BRB Nos. 00-0773
and 01-0534

SEAN McCARTHY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PETROLEUM CENTER, INCORPORATED	)	DATE ISSUED: Feb. 6, 2002
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits, Order Denying Claimant's Motion for Reconsideration, and Order on Remand Denying Claimant's Motion for Modification of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Sean McCarthy, Lafayette, Louisiana, *pro se*.

Ted Williams (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, appearing without legal representation, appeals the Decision and Order-Awarding Benefits, Order Denying Claimant's Motion for Reconsideration, and Order on Remand Denying Claimant's Motion for Modification (97-LHC-2878) 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, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. (the Act). In

reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant slipped while descending a staircase during the course of his employment as a mudlogger/night supervisor on January 25, 1994. He was initially treated conservatively by Dr. Cobb, who subsequently operated on claimant's lower back on February 16, 1995, January 25, 1996, November 22, 1996, and January 25, 1997. Claimant also underwent work-related left elbow surgery on June 3, 1997. On August 11, 1997, Dr. Cobb released claimant for medium duty work, which he described as limiting claimant to occasionally lifting as much as 50 pounds and frequently lifting up to 25 pounds. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from January 25, 1994, to February 10, 1998, and continuing compensation for partial disability from February 11, 1998. Prior to his work injury, claimant received a college degree in 1982, and he worked as a car salesman from 1983 to 1988. Claimant worked as an insurance salesman from 1989 until 1993, when he obtained employment in the offshore oil drilling industry. After his work injury, claimant returned to college at the University of Southwest Louisiana (USL), where he received a degree in social studies and education in May 1999. In the fall of 1999, he was accepted at USL as a full-time student in the master's degree program in vocational rehabilitation; he was pursuing his studies there on the date of the formal hearing, February 14, 2000.

In his initial decision, the administrative law judge credited evidence that claimant's back condition had not reached maximum medical improvement, and that claimant was unable to return to his usual employment. The administrative law judge credited evidence of positions within claimant's medical restrictions, identified in a labor market survey, and found that employer established the availability of suitable alternate employment. The administrative law judge rejected claimant's contention that he is entitled to compensation for total disability while pursuing his course of study at USL. The administrative law judge calculated claimant's post-injury wage-earning capacity based on the median wage of $486.50 paid by the credited positions, which the administrative law judge reduced by 12 percent to $428.12, to neutralize the effects of inflation after the date of injury. The administrative law judge determined that claimant sustained a loss of wage-earning capacity of $86.23 due to his work injury by subtracting $428.12 from claimant's average weekly wage of $514.35. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from January 25, 1994, to February 10, 1998, 33 U.S.C. §908(b), and for temporary partial disability, 33 U.S.C. §908(e), from February 11, 1998, based on a loss of wage-earning capacity of $86.23. The administrative law judge summarily denied claimant's motion for reconsideration.

Claimant appealed the administrative law judge's decision to the Board, BRB No. 00-0773. By Order dated July 14, 2000, the Board dismissed claimant's appeal without prejudice, and remanded the case to the Office of Administrative Law Judges, as claimant filed a petition for modification, 33 U.S.C. §922. On modification, claimant submitted evidence that he diligently sought, but was unable to obtain, suitable alternate employment, and claimant also asserted that a meniscus tear in his right knee is related to the January 25, 1994, work injury. In his Order denying modification, the administrative law judge found that claimant failed to establish a diligent job search, as claimant's evidence showed that he applied for jobs only during the last three months of 1997. The administrative law judge found that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his knee condition to the work injury, that employer rebutted the presumption, and, based on the record as a whole, that claimant failed to establish his meniscus tear is related to the work injury. Claimant appeals the administrative law judge's decision on modification, and he requested reinstatement of his appeal of the administrative law judge's initial decision. By Order dated March 23, 2001, the Board acknowledged receipt of claimant's new appeal, BRB No. 01-0534, granted reinstatement of claimant's prior appeal, BRB No. 00-0773, and consolidated claimant's appeals for purposes of decision.

On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's denial of his claim for total disability benefits, the administrative law judge's calculation of claimant's loss of wage-earning capacity, and the administrative law judge's finding that claimant's knee condition is not related to his work injury. Employer responds, urging affirmance.

We initially address the administrative law judge's finding on modification that claimant's knee condition is not related to his work injury. Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *see Banks v. Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition. *Metropolitan Stevedore Co. v. Rambo,* 515 U.S. 291, 30 BRBS 1(CRT) (1995). Where, as in the instant case, it is uncontested that claimant is entitled to the Section 20(a) presumption linking his meniscus tear to his employment, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. *See Conoco , Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The administrative law judge then must weigh all the evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of

persuasion. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge determined that employer established rebuttal of the Section 20(a) presumption based upon the opinion of Dr. Gidman, and the lack of a temporal nexus between the work injury and the manifestation of knee-specific symptoms in December 1998. The administrative law judge noted that Dr. Gidman examined claimant twice and reviewed claimant's medical records since the January 1994 work injury.[1] Dr. Gidman unequivocally opined that claimant's knee condition is not related to the work injury. EX 10 at 17-20. As the opinion of Dr. Gidman constitutes substantial evidence to rebut the presumption, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984).

In addressing the record evidence of claimant's condition, the administrative law judge found Dr. Gidman, whose specialty is orthopaedics, more qualified than Dr. Hodges, whose speciality is physical medicine and rehabilitation. Dr. Hodges opined that claimant's knee condition is related to the January 1994 work injury. CX 1. The administrative law judge also found that Dr. Hodges incorrectly stated that claimant had complained of knee pain since 1994, and that Dr. Hodges's opinion may be tainted by his expressed desire that claimant complete his education. EX 2 at 30-32, 39-40. The administrative law judge credited Dr. Gidman's review of the medical records as indicating that, while claimant complained of back pain that radiated into his legs from approximately the date of injury,

[1]On appeal, claimant alleges that the medical evidence includes records from two other persons treated by Dr. Cobb, and that this evidence improperly influenced the administrative law judge's credibility determinations. Claimant's Brief at 2. Claimant informed the administrative law judge of the extraneous evidence at the hearing on modification, and the administrative law judge responded that he would not consider these records. December 19, 2000, Hearing Transcript at 7. As there is no indication of error in the administrative law judge's decisions based on this extraneous evidence, claimant's allegation of error is rejected. *See generally Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999).

claimant did not complain of knee-specific pain until December 1998, EX 10 at 17-22; he also relied on Dr. Gidman's opinion that a meniscus tear caused by the January 1994 work accident would become manifest within one year of the injury, EX 10 at 18. Finally, the administrative law judge noted that claimant's knee complaints followed an ice skating outing with his family. December 19, 2000, Tr. at 22. In adjudicating a claim, it is well-established that an administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and is not bound to accept the opinion or theory of any particular medical examiner. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge rationally credited the opinion of Dr. Gidman, and the evidence regarding the onset of claimant's knee-specific complaints, to conclude that claimant's meniscus tear was not caused by the work accident. We affirm the administrative law judge's determination on modification, based on the record as a whole, that claimant's knee condition is not related to his employment as it is supported by substantial evidence. *See, e.g., Rochester v. George Washington University*, 30 BRBS 233 (1997).

We next address the administrative law judge's finding that employer established the availability of suitable alternate employment. Where, as in this case, claimant is incapable of resuming his usual employment duties, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See P & M Crane Co. v. Hayes*, 930 F. 2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions, and which he could realistically secure if he diligently tried. *See Avondale Shipyards v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). Moreover, claimant can establish entitlement to compensation for total disability if suitable alternate employment is not reasonably available due to claimant's participation in a Department of Labor (DOL)-sponsored rehabilitation program. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *see also Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

In the instant case, the administrative law judge credited the opinion of Dr. Cobb, that claimant was capable of returning to work in August 1997, EX 7 at 217, and found that there

was no contrary medical opinion of record until October 1998, when Dr. Hodges opined that claimant was totally disabled, EX 1 at 37. The administrative law judge gave less weight to Dr. Hodges's opinion, finding that the other examining physicians agreed with Dr. Cobb that claimant is capable of at least light duty work. Specifically, the administrative law judge noted the opinion of Dr. Kilroy in September 1998, that claimant may perform light duty work, EX 6 at 6, and the opinion of Dr. Ritter in January 1999, that claimant can perform light to medium duty work, EX 3 at 11. The administrative law judge also considered claimant's physical ability to attend school full-time while undergoing treatment with Dr. Hodges, which included student teaching from January to May 1999, Tr. I at 17, as establishing claimant's ability to work light duty. The administrative law judge rejected Dr. Hodges's opinion on the basis that his opinion was influenced by his belief that claimant should continue his education. EX 2 at 30-32, 39-40.

The administrative law judge further credited the January 1998 labor market survey of Mr. Melancon identifying several light to medium duty jobs: automobile service center manager; production scheduler; insurance sales; pharmaceutical sales; inside sales; sales manager; dispatcher; and job coordinator. EX 9 at 4-5. The administrative law judge rejected claimant's testimony that he is unable to perform sales work due to the required driving and walking, as these jobs are within his physical restrictions and claimant never attempted to perform sales work after Dr. Cobb released claimant to work.

On modification, the administrative law judge rejected claimant's contention that he diligently tried to obtain suitable work. Claimant submitted evidence that he unsuccessfully attempted to obtain jobs identified in a labor market survey performed by Mr. Arceneuax. CMX 2. The administrative law judge found that claimant's job search was not a diligent one, as it was primarily limited to the last three months of 1997 and the administrative law judge found that claimant failed to credibly explain the absence of any subsequent job search. The administrative law judge thus concluded that claimant failed to establish reasonable diligence in attempting to secure alternate employment.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness. Rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge's crediting of Dr. Cobb's opinion that claimant is capable of performing light to medium duty work, and Mr. Melacon's labor market survey identifying specific job openings within claimant's physical limitations, supports the administrative law judge's conclusion that employer established the availability of suitable alternate employment. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001). Moreover, the administrative law judge rationally found

that claimant did not rebut this showing by establishing he was unable to find a suitable job despite a diligent effort to do so. *See generally* *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

We next address the administrative law judge's finding that claimant is not entitled to compensation for total disability while he successfully pursued a degree in social studies and education, followed by a master's degree in vocational rehabilitation; he was a full-time student in the master's program at the time of the formal hearing. The burden of proof is on claimant to show that he is unable to perform suitable alternate employment due to his participation in a vocational training program. *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000). At the formal hearing, claimant testified that he entered USL in 1997 and that Louisiana Rehabilitation Services paid for claimant's tuition and books. Tr. I at 41-42. Claimant sought DOL approval of his degree program in social studies and education and was informed that approval was dependent on his residual wage-earning capacity. *Id.* at 46-47. Mr. Melacon, who was assigned by DOL to evaluate claimant's case, *id.* at 49-50, submitted the labor market survey credited by the administrative law judge as establishing a range of jobs claimant could perform, paying from $300 to $673 per week. In his report dated January 5, 1998, Mr. Melacon opined that whereas claimant's plan to obtain a teaching certificate is a valid vocational choice, claimant possesses sufficient work experience, training, and significant worker traits, that would enable him to return to the work force without further education and to earn wages equivalent to his past yearly earnings. EX 9 at 5. There is no evidence that claimant's course of study at USL was approved by DOL.

We hold that the administrative law judge rationally concluded that claimant is not entitled to total disability benefits during the time he was enrolled in USL. The administrative law judge rationally concluded from Mr. Melancon's report that he identified alternate jobs that would utilize claimant's college education and would pay wages comparable to his pre-injury average weekly wage, and that vocational training thus was unnecessary to increase claimant's wage-earning capacity. *See Anderson v. Lockheed Shipbuilding & Construction Co.*, 28 BRBS 290 (1994). Moreover, claimant failed to establish DOL approval of his vocational plan or to submit evidence that was unable to obtain suitable alternate employment while pursuing his education. *See Kee*, 33 BRBS 221; *Anderson*, 28 BRBS 290; *see also Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998). Thus, we affirm the administrative law judge's finding that claimant is not entitled to compensation for total disability while he is enrolled in USL. Accordingly, we affirm the administrative law judge's conclusion that claimant's entitlement to compensation for temporary total disability ended on February 10, 1998, when employer identified suitable alternate employment. *See* *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991).

Lastly, we address claimant's contention the administrative law judge erred in

calculating claimant's wage-earning capacity subsequent to February 10, 1998. An award for temporary partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Section 8(h) of the Act, 33 U.S.C. §908(h), 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. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director,* OWCP, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). The United States Court of Appeals for the Fifth Circuit has held that an average of the range of salaries identified as suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since a fact-finder has no way of determining which job, of the ones proven available, the employee will obtain; thus, the court stated, averaging ensures that the post-injury wage-earning capacity reflects each job that is available. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied,* 523 U.S. 1095 (1998). Additionally, in calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, claimant has not returned to work and he has no actual, post-injury earnings. The administrative law judge determined claimant's post-injury average weekly wage by crediting the median weekly wage of $486.50 paid by the positions the administrative law judge credited as establishing the availability of suitable alternate employment, which paid weekly wages of $300 to $673. EX 9 at 4-5. The administrative law judge adjusted claimant's post-injury wage of $486.50 for inflation by factoring out the 12 percent increase in the National Average Weekly Wage (NAWW) from January 1994, the month of claimant's work injury, to February 1998, when the administrative law judge found that employer established the availability of suitable alternate employment.[2] The administrative law judge subtracted the resulting average weekly wage of $428.12 from

[2]The National Average Weekly Wage for January 1994 is $369.15, and for February 1998 is $417.87.

claimant's stipulated average weekly wage at the date of injury of $514.35 to derive a post-injury loss of wage-earning capacity of $86.23. We hold that the administrative law judge's decision to average the wages of the credited positions identified in Mr. Melacon's labor market survey is rational and in accordance with law. *See Pulliam,* 137 F.3d 326, 32 BRBS 65(CRT). Moreover, the administrative law judge's adjustment of the post-injury wages for inflation also accords with law, and is affirmed. *See Quan v. Marine Power & Equip. Co.,* 30 BRBS 124 (1996). Thus, we affirm administrative law judge's calculation of claimant's post-injury loss of wage-earning capacity subsequent to February 10, 1997. Accordingly, we affirm the administrative law judge's compensation award for partial disability from February 11, 1998, based on a weekly loss of wage-earning capacity of $86.23.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits, Order Denying Claimant's Motion for Reconsideration, and Order on Remand Denying Claimant's Motion for Modification are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge