BRB No. 01-0272

MICHAEL POTTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WASHINGTON GAS LIGHT COMPANY	)	DATE ISSUED: Nov. 21, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Kirk D. Williams (Howard & Howard, P.C.), Washington, D.C., for claimant.

Stephen J. Price, Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1999-DCW-0005) of Administrative Law Judge Jeffrey Tureck 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *OKeeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury to his lumbar spine while working as a foreman at employer's Springfield, Virginia, office on January 5, 1976. Claimant continued to work at his usual employment until July 1976, when he underwent a laminectomy performed by Dr. Cooney. Claimant returned to restricted light duty work on December 6, 1976, but

worsening back pain forced him to stop on July 11, 1977. On August 25, 1977, Dr. Cooney released claimant to return to light duty work with permanent restrictions, including a limitation of no driving more than 50 miles per day. After considerable discussions with employer regarding alternate employment, claimant returned to work as a staff assistant at employer's Springfield office on November 28, 1977. In 1979, claimant moved from Gaithersburg, Maryland, to Damascus, Maryland, thereby increasing his daily commute to and from employer's Springfield office. Nevertheless, claimant continued to work regularly in the staff assistant position for employer through October 1, 1982, when he began to take time off due to increasing back pain. In the meantime, despite the fact that claimant, upon his return to work, was receiving the same wages as he had pre-injury, the parties stipulated, on May 3, 1978, that employer would pay claimant continuing permanent partial disability compensation for a 25 percent impairment to his back based on an average weekly wage of $412.09.

Claimant stopped working for employer altogether on February 2, 1983. On March 15, 1983, Dr. Luessenhop wrote to employer recommending that claimant limit his driving to no more than 12-15 miles at a time and no more than 30 miles daily, and on April 21, 1983, further stated that claimant could commute to his job if he were to stop for a rest period every 12-15 miles. Employer thereafter informed claimant that if he did not take action to comply with Dr. Luessenhop's restrictions, he would be fired. Claimant sought other work with employer but apparently was unable to find another position. Employer terminated claimant effective June 13, 1983, on the basis that he was "unavailable for work." Claimant underwent a second laminectomy in July 1984, and although he continues to have some intermittent back pain he has rarely seen a doctor for his back condition since his recovery from the 1984 surgery. Employer paid claimant temporary total disability benefits from February 2, 1983, until August 15, 1993, when it learned of claimant's alleged earnings from his own business.[1]

Meanwhile, in 1978, claimant, his wife, and another person who soon dropped out of

[1]Employer paid temporary total disability benefits totaling $160,968.05 as follows: from July 12, 1976, to December 5, 1976, from July 12, 1977, to October 2, 1977, from October 1, 1982, to October 10, 1982, from October 18, 1982, to October 20, 1982, from December 6, 1982, to December 7, 1982, from January 25, 1983, to January 30, 1983, and from February 2, 1983, to August 15, 1993.

the venture, started a real estate management company, named MTM Management Associates (MTM). Claimant served as president of MTM from the outset; however, he stated that MTM was his wife's business and that he merely helped out a bit and was not paid. MTM flourished over the course of the next ten years, and with that claimant's involvement in the company grew, although claimant testified that in 1989, he was spending only 5-10 hours a week working for MTM. Claimant also testified that MTM now has gross earnings of $230,000 a year and that starting in 1997, he began receiving an annual salary from MTM of $52,000.

In his decision, the administrative law judge determined that claimant was capable of performing his work as a staff assistant for employer from February 2, 1983, until his surgery in July 1984, that he was then unable to perform this work for six months through the end of January 1985, and that thereafter he has been able to perform the staff assistant work for employer. The administrative law judge also found that claimant had a wage-earning capacity as a property manager since at least 1989, at which time it appeared as though he was working for MTM full-time. Accordingly, the administrative law judge found claimant entitled to an award of temporary total disability benefits from July 1, 1984, through January 31, 1985, and to continuing medical benefits arising from the work-related back injury sustained on January 5, 1976.[2]

On appeal, claimant challenges the administrative law judge's determination that claimant was, with the exception of the period of disability related to his second back surgery in 1984, capable of performing the staff assistant work for employer. Claimant also contends that the administrative law judge erred in finding that claimant has had the wage-earning capacity of a property manager since 1989. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that he voluntarily limited his income as of February 3, 1983, by failing to continue to work as the staff assistant position at employer's Springfield facility, as that position required him to exceed the daily driving restriction imposed by Dr. Luessenhop in March 1983. Where, as in the instant case, claimant has shown that he cannot return to his regular or usual employment

[2]In addition, the administrative law judge determined that employer is entitled to a credit for all previous payments of compensation since February 2, 1983, in excess of the permanent partial disability compensation paid pursuant to the May 3, 1978, stipulation between the parties.

due to a work-related injury, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides, which he is capable of performing, considering her age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See generally Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51(CRT) (D.C. Cir. 1991); *Director, OWCP v. Berktresser*, 921 F.2d 306, 311-312, 24 BRBS 69, 73(CRT) (D.C. Cir. 1990); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988). Employer may meet this burden by offering claimant a suitable position in its facility. *See generally Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Buckland v. Department of the Army/NAF/CPO*, 32 BRBS 99 (1997).

It is uncontested that claimant was physically able to perform the staff assistant job provided by employer. The issue in this case concerns claimant's ability to drive between his home and his job. The administrative law judge found that claimant was able to drive to and from work up to the time of his surgery despite the fact that his round-trip commute exceeded his doctor's restrictions. The administrative law judge found that claimant's actions belied his assertion that he could not drive due to pain, as claimant never attempted to drive using additional back support, or find someone to commute to work with, or commute with a rest stop as recommended by Dr. Luessenhop. The administrative law judge also rejected the driving restrictions imposed by Drs. Cooney and Luessenhop because no basis is in the record to support their findings that claimant's driving should be limited to a set number of miles per day. *See* n. 4, *infra.* The administrative law judge concluded that the driving restrictions imposed by Drs. Cooney and Luessenhop based on the number of miles driven per day, as opposed to number of hours of driving per day, are "nonsensical." *See* Decision and Order at 5, n. 7. He found this conclusion supported, in part, by the medical opinion of Dr. Gordon.[3] *Id.* The administrative law judge also rejected claimant's testimony that he was unable to work after February 1, 1983, because his taking of prescription medication precluded his driving the required distance on a daily basis, as claimant has been taking medication all along and it had never interfered with his driving before that time. Thus, the administrative law judge concluded that claimant was capable of performing his work for employer and therefore was not totally disabled from February 2, 1983, until his surgery in July 1984.[4]

[3] Dr. Gordon stated that the driving restriction imposed by Dr. Luessenhop was "absurd," EX 10 at 12, given Dr. Gordon's belief that claimant, at the time of his maximum medical improvement in January 1985, was able to sit 6 to 8 hours a day.

[4]The administrative law judge continued by finding that as of 1983, claimant decided that he would rather work for MTM than commute 40 miles to work for employer, and since employer was voluntarily paying him temporary total disability compensation which

With regard to the period following claimant's surgery, the administrative law judge concluded that from February 1985 and continuing, claimant has been capable of driving to Springfield from his home. The administrative law judge relied on the opinion of Dr. Gordon, who opined that claimant had excellent results from his second back surgery, that he was capable of driving a car the distance that is required for him to work for employer in Springfield, Virginia, and that he could perform the staff assistant position offered by employer. Consequently, the administrative law judge found claimant entitled only to temporary total disability benefits from the time of his second surgery, July 1, 1984, until he reached maximum medical improvement on January 31, 1985.

We affirm the administrative law judge's determination that claimant is capable of driving from his home to Springfield, with the exception of the period during which he underwent and recovered from his second surgery, as it is rational and supported by substantial evidence. It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

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continued until 1993, claimant had absolutely no incentive to return to work for employer.

In the instant case, the administrative law judge rationally credited the medical opinion of Dr. Gordon over the contrary opinions of Drs. Cooney and Luessenhop to find that claimant was physically capable of driving the required distance to perform his position for employer as a staff assistant. In particular, the administrative law judge found that the record contains reports of Dr. Gordon's two examinations of the claimant as well as his deposition testimony explaining his conclusions. Employer's Exhibits (EXs) 3, 4, 10. In contrast, the administrative law judge found that there are no medical reports in the record from either Dr. Cooney or Dr. Luessenhop which would provide a basis for their driving restrictions.[5] EXs 1, 2, 5. In addition, the administrative law judge observed that claimant's actions indicate that driving was not a problem.[6] As this conclusions are supported by

[5]In fact, the record contains only the two letters written by Dr. Luessenhop setting out the driving restriction, EXs 1, 2; Claimant's Exhibit 5, and several office notes from Dr. Cooney which do not address claimant's physical restrictions, including one, dated April 17, 1982, wherein Dr. Cooney stated that claimant "may continue to perform his usual work." EX 5.

[6]In making this observation, the administrative law judge relied on the facts: that in 1979 claimant moved further away than closer to his job; that claimant took no steps, *e.g.*, using additional back support, or finding someone to commute with, to help make driving easier; that claimant never tried to commute with a rest stop as recommended by Dr. Luessenhop;

substantial evidence, the administrative law judge's determination that claimant is not, with the exception of the period related to his second back surgery in 1984, entitled to temporary total disability benefits is affirmed.[7] *See generally Ezell*, 33 BRBS 19; *Buckland*, 32 BRBS 99.

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and that claimant drove his car frequently while engaging in his duties for MTM.

[7]Inasmuch as the administrative law judge found that claimant was capable of engaging in suitable alternate employment as a staff assistant, it is unchallenged that said position paid the same wages as claimant's pre-injury position as a foreman, and as the administrative law judge determined that claimant voluntarily left the staff assistant job for reasons unrelated to his injury, claimant has no loss in wage-earning capacity and therefore is, contrary to his contentions, not entitled to an award of partial disability benefits. *See Ward v. Cascade General Inc.*, 31 BRBS 65 (1995); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). As such, we decline to address the administrative law judge's alternative findings on this issue.

We note that, in the alternative, the administrative law judge concluded claimant has had a wage-earning capacity as a property manager since at least 1989. The administrative law judge rejected claimant's assertion that his claimed income, based on the LS-200 Report of Earnings he filed, of $5,923.20 between February 2, 1983, and June 24, 1983, and of no income between June 25, 1985, through December 31, 1991, is an accurate representation of his post-injury earnings. The administrative law judge determined that while these reports are literally true, they failed to account for any work claimant did during the periods in question for MTM. The administrative law judge found that claimant's work with MTM directly benefitted him by increasing the value of the business owned by his wife, and in all likelihood, it permitted his wife to pay herself a higher salary.[8] Moreover, the administrative law judge found that as MTM grew, so too did claimant's work for that entity.[9] These findings are rational and supported by substantial evidence. Although the administrative law judge did not calculate a figure representing claimant's wage-earning capacity as a property manager since 1989, any error in this regard is harmless. In view of our affirmance of the finding that claimant was able to perform his job with employer, we need not further address this issue. As claimant had no loss in wage-earning capacity in view of the wages paid by the job with employer, plus his work for MTM, he is not entitled to an award of permanent partial disability benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

[8]The administrative law judge further noted that the fact that claimant was not paid a salary by MTM until some time in 1997 was a business decision by claimant and his wife which does not reflect on claimant's contributions to the business or on his wage-earning capacity which, as is indicated by the salary claimant received starting in 1997, was substantial.

[9]Between 1985 and 1989, MTM grew to the point that it was managing 10-11 properties, necessitating the hiring of two secretaries. HT at 114. During this period, the work performed by claimant for MTM grew to include attending association meetings, doing site inspections, soliciting bids from vendors, writing letters regarding violations of restrictive covenants, securing payments from delinquent property owners, bidding on management contracts, and other tasks. HT at 116-146.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge