BRB No. 98-380

JUAN A. TORRES	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
TEXAS DRYDOCK, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Motion to Reconsider of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Ed W. Barton, Orange, Texas, for claimant.

Andrew Z. Schreck (Phillips & Akers, P.C.), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Motion to Reconsider (96-LHC-304) of Administrative Law Judge Lee J. Romero, Jr., 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Gryll Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a welder when, on November 16, 1989, while assisting a

shipfitter and moving heavy pipes, he sustained an injury to his back. Claimant sought treatment immediately and eventually underwent surgery on his back. He continued to complain that his left leg would "go to sleep" or "give way if he would walk." He attempted to return to work in March 1995, but quit after two days because of pain. Claimant sought permanent total disability benefits under the Act.

The administrative law judge found that the parties stipulated that claimant suffered a work-related injury, and that it is undisputed that claimant is unable to return to his usual employment as a welder. He found that if claimant needs further surgery, he has not reached maximum medical improvement, but if an additional fusion is not necessary, claimant reached maximum medical improvement on May 26, 1993. In addition, the administrative law judge found that the positions identified by Mr. Quintanilla in a labor market survey dated January 17, 1994, do not denote any requirements, except experience, and thus are insufficient to establish suitable alternate employment. Likewise, the administrative law judge found that the positions identified by Mr. Quintanilla in a labor market survey dated March 5, 1997, did not specifically identify the physical demands of the jobs; thus, the jobs cannot be considered suitable alternate employment as the requirements may exceed claimant's restrictions. Therefore, the administrative law judge concluded that claimant is totally disabled. The administrative law judge then calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), by dividing claimant's actual pre-injury earnings by the number of weeks claimant worked pre-injury and found that claimant had an average weekly wage of $447.28. The administrative law judge reaffirmed his average weekly wage finding in a Decision and Order on Motion to Reconsider.

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to establish suitable alternate employment, and thus in awarding total disability benefits. In addition, employer contends that the administrative law judge erred in his calculation of claimant's average weekly wage under Section 10(c). Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, employer contends that Mr. Quintanilla, employer's vocational counselor, testified that he considered the claimant's medical restrictions and the positions' physical requirements in identifying positions suitable for claimant, and thus the administrative law judge erred in finding that suitable alternate employment was not established. As it is uncontested that claimant is unable to perform his usual work, the burden shifted to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

The administrative law judge in the instant case found that the position descriptions listed in the labor market surveys performed in 1994 and 1997 did not specifically identify the physical requirements of the employment and thus were insufficient to establish suitable alternate employment. While Mr. Quintanilla testified that in identifying alternate employment he considered that claimant could sit, stand, or walk alternatingly, and could not lift over 50 pounds, the administrative law judge found that the labor market survey dated January 17, 1994, did not list any of the physical requirements of the positions identified, and thus that he could not determine their suitability for claimant. Moreover, although Mr. Quintanilla testified that the positions identified in 1997 fit claimant's physical restrictions, the position at Ellerbee Brothers noted that there was no "heavy lifting," and claimant's vocational expert testified that this could mean weights up to 100 pounds, whereas claimant was restricted from lifting over 40 pounds. Thus, the administrative law judge found that the term "heavy lifting" is ambiguous and rejected this position as it may exceed the restrictions placed upon claimant. Moreover, the administrative law judge rejected the position identified at Taco Bell as it lacked specificity as to the physical, mental and functional demands of the work to be performed, even though the duties involved were described.

We affirm the administrative law judge's finding that the positions identified by Mr. Quintanilla in the labor market surveys performed in 1994 and 1997 are not sufficient to establish suitable alternate employment. The administrative law judge rationally determined that the lack of specificity of the physical demands of the positions did not allow him to consider whether the available positions are within the restrictions imposed upon claimant. *See Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94 (1988). As the administrative law judge's role as fact-finder requires that he determine whether jobs identified by a vocational expert are indeed suitable for claimant, *see generally P & M Crane Co. v. Hayes,* 930 F.2d 424, 431, 24 BRBS 116, 120 (CRT) (5th Cir. 1991), we reject employer's contention that the administrative law judge erred, and we affirm the administrative law judge's finding that claimant is entitled to total disability benefits as it is supported by substantial evidence.

Employer also contends that the calculation of claimant's average weekly wage should take into account his voluntary withdrawal from the labor market for the six year period prior to his return in 1989. Claimant worked as a welder in the Beaumont, Texas, area from 1973 to 1983, when he left the work force due to a downturn in the economy. He returned to his native country, Mexico, where he lived with his mother and brothers for approximately six years. The record does not contain any evidence concerning claimant's earnings during these years. After returning to the Beaumont area in 1989, and prior to the injury, claimant worked for 18.9 weeks and earned $8,319.47. In calculating claimant's average weekly wage at the time of the injury, the administrative law judge found that given the expanded number of work sites available to welders, claimant would have continued to be employed as a welder if not for the injury, and thus found that his actual earnings fairly represented his earning

capacity at the time of the injury. Thus, he divided claimant's actual earnings of $8,319.47 by 18.9 weeks and concluded claimant had an average weekly wage of $447.28.

In his decision on reconsideration, the administrative law judge considered employer's contention that claimant voluntarily withdrew from the work force, and thus that the administrative law judge should divide claimant's actual earnings by 52 weeks rather than the actual number of weeks worked. The administrative law judge rejected the cases relied on by employer, finding they were not dispositive. In *Conaster v. Pittsburgh Testing Laboratory*, 9 BRBS 541 (1978), and *Geisler v. Continental Grain Co.*, 20 BRBS 35 (1987), the claimants were seeking to increase their average weekly wages by being credited for higher wages which they had voluntarily foregone. The administrative law judge distinguished these cases by noting that claimant herein did not voluntarily refuse or choose not to perform additional work while performing other wage-earning duties; rather, he was absent from both the work force and the country for six years. The administrative law judge also noted that testimony of the vocational counselors, Mr. Kamberg and Mr. Quintanilla, and claimant indicate that claimant could have continued to realize and earn the same wages, if not for the injury. The purpose of Section 10(c) is to arrive at a fair approximation of the amount claimant would have the potential and opportunity to earn absent his injury. *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). As the administrative law judge thoroughly considered employer's arguments as well as the vocational evidence that claimant could have continued to earn the same wages, if not for the injury, we affirm the administrative law judge's finding that claimant's actual earnings accurately represented his annual earning capacity as it is a rational exercise of his discretion and supported by substantial evidence. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge