shana L. Prechtl (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2006-LDA-144) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with

law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired by employer on May 16, 2003, as an Arabic and Kurdish translator for the United States Army, and was deployed to a military base in Mozul, Iraq. On July 1, 2003, claimant was exposed to sulfur smoke while in the course of his employment with employer. It is undisputed that as a result of this work-related exposure, claimant developed reactive airways diseases (RAD) and is unable to return to his former employment as a translator for employer in Iraq.[1] Employer voluntarily paid claimant temporary total disability compensation from September 24, 2004 to July 20, 2006. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge found that employer failed to establish the availability of suitable alternate employment. He further found that claimant's average weekly wage should be determined under Section 10(c) of the Act, 33 U.S.C. §910(c), and should be based on the actual wages claimant received while working for employer in Iraq, both preceding and subsequent to claimant's July 1, 2003 injury; he therefore found that claimant's average weekly wage was $1,942.66. The administrative law judge accordingly awarded claimant temporary total disability compensation from May 17, 2004 to September 29, 2004,[2] and permanent total disability compensation thereafter, based on this average weekly wage.

On appeal, employer contends that the administrative law judge erred in determining claimant's present medical restrictions and in finding that it did not establish the availability of suitable alternate employment. Employer further assigns error to the administrative law judge's average weekly wage determination. Claimant responds, urging affirmance.

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[1] Immediately following his exposure to sulfur smoke on July 1, 2003, claimant developed respiratory symptoms. He was diagnosed with RAD and treated for this condition by military physicians in Iraq until May 2004. During this period, claimant continued to work as a translator although he frequently had to take time off work and could not perform all of his regular duties. After being advised by a military doctor in Iraq that he should see a specialist for his condition, claimant returned to his home in St. Louis, Missouri, in May 2004. *See* Hearing Tr. at 47-57; 63-80; CXs 19-23; CX 26 at 25-27, 32-40, 47-49, 83-86, 97-99.

[2] On appeal, employer does not challenge the administrative law judge's finding that claimant reached maximum medical improvement as of September 29, 2004.

Where, as in the instant case, it is uncontested that claimant is unable to return to his usual employment duties due to his work injury, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and which he could realistically secure if he diligently tried. *See Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Meehan Seaway Serv., Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's medical restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Pietrunti,* 119 F.3d 1035, 31 BRBS 84(CRT); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

We first address employer's contention that the administrative law judge erred in finding that claimant is limited to employment performed in his own house on the basis of Dr. Tuteur's opinion without providing a sufficient discussion of the contradictory medical and lay evidence of record. Employer states that the record in this case includes evidence, not addressed by the administrative law judge, which could support a finding that claimant is not restricted to in-home employment by his medical condition. In reaching his conclusion, the administrative law judge first credited claimant's testimony concerning his episodes of respiratory distress and the environmental irritants that trigger such attacks.[3] Decision and Order at 13-14. Next, after summarily acknowledging that

[3] Claimant testified that he averages four respiratory attacks a month, that his attacks involve wheezing, coughing, sputum production, and chest tightness, and that most of the time he does not know what has triggered the attacks. EX 26 at 24, 45-47, 54, 57-58, 60-61; Hearing Tr. at 98-100, 118, 122-125. He identified gasoline, exhaust fumes, perfume, housecleaning supplies, mowing the lawn, and cigarette smoke as known triggers; additionally, claimant testified that he is bothered by cold weather and humidity. EX 26 at 24-25, 46-47, 55-57, 60-66; Hearing Tr. at 96-98, 117-118, 121. Claimant presently takes Advair, Singulair, Spiriva, Fluticasone, prednisone, and albuterol to control his condition, and he tries to avoid exposure to known triggers and leaves the house when his wife uses cleaning supplies. EX 26 at 56, 60, 67, 81; Hearing Tr. at 86-89, 97, 124-125.

Drs. Botney[4] and Bruce[5] stated that claimant could work in clean-air office environments, the administrative law judge accorded determinative weight to Dr. Tuteur's opinion that claimant should engage only in home-based employment.[6] Decision and Order at 14. In

[4] Dr. Botney, who is Board-certified in Internal Medicine and the subspecialty of Pulmonary Disease, first saw claimant on June 27, 2004, and continued to treat claimant as of the date of the hearing. Dr. Botney confirmed claimant's diagnosis of RAD and stated that any exposure to inhaled irritants has the potential to trigger his condition, which could result in a full-blown reaction similar to a severe asthma attack. CX 24; CX 41B at 14, 21, 24-25, 31. Dr. Botney testified that gases, smoke, fumes and dust are likely triggers, and stated that it is not possible to identify all of the inhaled substances that could potentially trigger a reaction in claimant; he indicated that additional exposures to inhaled irritants could provoke a worsening of claimant's condition with much greater associated disability. CX 24; CX 41B at 14-15, 31-32, 50. Dr. Botney stated that claimant should avoid all noxious inhalations including gases, fumes, dust, cigarette smoke, and car exhaust. CX 24; CX 41B at 21. He further stated that claimant can perform all types of work in a clean-air environment in which there is little to no risk of exposure to inhaled irritants, and he cited office work as one example of work claimant could perform. CX 24; CX 41B at 25, 47.

[5] Dr. Bruce, who is Board-certified in Internal Medicine and Pulmonary Disease, saw claimant at employer's request on February 14, 2006. He also diagnosed RAD and stated that claimant should avoid exposure to substances that trigger his reactive airways. EXs 7, 8, 27 at 21-23, 44. Like Dr. Botney, Dr. Bruce stated that it was not possible to identify all of the triggers that could cause a reaction in claimant. EX 27 at 41. Dr. Bruce testified that he agreed with Dr. Botney that claimant can work in a clean-air environment including all types of office work. EX 27 at 26-28. He further stated that claimant's special work conditions would require that he not be exposed to substances already identified as triggers or to substances he has not previously been exposed to that could trigger his reactive airways. EX 27 at 47-48.

[6] Dr. Tuteur, who is Board-certified in Internal Medicine and Pulmonary Disease, saw claimant at employer's request on September 29, 2004. He diagnosed RAD, testified that recurrent exposure to triggers could produce permanent narrowing of the airways, and stated that claimant requires environmental controls so as to make it highly unlikely that he will be exposed to irritants that might trigger episodes of airways obstruction. CX 29; CX 41C at 18-23. Dr. Tuteur explained that it would be dangerous for claimant to work outside of his home because claimant would not be able to control the workplace environment and the environment during his commute, *e.g.*, exposure to vehicular fumes. CX 41C at 24, 29. Dr. Tuteur thus restricted claimant to home-based work because his home is an environment he can control. CX 29; CX 41C at 23-24, 42.

this regard, the administrative law judge found Dr. Tuteur's limitation of claimant to employment performed in his own home to be the most reasonable work restriction in light of claimant's need to avoid irritants even at low concentrations in combination with his inability to control an environment outside of his home office. *Id.*

We agree with employer that the administrative law judge did not provide a sufficient discussion of all of the record evidence relevant to the issue of claimant's ability to work in settings outside of his own home. First, the administrative law judge credited claimant's testimony regarding environmental irritants that trigger his respiratory attacks, Decision and Order at 13-14, without addressing the surveillance videotape entered into evidence which shows claimant sanding and installing a door on his house in cold weather.[7] EX 9; *see also* Decision and Order at 2; Hearing Tr. at 17-18. Next, in giving controlling weight to Dr. Tuteur's opinion regarding claimant's work restrictions, the administrative law judge did not discuss the contrary opinions of claimant's treating physician Dr. Botney, who saw claimant on a regular basis over the 28-month period preceding the hearing, and Dr. Bruce, who concurred with Dr. Botney. Moreover, the administrative law judge did not discuss Dr. Tuteur's opinion regarding claimant's restrictions in light of claimant's testimony regarding his activities outside of his home and claimant's activities shown on the surveillance videotape.[8] We therefore vacate the administrative law judge's finding that claimant's present medical condition limits him to in-home employment, and we remand the case for the administrative law judge to weigh all of the record evidence relevant to the issue of whether claimant is able to work outside of his home and to provide an explanation of his reasons for rejecting the evidence contrary to his findings. *See, e.g., See Washington Metropolitan Area Transit Authority,*

[7] Although the administrative law judge briefly summarized claimant's hearing testimony regarding the event recorded on the videotape in the "Statement of the Case" section of his decision, Decision and Order at 6; *see also* Hearing Tr. at 118-121, his discussion of claimant's credibility includes neither a reference to the videotape itself nor to claimant's testimony regarding the videotaped activity. Thus, we are unable to discern whether the administrative law judge considered whether the surveillance videotape diminishes the credibility of claimant's testimony regarding his environmental limitations.

[8] Dr. Tuteur's restriction of claimant to in-home work was based in part on his opinion that exposure to vehicular fumes during a commute to a workplace outside of claimant's home would endanger claimant. *See* Emp. P/R at 12; CX 41 C at 24, 29. The administrative law judge, however, did not discuss claimant's testimony that he presently drives his car to run errands and to pick up his daughter from school. *See* Emp. P/R at 12; Hearing Tr. at 116-117; EX 26 at 56, 80.

36 F.3d 375, 384, 28 BRBS 96, 106(CRT) (4th Cir. 1994); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

Employer next challenges the administrative law judge's rejection of the testimony of its vocational expert Beverly G. Brooks, who conducted a vocational evaluation of claimant and several labor market studies, which it asserts establish the availability of suitable alternate employment for claimant.[9] EXs 13-16; EX 29 (Attachment 1). Specifically, employer contends that the administrative law judge erred in discrediting Ms. Brooks's testimony regarding the suitability of jobs outside of claimant's home that she believed met the requirements of a clean-air environment in accordance with the work restrictions imposed by Drs. Botney and Bruce. *See* Decision and Order at 14, 16. The administrative law judge rejected this testimony by Ms. Brooks on the basis that she had not elicited sufficient information from the prospective employers to demonstrate that the jobs she identified were consistent with claimant's environmental restrictions. *Id*. at 14. Ms. Brooks testified on deposition, however, that she contacted each of the identified prospective employers, advised them of claimant's environmental restrictions, obtained information regarding the work environment of their facilities, and was told that claimant would be considered for employment. EX 29 at 19-26, 31, 67, 69, 73-74. Having eliminated jobs outside of claimant's restrictions, Ms. Brooks listed only those jobs meeting Dr. Botney's clean-air environment restrictions. EX 29 at 31, 39, 47, 88. In this regard, in determining that the jobs she listed met claimant's need for a clean-air environment, Ms. Brooks testified that the employers described the workplace environment as clean, air-conditioned, smoke-free, and free of exposure to strong chemicals. EX 29 at 20-22, 25-26, 31-32, 36-37, 41-45, 74. *See also* EXs 13-16, 29 (Attachment 1). As he thus did not fully address the relevant evidence, we cannot affirm the administrative law judge's rejection of Ms. Brooks's testimony and labor market surveys.[10] *See Patterson*, 36 BRBS 149; *Hernandez v. Nat'l Steel & Shipbuilding Co.*,

[9] In her labor market surveys, Ms. Brooks identified specific positions in two categories: 1) jobs outside claimant's home that she believed would accommodate Dr. Botney's clean-air environment restrictions, and 2) translator work, which was available on an as-needed basis that claimant could perform in his own home pursuant to Dr. Tuteur's restrictions. EXs 13-16; EX 29 at 15-18 (and Attachment 1 to EX 29).

[10] As employer correctly argues, the administrative law judge's discrediting of Ms. Brooks's opinion in part on the basis that she lacked experience in placing individuals with asthma or asthma-like conditions is not supported by the record. First, the administrative law judge's finding is based on a mischaracterization of Ms. Brooks's deposition testimony. Although Ms. Brooks initially stated that she had not placed anyone with asthma, EX 29 at 89, she went on to testify that she believed that she had placed several individuals with respiratory conditions similar to claimant's, *id.* at 93-94. Moreover, the administrative law judge did not provide a satisfactory explanation of how

32 BRBS 109 (1998). If, on remand, the administrative law judge finds that claimant is not restricted to in-home employment, he must reconsider Ms. Brooks's reports and deposition testimony and determine whether the jobs identified outside of claimant's home in the labor market surveys meet employer's burden of establishing the availability of suitable alternate employment.[11] *See id.*

Employer next argues that the administrative law judge erred in rejecting Ms. Brooks's testimony regarding the availability of the home-based translator jobs listed in her labor market surveys.[12] After summarizing Ms. Brooks's testimony regarding employment as a translator that could be performed in claimant's home on an as-needed basis, Decision and Order at 11-12, the administrative law judge stated that Ms. Brooks's estimates about earnings from these positions were "unimpressive," *id.* at 14, and concluded that employer had not established the availability of suitable alternate employment that claimant could perform from his home. *Id.* at 14, 16. In rejecting the evidence of home-based translator jobs on this basis, the administrative law judge erred

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the extent of Ms. Brooks's experience in placing individuals with asthma or asthma-like conditions had bearing on her ability to render a professional opinion regarding the suitability of particular jobs for claimant in light of his specific environmental restrictions.

[11] Employer further avers that in light of claimant's work overseas and his expressed willingness to relocate, the relevant labor market is not limited to the St. Louis area; in support of this argument, employer cites the Board's decision in *Patterson*, 36 BRBS 149. As the administrative law judge did not reach this issue, which was raised by employer below, *see* Emp. Post-Trial Brief at 14-18, we will not consider it for the first time on appeal. If, on remand, the administrative law judge finds that claimant is able to work outside of his home, he must determine the relevant labor market in accordance with applicable law.

[12] We agree with employer that Ms. Brooks's testimony that in-home translator jobs were both suitable for and available to claimant is not contradicted by the testimony of James M. England, Jr., claimant's vocational expert. *See* CX 41A at 29-30, 41. Although the administrative law judge correctly observed that Mr. England had no problem with the home-based translator jobs identified by Ms. Brooks if such jobs were available, he misconstrued Mr. England's testimony in his statement that Mr. England's job search revealed that none of these in-home translator jobs was available to claimant. *See* Decision and Order at 8; CX 41A at 29-31. Mr. England's search was confined to St. Louis-based companies, and he testified that he did not look into any translator companies not based in St. Louis offering home-based employment. *See* CX 41A at 31, 41.

in failing to address whether these at-home positions were both suitable for and available to claimant prior to considering claimant's earning capacity in any suitable positions. *See Neff v. Foss Maritime Co.*, 41 BRBS 46, 48 (2007). Moreover, in summarily rejecting Ms. Brooks's testimony regarding potential earnings as "not impressive," the administrative law judge failed to provide a reasoned analysis of the relevant evidence. Contrary to the administrative law judge's statement that Ms. Brooks's estimates of claimant's potential earnings from in-home translator positions were based on "guesses," Decision and Order at 14, Ms. Brooks's deposition testimony sets forth the specific information she considered in reaching these estimates.[13] EX 29 at 51-61, 85-90. On remand, the administrative law judge must consider whether the in-home translator jobs specifically identified by Ms. Brooks are sufficient to meet employer's burden of establishing suitable alternate employment in accordance with the applicable legal standards.[14] *See, e.g., Patterson*, 36 BRBS 149.

[13] Ms. Brooks testified that translators working for the companies which she identified are acting as independent contractors and that they can register with several companies at a time. EX 29 at 48-51, 54, 87. She stated that although many of the companies have a lot of Arabic translation work available, individual companies could not commit to how much work they could provide to claimant. *Id.* at 48, 54-58. Ms. Brooks testified that if claimant was aggressive about seeking work with these companies, he probably could work full-time, *id.* at 52-54, 60, and stated that she used her "best estimate" in indicating how much work claimant could get working for several companies. *Id.* at 57-58. She explained that the translation companies employ various means of payment including by the page, line or word, or by the hour. *Id.* at 55; *see also* EX 16. On the basis of information provided by the companies, Ms. Brooks estimated claimant's potential earnings, using either the average or low end of the pay scale, and she concluded that claimant could potentially earn $120,640 per year working approximately a 40-hour work week for 52 weeks if he obtained work from approximately six companies. EX 29 at 54-62, 85-90. She additionally testified that she spoke with all of these companies about claimant's qualifications as a translator and was told claimant would be highly considered based on his experience. *Id.* at 61-62.

[14] If, on remand, the administrative law judge finds that the in-home translator jobs identified by employer establish the availability of suitable alternate employment, he must then determine claimant's post-injury wage-earning capacity pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h). At that juncture, the administrative law judge may consider the evidence regarding earnings from the in-home translator positions as well as the other factors relevant to a determination of claimant's wage-earning capacity. *See Neff*, 41 BRBS at 48; *Ryan v. Navy Exch. Serv. Command*, 41 BRBS 17 (2007); *Devillier v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Lastly, employer assigns error to the administrative law judge's calculation of claimant's average weekly wage. Section 10(c) is to be used in instances when neither Section 10(a) nor (b) can be reasonably and fairly applied to calculate claimant's average weekly wage, or where there is insufficient information for application of those subsections.[15] *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *S.K. v. Serv. Employers Int'l, Inc.*, 41 BRBS 123 (2007).

Section 10(c) of the Act states:

> such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c). The object of Section 10(c) is to arrive at a sum that reasonably represents claimant's annual earning capacity at the time of his injury. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991). In its recent decision in *S.K.*, the Board held that although post-injury events generally are irrelevant to the average weekly wage calculation, consideration of post-injury factors may be appropriate under Section 10(c) where claimant's previous earnings do not realistically reflect his wage-earning potential. *S.K.*, 41 BRBS at 125; *see Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The administrative law judge is afforded wide discretion in arriving at a Section 10(c) calculation. *See, e.g., Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41, 44-45 (2006).

In this case, the administrative law judge based his calculation of claimant's average weekly wage under Section 10(c) on claimant's actual wages received throughout his employment with employer in Iraq, including those raises and bonuses he received while continuing to work for employer subsequent to his July 1, 2003, injury. We hold that the administrative law judge's inclusion of those actual earnings received by claimant subsequent to his injury represents a reasonable means of reflecting claimant's potential to earn income and ensures that claimant is fully compensated for the

[15] Employer does not contest the administrative law judge's finding that Section 10(a), (b), is inapplicable in the instant case.

earnings he lost due to his injury. *See Proffitt*, 40 BRBS at 44-45. We therefore affirm the administrative law judge's average weekly wage calculation.

Accordingly, the administrative law judge's determination that employer did not establish the availability of suitable alternate employment is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge