BRB No. 97-1561

WILLIAM A. ROBERTS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
DRAVO BASIC MATERIALS COMPANY	)	
	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Susan Foltz (Granger, Santry, Mitchell & Heath, P.A.), Tallahassee, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-1281) of Administrative Law Judge Robert D. Kaplan 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).

On May 24, 1989, claimant, a crane operator, was handling lines on a tugboat when he was compelled to jump. This resulted in claimant's sliding into the river, and he hurt his back, arm and shoulder. Employer paid claimant temporary total disability benefits from June 2, 1989 to August 27, 1989, and also paid claimant a lump sum of $18,375 in settlement of a claim for benefits under the Florida workers' compensation statute. The administrative law judge found that the Florida settlement did not bar claimant from recovery under the Longshore Act, but that employer is entitled to an offset for all compensation previously paid to claimant. The administrative law judge awarded claimant temporary total disability benefits from June 2, 1989 to January 26, 1990, and denied claimant permanent total disability benefits.

On appeal, claimant contends that the administrative law judge erred in denying him permanent total disability benefits, and in applying Section 10(c) of the Act instead of Section 10(a) in determining his average weekly wage. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge erred in denying him permanent total disability benefits because the administrative law judge mischaracterized the opinion of Dr. Wingo and irrationally rejected the opinion of claimant's principal treating physician, Dr. VanDeCar. We reject claimant's contention.

In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual pre-injury employment. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge found that none of the physicians determined that claimant's back pain was due to an injury to the spine itself, and that the objective tests, *i.e.*, two series of x-rays and three MRI's, supported the conclusion that claimant had only a sprain. The administrative law judge credited the opinions of Drs. Boxell and Moore over the opinion of Dr. VanDeCar, and thus determined that claimant reached maximum medical improvement on January 26, 1990, and was not precluded from returning to his usual work after this date.[1] In rejecting the opinion of

[1]Dr. Moore, an orthopedist, examined claimant on August 15 and 18, 1989, and noted on August 23, 1989, that an MRI did not indicate a herniated disc. The physician instructed claimant to return to work on August 28, 1989, and return in three months for an examination. In a clinical note dated September 20, 1989, Dr. Moore stated that claimant continued to complain of pain but that the physical examination did not reveal any significant findings. Dr. Boxell specifically stated that claimant reached maximum medical improvement on January 26, 1990, and could

Dr.VanDeCar that claimant reached maximum medical improvement on July 5, 1990, and that claimant suffered from pain due to myofascitis and continued to be disabled from his job, the administrative law judge found that Dr. VanDeCar's opinion was not a reasoned medical judgment as it was not based on objective data. The administrative law judge therefore concluded that claimant was temporarily totally disabled due to the accident from June 2, 1989 until January 26, 1990, and that as of January 26, 1990, claimant failed to establish that he had any disability due to the work injury. Such a determination is within the administrative law judge's discretion as the trier-of-fact. *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). As the Board may not reweigh the evidence, we affirm the administrative law judge's crediting of Drs. Boxell and Moore, and the administrative law judge's consequent finding that claimant has not established that he is permanently totally disabled, as it is supported by substantial evidence.[2]

We also reject claimant's contention that the administrative law judge erred in applying Section 10(c) rather than Section 10(a) to determine claimant's average weekly wage. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see generally Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in

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return to his usual work.

[2]The administrative law judge's mischaracterization of Dr. Wingo's opinion as unclear on the extent to which claimant's limitations are due to the work injury is harmless error inasmuch as the administrative law judge did not rely on this opinion to deny claimant's claim for continuing total disability benefits. Decision and Order at 10; *see* EX 48.

instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied. *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988).

The administrative law judge found that inasmuch as claimant's work for employer was sporadic, use of Section 10(a) would give claimant an unfair windfall. Specifically, the administrative law judge noted that claimant worked 199 days in the year prior to the accident, but that he worked a six-day week in only eight weeks, and frequently worked less than a 40-hour week, even though employer made a 48-hour work week available to claimant. We thus hold that the administrative law judge rationally determined that Section 10(a) could not be applied to this case and that claimant's average weekly wage should be calculated pursuant to Sections 10(c). *See Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT) (5th Cir. 1996). The administrative law judge's calculation of claimant's average weekly wage by dividing claimant's actual pre-injury earnings of $14,467.68 by 52 ($278.23) is rational and is affirmed. *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge