BRB No. 12-0429

JOHN LARSEN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 04/22/2013
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

John Schouest and Limor Ben-Maier (Kelley, Kronenberg, Gilmartin, Fichtel, Wander, Bamdas, Eskalyo & Dunbrack, P.A.), Houston, Texas, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2010-LDA-0353) of Administrative Law Judge Russell D. Pulver 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, rational, 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, who was hired by employer on August 21, 2003, to work as a tanker and flatbed truck driver in Iraq, sustained an injury to his left shoulder during a pre-trip inspection on September 29, 2006. Claimant had surgery on this shoulder in January 2007 in the United States. On June 11, 2007, Dr. Casey declared claimant medically stationary, outlined claimant's physical restrictions, and opined that claimant could return to truck driving but not the lifting required of his previous work. Claimant underwent a Department of Transportation physical examination in February 2008 which indicated he did not have any impairment that would affect his ability to work as a truck driver.

Claimant was rehired by employer on June 12, 2008, and he resumed work in Iraq in July 2008, on the condition that he would drive only tankers. Claimant performed this work, without missing any time because of his shoulder injury, through August 2010, at which time he chose to return to the United States in conjunction with employer's reduction-in-force. Claimant later testified on deposition that from June 2008 through August 2010, he was "having some problems" with his left shoulder, such that it felt much worse at the end of his deployment than it had before he left for Iraq in June 2008. HT at 29, 35; EX 17 at 39. Claimant was unemployed until November 15, 2010, when, out of financial need, he took a truck driver position with PEBEN, hauling pipes for pipeline construction in Nevada. EX 24 at 10-11. Claimant stated he had difficulty with certain physical aspects of this job and was terminated after ten days. *Id.* at 25. Claimant has not been employed since that time.

Claimant filed a claim seeking additional benefits for his left shoulder injury.[1] Employer controverted the claim. In his decision, the administrative law judge found that claimant was unable to perform his usual work as a truck driver for employer as of October 17, 2006, and that employer established suitable alternate employment, first via a labor market survey dated July 18, 2007, and then by offering claimant a suitable light-duty job as a tanker truck driver on June 12, 2008, which claimant successfully performed until August 5, 2010. The administrative law judge, therefore, found claimant entitled to temporary total disability benefits from October 17, 2006 through June 10, 2007, permanent total disability benefits from June 11 through July 17, 2007, and permanent partial disability benefits from July 18, 2007 until June 11, 2008. The administrative law judge found that claimant did not have a loss in wage-earning capacity while he worked for employer from June 12, 2008 to August 5, 2010. The administrative law judge found that claimant stopped working for employer for reasons unrelated to his

[1]Employer voluntarily paid claimant temporary total disability benefits from October 23, 2006 to July 29, 2007, and permanent partial disability benefits from July 30, 2007 to June 8, 2009. CX 2.

left shoulder work injury. He thus concluded that claimant is not entitled to any additional disability benefits.

On appeal, claimant challenges the administrative law judge's finding that he is not entitled to any disability benefits after June 11, 2008. Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Claimant first contends the administrative law judge's finding that he "voluntarily" left the work force as of August 5, 2010, is not supported by substantial evidence. Claimant maintains that he left the suitable alternate employment in Iraq in August 2010 because it had become too physically demanding, and that, as he remained unable to perform his pre-injury work, he is entitled to total disability benefits as employer did not again establish the availability of suitable alternate employment.[2]

The Act defines the term "disability" as "*incapacity because of injury* to earn the wages which the employee was receiving at the time of injury…." *See* 33 U.S.C. §902(10) (emphasis added). In this case, therefore, the seminal issue is whether claimant accepted employer's reduction-in-force, and thus removed himself from his employment in Iraq for reasons unassociated with his work-related left shoulder condition, or whether claimant's inability to earn his wages with employer after August 5, 2010, resulted at least in part from his work injury. Specifically, if claimant terminated his employment relationship with employer for reasons unrelated to the work injury, claimant's subsequent inability to earn those wages can be attributable to his decision to voluntarily end his employment relationship. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). Conversely, if claimant terminated his employment in August 2010 because it became unsuitable in view of his left shoulder injury, his subsequent inability to earn wages in that employment may be compensable, with employer having a renewed burden to establish the availability of suitable alternate employment within claimant's restrictions in order to avoid liability for total disability benefits. *See, e.g., Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

[2]In this regard, claimant avers his employment with PEBEN is insufficient to meet employer's renewed burden given that the work was "significantly harder" than the work claimant had performed for employer in Iraq, and claimant was physically incapable of performing that work, as a result he was terminated, after only ten days.

The administrative law judge's finding that claimant voluntarily accepted employer's reduction-in-force for reasons unrelated to his left shoulder injury is supported by substantial evidence of record. The administrative law judge acknowledged claimant's testimony that he suffered from shoulder pain while working for employer from 2008 to 2010 which prompted him to accept employer's reduction-in-force, but the administrative law judge rationally accorded that testimony no weight as he found the record contained no evidence that claimant sought medical treatment for his left shoulder during this employment. *See* HT at 28-31, 35; CX 1; EX 11; EX 17 at 39; EX 24 at 38; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge found that claimant did not complain about shoulder pain to employer, and claimant testified that he could perform the work, that he never missed work due to any shoulder pain, that he routinely worked twelve hours per day even though Dr. Casey had limited him to eight hours of work, and that he did not mention shoulder pain at the time he accepted the reduction-in-force. Rather, the administrative law judge found that claimant accepted employer's reduction-in-force as he was ready to leave Iraq because it was a stressful work environment. EX 17 at 39. As the administrative law judge's findings are rational and supported by substantial evidence, they are affirmed.[3] *See Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001). Consequently, as the administrative law judge rationally found that claimant stopped working in Iraq on August 5, 2010, for reasons unrelated to his shoulder injury, employer did not bear a renewed burden of establishing the availability of suitable alternate employment. *Id.; cf. Hord*, 193 F.3d 836, 33 BRBS 170(CRT). Accordingly, the administrative law judge's finding that claimant is not entitled to further total disability benefits comports with law and is affirmed.[4]

[3]We reject claimant's contention that the administrative law judge improperly found that claimant's diabetes diagnosis in May 2010 was "a factor" in claimant's decision to return to the United States in August 2010. Decision and Order at 20. The administrative law judge did not err in inferring that claimant, who was 75 years old at the time, had other physical ailments that contributed to his decision to accept employer's reduction-in-force. *See generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

[4]As the administrative law judge observed, claimant's counsel conceded that claimant's job with employer from 2008 to 2010 "certainly constituted suitable alternate employment, as they accommodated his restrictions." Decision and Order at 19 (citing HT at 16). Thus, there is no merit to claimant's contention that he is entitled to total disability benefits during the period he worked for employer from 2008 to 2010 because of the difficulties he allegedly had in performing this work

Claimant next contends the administrative law judge erred in finding he is not entitled to an award of permanent partial disability benefits after June 10, 2008. Claimant alleges he sustained an ongoing loss in wage-earning capacity as a result of working in the light-duty job for employer.

The administrative law judge's discussion of this issue is brief. The administrative law judge found that upon claimant's return to work for employer in Iraq, claimant "was earning higher wages and doing substantially the same work." Decision and Order at 17. The administrative law judge relied on a comparison of claimant's original employment contract with employer, signed on August 21, 2003, which specified a base salary of $2,700 per month, to the employment contract he signed upon his rehire with employer in 2008, which specified a base monthly salary of $3,000, to conclude that claimant did not sustain any loss in wage-earning capacity. *Id.* In a footnote, the administrative law judge also stated that while claimant earned $47,030 or $1,629.59 per week for the period from June 12 through December 31, 2008, in 2009 he earned $101,906 or $1,959.73 per week, "which is greater than his pre-injury AWW of $1,943.12." Decision and Order at 17 n.6. The administrative law judge thus concluded that claimant is not entitled to any permanent partial disability benefits after June 12, 2008. We cannot affirm this conclusion on the analysis offered by the administrative law judge.

Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *Id.; see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *see also Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001).

As the administrative law judge noted, the record contains evidence of claimant's actual earnings in his post-injury light-duty work for employer in Iraq from June 12, 2008 through December 31, 2009. Specifically, the record establishes that claimant earned $47,030.65 for the 28.86 weeks from June 12 through December 31, 2008, and $101,906 for calendar year 2009.[5] CX 3. The administrative law judge, however, did not explicitly

[5]The record does not include any specific information regarding claimant's earnings from January 1 to August 5, 2010.

calculate claimant's post-injury wage-earning capacity based on these actual earnings but instead determined that claimant had no loss in wage-earning capacity merely by comparing claimant's 2003 pre-injury and 2008 post-injury base monthly salaries with employer. In the absence of any finding that claimant's actual post-injury earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge's decision not to use those actual earnings to calculate claimant's wage-earning capacity cannot stand. 33 U.S.C. §908(h); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999). Moreover, to the extent that the administrative law judge relied on claimant's actual earnings, Decision and Order at 17 n.6, use of the 2008 actual earnings demonstrates a loss in earnings as compared to claimant's average weekly wage.

We thus vacate the administrative law judge's finding that claimant's entitlement to permanent partial disability benefits ceased on June 11, 2008, and we remand this case. The administrative law judge must determine if claimant's actual post-injury wages fairly and reasonably represent his post-injury wage-earning capacity. If they do, the administrative law judge must adjust those wages to the rate paid at the time of the September 2006 injury in order to account for inflation. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT). The administrative law judge must compare that adjusted figure with claimant's pre-injury average weekly wage to determine whether claimant established a loss in wage-earning capacity due to his work injury for which he may be entitled to an ongoing award of permanent partial disability benefits from June 11, 2008.[6] *Id.; Raymond v. Blackwater Security Consulting, L.L.C.*, 45 BRBS 5 (2011), *aff'd mem. sub nom. Blackwater Security Consulting, L.L.C. v. Director, OWCP*, No. 11-71587, 2012 WL 6759998 (9th Cir. Dec. 19, 2012).

[6]If claimant is entitled to an ongoing award of permanent partial disability benefits for the post-injury period he worked for employer, i.e., from June 11, 2008 through August 5, 2010, claimant's entitlement to such benefits continues thereafter even though he voluntarily removed himself from that employment, unless it is demonstrated that claimant no longer has a loss in wage-earning capacity due to his injury. *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

Accordingly, the administrative law judge's finding that claimant is not entitled to additional partial disability benefits 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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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge