BRB No. 12-0125

MICHAL G. CIECHORSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
REICON GROUP, LLC	)	DATE ISSUED: 10/16/2012
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED c/o LAMORTE BURNS AND COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Timothy F. Schweitzer (Hofmann & Schweitzer), New York, New York, for claimant.

Christopher J. Field (Field Womack & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2010-LHC-01836) of Administrative Law Judge Adele Higgins Odegard 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.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 began working for employer in September 2009 as a dockbuilder; he was assigned to a jobsite which involved the demolition and replacement of a ferry pier on the East River in New York City. CX 6; Tr. at 13, 58. Claimant testified that he injured his neck and upper extremities in January 2010 while carrying buckets of epoxy. Tr. at 14-17. Claimant stated he continued to work for employer throughout February 2010 but no longer performed the epoxy-carrying job; rather he switched to an epoxy-mixing job. *Id*. at 22-23. A February 12, 2010, MRI revealed that claimant suffered a large right posterolateral and right proximal foraminal C6-C7 disc herniation with extrusion and a severe impingement of the right C7 nerve root sheath. CX 9. Claimant's last day of work with employer was March 25, 2010. On April 14, 2010, claimant filed a claim for benefits under the Act. CX 2-3.

Finding that claimant established a prima facie case pursuant to Section 20(a), 33 U.S.C. §920(a), and that employer failed to rebut the Section 20(a) presumption, the administrative law judge found that claimant sustained an injury arising out of his employment with employer.[1] Based on the uncontradicted opinion of Dr. Acquista, the administrative law judge determined that claimant established he was totally disabled from his work injury as of April 19, 2010. Relying on the opinion of Dr. Bercik, the administrative law judge found that claimant reached maximum medical improvement on December 6, 2010, and that, as of that date, his disability abated. After determining that claimant's average weekly wage at the time of injury, as calculated pursuant to 33 U.S.C. §910(a), was $1,022, the administrative law judge awarded claimant temporary total disability benefits from April 19 to December 6, 2010. 33 U.S.C. §908(b).

On appeal, claimant argues that the administrative law judge erred in finding his average weekly wage as calculated under Section 10(a) to be $1,022. Claimant asserts that his average weekly wage, as calculated under Section 10(a) or (c), 33 U.S.C. §910(a), (c), is $1,888.55. Claimant also asserts that the administrative law judge erred in finding that his disability subsided and that he reached maximum medical improvement on December 6, 2010; claimant contends that his injury currently disables him from performing his job as a dockbuilder. Employer responds, urging affirmance of the administrative law judge's decision.

[1]In so finding, the administrative law judge observed that every physician diagnosed claimant with a disc herniation, which Dr. Herrera opined can be a result of repetitive movements, and claimant's uncontradicted testimony that he moved several hundred buckets of epoxy over a several-week period. Decision and Order at 9.

Claimant contends the administrative law judge erred in calculating his average weekly wage. Section 10 sets forth three alternative methods for determining claimant's average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average weekly wage where the injured employee's work is regular and continuous, and he is a five- or six-day per week worker.[2] Section 10(a) cannot be applied if the number of days a claimant worked is not evident from the record.[3] *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999), *aff'g* 31 BRBS 98 (1997). The computation of average annual earnings must be made pursuant to Section 10(c) if subsection (a) or (b) cannot be reasonably and fairly applied. *See Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997). The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In this case, the administrative law judge stated she was applying Section 10(a) to calculate claimant's average weekly wage. Decision and Order at 17 (citing *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66, 17 BRBS 130(CRT) (2d Cir. 1985)). The administrative law judge found that claimant's earnings records established he earned $53,143.82 in the 52 weeks prior to January 12, 2010, and that, pursuant to 33 U.S.C. §910(d), this total, divided by 52, results in an average weekly wage of $1,022. Decision and Order at 17. Claimant contends this was an inappropriate application of Section 10(a) as the formula therein requires an employee's average daily wage be

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[2]No party contends on appeal that Section 10(b) should be applied in this case. Indeed, the record does not contain any evidence of the actual wages of co-workers or the number of days co-workers worked such that Section 10(b) could apply. 33 U.S.C. §910(b).

[3]Section 10(a) states:

> If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a).

multiplied by 260 for a five-day worker or by 300 for a six-day worker. By doing so, he asserts his average weekly wage is $1,888.55.[4]

While neither party disputes the administrative law judge's use of Section 10(a), we hold that Section 10(a) cannot apply in this case. First, contrary to claimant's contention, *see* n.4, the record contains no evidence of the number of days claimant actually worked or whether he was a 5- or 6-day worker. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *see also Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Moreover, the administrative law judge did not determine whether claimant worked substantially the whole of the year immediately preceding his injury. As the record establishes he worked in only 28.14 weeks, he did not work substantially the whole of the year. *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979) (33 weeks is not a substantial part of the year). As the factors needed to apply the Section 10(a) formula are absent, Section 10(a) cannot apply. *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT). However, the administrative law judge's calculation can be affirmed under Section 10(c) as Section 10(c) applies when Section 10(a) cannot be applied. The administrative law judge rationally divided claimant's agreed-upon actual annual earnings by 52 weeks. This calculation is reasonable under Section 10(c) and is supported by substantial evidence of record. *See Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *see also Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985). Accordingly, we affirm the administrative law judge finding that claimant's average weekly wage is $1,022.

Claimant also contends the administrative law judge erred in crediting the opinion of Dr. Bercik in finding that claimant's condition reached maximum medical improvement and that claimant was not disabled after December 6, 2010. If the claimant can return to his usual work as of the date of maximum medical improvement, then there is no residual disability. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). The administrative law judge is entitled to weigh the evidence and to draw her own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

[4]Claimant contends that, in the 52-week period prior to his injury, he was employed for periods encompassing 197 days or 28.14 weeks and earned a total of $53,143.82. Therefore, claimant avers, under Section 10(a): 28.14 weeks x 5 days = 140.70 days actually worked. $53,143.82 ÷ 140.70 days worked yields an average daily wage of $377.71. $377.71 x 260 days worked for a 5-day worker = $98,204.60 earned annually. $98,204.60 ÷ 52 weeks yields an average weekly wage of $1,888.55. 33 U.S.C. §910(a), (d).

The administrative law judge found that the opinion of Dr. Bercik, that claimant had reached maximum medical improvement and could return to his usual work without restrictions on December 6, 2010, outweighed the remaining evidence of record as it was the best reasoned medical opinion. Decision and Order at 15-16; EX 6, 12; CX 9, 10, 12, 18. In so finding, the administrative law judge addressed the opinions of Drs. Herrera, Kang, Schottenstein, and Bercik, as well as claimant's subjective complaints of pain. Drs. Herrera, Kang, and Schottenstein all stated that claimant remained disabled after December 6, 2010, while Dr. Bercik, in contrast, stated that as of December 6, 2010, claimant reached maximum medical improvement and had no impediments to performing his usual work. The administrative law judge rejected the opinions of Drs. Kang, Herrera, and Schottenstein for various reasons: because Dr. Kang did not explain how he reached his opinion; Dr. Herrera did not review the surveillance tape and relied solely on claimant's subjective complaints of pain; and Dr. Kang failed to address claimant's job duties. Contrary to claimant's assertions, these findings are rational and represent a proper exercise of the administrative law judge's discretion. The administrative law judge reasonably gave less weight to Dr. Herrera's opinion because Dr. Herrera did not address the surveillance video, which Dr. Bercik had seen, and which undermined the credibility of claimant's complaints. Further, she reasonably credited Dr. Bercik's opinion as to maximum medical improvement over claimant's subjective complaints of pain and Dr. Herrera's opinion because Dr. Bercik stated that the activities claimant is seen performing on the video footage are consistent with the absence of a residual impediment to claimant's performing his usual work.[5] Thus, the administrative law judge found that claimant's condition reached maximum medical improvement on December 6, 2010, the date Dr. Bercik examined claimant and reported that he had no objective findings of abnormalities and his subjective complaints did not establish a continuing disability or warrant work restrictions. As the administrative law judge acted within her discretion in evaluating and weighing the evidence and provided rational explanations for her conclusions, we affirm the denial of disability benefits after December 6, 2010. *See generally Gacki*, 33 BRBS 127; *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

[5]The administrative law judge accurately observed that Dr. Schottenstein's work restrictions were based on claimant's complaints of pain. Decision and Order at 12; CX 11. Therefore, as the administrative law judge rationally credited Dr. Bercik's opinion over claimant's subjective complaints of pain, any error the administrative law judge may have made in discounting Dr. Schottenstein's opinion for failing to address claimant's job duties is harmless.

Accordingly, the administrative law judge Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge