BRB No. 90-1941

DOYLE WORTHAM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

James Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (88-LHC-2021) of Administrative Law Judge Richard K. Malamphy 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, & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

During the course of his employment as a handyman in employer's electrical department, claimant suffered two injuries which form the bases for this claim. Initially, on November 8, 1978, claimant suffered a cervical strain when he was struck on the top of his head by a coil of wire which he and a co-worker were carrying. Claimant returned to work following this injury in February 1979. Thereafter, on April 17, 1980, claimant stepped into

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

a manhole, sustaining contusions and abrasions of his right knee and shin, a groin strain and a

cervical strain. As a result of these incidents, claimant suffered injuries to his head, neck and leg and groin area as well as a functional psychological overlay. Claimant has not returned to work as of the date of the second work-related incident.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on September 9, 1988, and that claimant could not return to his usual employment duties with employer. Next, the administrative law judge determined that employer established the availability of suitable alternate employment paying $3.10 per hour, and thus awarded claimant temporary total disability compensation from April 17, 1980, through September 9, 1988, and permanent partial disability compensation thereafter based upon the difference between claimant's average weekly wage at the time of the 1980 injury and his post-injury wage-earning capacity of $3.10 per hour. Lastly, the administrative law judge found that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant contends that the administrative law judge erred in finding that he reached maximum medical improvement on September 9, 1988, that employer established the availability of suitable alternate employment, and in determining claimant's residual wage-earning capacity. Employer responds, urging affirmance.

Maximum Medical Improvement.

Claimant initially contends that the administrative law judge erred in determining that maximum medical improvement had been reached as of September 9, 1988. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The determination of when maximum medical improvement is reached so that a disability may be said to be permanent is to be based on medical evidence. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). A disability may be considered permanent where it has continued for a lengthy period, and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). In the instant case, the administrative law judge found that claimant had reached maximum medical improvement as of September 9, 1988, approximately eight years and five months after his second work injury, based upon the treatment notes of Dr. Greenberg and that physician's deposition testimony. *See* Decision and Order at 8. Following an examination of claimant, Dr. Greenberg reported on September 9, 1988, that claimant was doing better. EX 16 at 47. During his subsequent deposition testimony, Dr. Greenberg stated that claimant "got things under control in the spring or summer of 1988" and that claimant probably reached maximum medical improvement sometime in the spring or summer of 1988. *See* Greenberg depo. at 24-25, 31. As it was within the administrative law judge's discretion to credit the opinion of Dr. Greenberg, and as the administrative law judge could infer from the opinion that claimant's condition was stationary, we affirm the administrative law judge's finding that claimant's condition became permanent on

September 9, 1988.[1] *See Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989).

Suitable Alternate Employment

Where, as in the instant case, it is uncontroverted that claimant cannot return to his usual employment, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Mills v. Marine Repair Serv.*, 21 BRBS 115 (1988), *modified on other grounds on recon.*, 22 BRBS 335 (1989). In order to meet this burden, employer must show the availability of a range of 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. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109; *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992).

In the instant case, the administrative law judge, based upon the labor market survey and testimony of Mr. Donnelly, a vocational consultant, concluded that employer had established the availability of suitable alternate employment. Mr. Donnelly, who interviewed claimant in January 1989, set forth several specific available positions with specific employers, such as a computer bid specialist and a fiscal assistant, which he determined were within claimant's physical, intellectual and emotional capabilities. In making these determinations, Mr. Donnelly noted Dr. Foer's failure to report any physical restrictions on claimant and Dr. Thrasher's suggestion that claimant needs a white collar job such as clerical or administrative work.

Contrary to claimant's contention, evidence of specific job openings available at any time during the critical periods when claimant is medically able to seek work is sufficient to establish the availability of suitable alternate employment, which in this case is after the September 9, 1988, date of maximum medical improvement. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). In the instant case, Mr. Donnelly identified specific positions which were available subsequent to September 1988; thus, we reject claimant's allegation that the administrative law judge erred in failing to find the identified positions to be unavailable.

Next, claimant contends that the administrative law judge erred in relying on Mr. Donnelly's testimony and report because Mr. Donnelly did not address Dr. Greenberg's physical restrictions and relied instead on the opinions of Drs. Foer and Thrasher. We disagree. The sole physical restriction imposed on claimant by Dr. Greenberg was that claimant engage in no lifting on and off a conveyor belt; furthermore, Dr. Greenberg opined that claimant was capable of returning to work as long as it

[1]We further note that the administrative law judge's selection of September 1988 is supported by the opinion of Dr. Foer, a neurosurgeon, who first examined claimant in September 1985 and concluded in November 1988 that there was no evidence of any organic residuals from the 1978 and 1980 injuries. EX 18.

was low stress. *See* Greenberg depo. at 20-22. Additionally, Mr. Donnelly specifically stated that he had considered the stress levels of the positions which he identified as being suitable for claimant. It is well-established that fact-finding functions reside with the administrative law judge, who is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Based upon the record before us, the administrative law judge's decision to credit the vocational testimony of Mr. Donnelly, as supported by the medical opinions of Drs. Foer and Thrasher, appears neither inherently incredible or patently unreasonable. We hold therefore that the administrative law judge's findings that claimant is capable of performing the identified jobs and that employer has thus established the availability of suitable alternate employment are supported by substantial evidence and consistent with law. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109; *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Accordingly, we affirm the administrative law judge's finding on this issue, and his consequent award of permanent partial disability compensation. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Post-Injury Wage Earning Capacity.

Claimant additionally challenges the administrative law judge's calculation of his post-injury wage-earning capacity, contending that such a calculation cannot be made since employer failed to establish claimant's earning capacity with any degree of accuracy. In determining the 1980 rate of pay for the positions which he identified as being suitable for claimant, Mr. Donnelly reduced those positions' current pay scales by the 28 percent increase in the *Consumer Price Index* from the date of claimant's injury. The administrative law judge, in calculating claimant's post-injury wage-earning capacity, determined that the identified positions would have paid at least the minimum wage at the time of claimant's 1980 injury, *i.e.*, $3.10 per hour. Thus, based upon a forty-hour week, the administrative law judge concluded that claimant's post-injury wage-earning capacity was $124.00 per week. *See* Decision and Order at 11. As the administrative law judge's determination of claimant's post-injury wage-earning capacity is rational and is in accordance with law, it is affirmed. *See* 33 U.S.C. §908(h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

Commencement Date of Permanent Partial Disability.

Lastly, the administrative law judge in the instant case commenced claimant's permanent partial disability award on September 10, 1988, the day following the date claimant reached maximum medical improvement. An award of permanent partial, rather than total, disability commences on the date employer establishes the availability of suitable alternate employment. *See generally Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *vacating on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished). In the instant case, the administrative law judge determined that employer established the availability of suitable alternate employment, but made no affirmative finding regarding the date upon which employer did so. We therefore vacate the administrative law judge's finding that claimant's award of permanent partial disability compensation commences on September 10, 1988, the day following claimant's date of maximum medical improvement. We remand the case to the administrative law judge for a determination of the date upon which employer established the availability of suitable alternate employment, and thus the commencement date of claimant's permanent partial disability benefits.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed regarding the issues of maximum medical improvement, the availability of suitable alternate employment, and claimant's post-injury wage-earning capacity. The administrative law judge's finding regarding the date the award of permanent partial disability compensation commences is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge