BRB No. 03-0314

FLOYD L. MAY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Dec. 23, 2003
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

D. Jason Embry (Davis & Feder, P.A.), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (01-LHC-2886) of Administrative Law Judge Larry W. Price 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).

Claimant began working for employer as a painter in March 1977. In 1998 claimant injured his left shoulder at work when he tripped and fell down some stairs. Tr. at 39. He reinjured his shoulder at work on July 19, 1999. An x-ray revealed a pre-existing bone spur, and an MRI revealed a torn rotator cuff. Dr. Longnecker, an orthopedic surgeon, performed surgery in September 1999 to repair the rotator cuff and remove the bone spur from the shoulder. Tr. at 14-15, 43-44. After surgery, claimant

attended physical therapy and was released to light duty on January 3, 2000. Claimant continued to experience problems with the shoulder, and on May 31, 2000, Dr. Longnecker released claimant, informing him that he could not do anything further for him. Dr. Longnecker imposed restrictions of no climbing, no crawling, no overhead work, no repetitive use of the left arm and no lifting over twenty pounds. CX 1 at 24; EX 14 at 16.

Claimant returned to work in the shop and on fire watch on June 2, 2000. On July 11, 2000, claimant's restrictions became permanent and claimant went to Internal Placement to ask about a permanent light duty job in the shipyard. Melinda Wiley, the employee relations representative, told claimant that he did not qualify for any position given his restrictions. Claimant then went to see Terry Hayes, the general superintendent in the paint department. According to claimant, Mr. Hayes arranged for a light duty position for him in exchange for a promise to retire on March 14, 2001. Claimant acknowledged that it was he who first asked Mr. Hayes if he could work up until his retirement date, but explained that he was afraid to ask if he could work longer and he just wanted to buy some time. Tr. at 52-53. Claimant began permanent light duty work in the shipyard on June 9, 2000, as a service painter. He testified that this job involved working in small spaces, that 90 percent of the work was overhead and that it involved working from ladders, which he was unable to do. He testified that the supervisor told him not to complain. Claimant was then transferred to the fabricator shop, where he had no difficulty in operating a trolley car by computer, but occasionally he also had to shovel grit off the deck and floors, and he claimed that this hurt his shoulder and was outside his restrictions. Claimant testified that he retired in March 2001, at age 62, because he felt he had no choice, even though he wanted to work until he was 65 in order to increase his Social Security benefits.

In his decision, the administrative law judge awarded claimant temporary total disability benefits from September 27, 1999, to January 1, 2000, and from February 1, 2000, to June 1, 2000, based on an average weekly wage of $819.23. The administrative law judge found that claimant was employed in suitable work in employer's facility as a service painter doing touch up work and in the fabricator shop operating a trolley and occasionally shoveling steel grit at the time of his retirement; he also found that claimant voluntarily retired in March 2001. The administrative law judge found, therefore, that claimant had no loss of wage-earning capacity due to his injury, and he therefore denied further benefits.

On appeal, claimant contends the administrative law judge erred in finding that he is not entitled to compensation following his retirement. Claimant avers that the post-injury job he performed for employer was not suitable, and that even if the work were suitable, he did not retire voluntarily, and that he is therefore entitled to compensation.

Employer responds, urging affirmance of the administrative law judge=s Decision and Order.

We first address claimant's contention that the light duty job provided by employer in the fabricator shop was not suitable. Once, as here, claimant establishes his inability to perform his usual work, the burden of proof shifts to employer to establish the availability of suitable alternate employment which 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). Employer may meet this burden by offering claimant a suitable, light duty position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In finding the jobs claimant performed in employer's facility suitable, the administrative law judge stated that claimant's credibility has been compromised by the fact that none of the evidence corroborates his allegation that he was working outside of his restrictions, and he reasoned that claimant's version of events in both his deposition and the hearing was contradicted by his supervisors, his doctor, and a vocational rehabilitation expert who monitored his return to work. The administrative law judge observed that Dr. Longnecker's reports indicate that claimant was doing well at work and that reports of Mr. Walker, a vocational rehabilitation counselor certified through the Department of Labor, reflect that claimant reported having no problems working within his restrictions. Ms. Wiley and Mr. Hayes never received any complaints from claimant about working outside his restrictions, and both testified that if claimant had reported such a problem, it would have been solved by management. EX 17 at 51. The administrative law judge reasoned that it is employer's policy that any employee required to work outside his restrictions should report this to management or go to the company hospital, and claimant never made such a report to either one. Moreover, in Mr. Walker's opinion, shoveling steel grit could be within claimant's restrictions as long as he monitored himself with regard to the type of scooping or the amount of material scooped. EX 22 at 19.

As the trier-of-fact, the administrative law judge is entitled to weigh the evidence and to determine the credibility of witnesses, and his findings must be accepted if they are rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In determining the duties required by claimant=s light duty position with employer, the administrative law judge in the case at bar fully considered and discussed all of the evidence, articulated the rationale for his credibility determinations and concluded that

claimant was capable of performing the work, as claimant's position did not involve work which exceeded the credited restrictions. We therefore affirm the administrative law judge=s finding regarding this issue as it is rational and is supported by substantial evidence. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Ezell*, 33 BRBS 19.

Claimant next alleges that he did not retire voluntarily, but rather was forced by employer to promise to retire on March 14, 2001, in exchange for being placed in a light duty position following his injury. The determination of whether retirement is voluntary or involuntary is based on whether a work-related condition forced the claimant to leave the workforce. If his departure is due to considerations other than the work injury, his retirement is voluntary. *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997)*; MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). A claim for total disability benefits requires that claimant establish a loss of wage-earning capacity. *See* 33 U.S.C. '902(10); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). When a claimant voluntarily leaves the work force after sustaining a traumatic injury, the administrative law judge may deny total disability benefits on the basis that claimant failed to establish a loss in wage-earning capacity due to his injury. *Hoffman v. Newport News Shipbuilding & Dry Dock, Co.*, 35 BRBS 148 (2001). If claimant retired due to his work injury, however, he may be found entitled to total disability benefits. *Harmon*, 31 BRBS 45.

In the instant case, the light duty work claimant performed was found to be suitable, and we hold that the administrative law judge rationally found that claimant did not retire because of the work injury; therefore, employer is not liable for total disability benefits. *Hoffman*, 35 BRBS 148. Since employer established suitable alternate employment, claimant, however, would be entitled to partial disability compensation into retirement if he had a loss of wage-earning capacity prior to retirement. In finding that claimant was a voluntary retiree, the administrative law judge concluded that claimant's hearing and deposition testimony that he was forced to leave his job before he was ready to retire is not supported by the evidence. The administrative law judge noted that several witnesses reported that claimant had told them in conversation that he was planning to retire soon after returning to work so he could begin drawing his Social Security benefits; that claimant first mentioned retiring to Dr. Longnecker in March 2000; that he told Mr. Walker that he intended to consider retirement after finishing out the year; and that Mr. Hayes testified that claimant asked whether he could work until his retirement in March 2001. Decision and Order at 21; CX 1 at 23, 25; EX 22 at 27-28; EX 18 at 11-12, 27, 58. Thus, substantial evidence supports the administrative law judge's finding that claimant did not retire because of his work injury. *Hoffman*, 35 BRBS 148; *Burson*, 22 BRBS 124.

The administrative law judge also found that claimant had no loss of wage-earning capacity in his post-injury job in employer's facility. Decision and Order at 20. He noted that claimant earned more than he did before the accident by working the second shift and overtime. As claimant does not challenge the administrative law judge's finding that his post-injury earnings prior to his retirement were higher than his earnings prior to his accident, nor does he assert that his post-injury pre-retirement earnings do not fairly reflect his wage-earning capacity, this finding is affirmed. 33 U.S.C. §908(h). Claimant argues that after retirement he was able to obtain only jobs mowing lawns, and therefore he is entitled to compensation for a loss of wage-earning capacity after retiring in March 2001. Claimant's argument is without merit, as an employer's job offer of a suitable job within its own facility is sufficient to establish suitable alternate employment; employer need not show that claimant can earn wages in the open market. *Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676 (1979). Since the administrative law judge's finding that claimant voluntarily left the work force is rational and the finding that claimant failed to establish a loss of wage-earning capacity prior to retirement is not challenged, we affirm the administrative law judge's denial of further benefits. *See generally Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985).

Lastly, claimant alleges that his average weekly wage should be the $44,302.67 he earned, divided by the 52 weeks he worked, prior to the injury, or $851.97. The administrative law judge found that claimant's average weekly wage calculated under Section 10(a) is $819.23.[1] Claimant's contention is without merit. In *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), the Fourth Circuit rejected the contention that under Section 10(a) an administrative law judge could merely divide the claimant=s annual earnings by 52 weeks. *See also Wooley v. Ingalls*

[1] 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.
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> 33 U.S.C. §910(a).

The parties agree that claimant worked substantially the whole of the year before his June 1999 accident and that his average weekly wage should be determined pursuant to this section. Decision and Order at 22.

Shipbuilding, Inc., 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). The proper inquiry requires the administrative law judge to determine the claimant=s total earnings in the 52 weeks prior to the injury and to divide that sum by Athe actual number of *days* for which the employee was paid to determine an average daily wage,@ which is then multiplied by 260 or 300 depending on whether the employee is a 5 or 6-day per week worker. *Moore*, 126 F.3d at 265, 31 BRBS at 125(CRT) (emphasis in original). This use of the number of actual days worked is required by the language of Section 10(a) stating that a claimant=s earnings are those extrapolated from the average daily wage earned Aduring the *days* when so employed.@ 33 U.S.C. '910(a) (emphasis added). Thus, the administrative law judge=s calculation of claimant's average weekly wage accords with law and it is affirmed.[2]

[2] The administrative law judge calculated claimant's average weekly wage as follows:

> Claimant earned $44,302.67 for 2,618 hours. EB at 8. Claimant worked an average of 50.35 hours per week (2,618/52). Claimant was a six-days per week worker, Tr. at 93, based on the average hours per day of 8.39 (50.35/6). Dividing the total hours claimant worked during the year, 2,618, by the average number of hours he worked per day, 8.39, equals 312, the number of days claimant worked during the year prior to the injury. Therefore, claimant's average daily wage equals $142 ($44.302.67/312). Multiplying claimant's average daily wage by 300, as he was 6-day worker, and dividing by 52, yields an average weekly wage of $819.23.
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> Decision and Order at 22.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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