BRB No. 98-897

WILLIE J. SIMPSON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Willie J. Simpson, Gautier, Mississippi, *pro se*.

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

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order - Denying Benefits (96-LHC-1308) of Administrative Law Judge David W. Di Nardi 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). In an appeal filed by a claimant without representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220, 802.301.

Claimant, an insulator, injured his right shoulder and neck on June 16, 1989,

at work. Subsequently, claimant had two shoulder surgeries and neck surgery. Employer voluntarily paid claimant temporary total disability benefits from June 16, 1989, through July 21, 1994, and permanent partial disability benefits from July 22, 1994, through May 14, 1995. Claimant sought permanent total disability benefits from July 22, 1994, through May 14, 1995, and permanent partial disability benefits from May 15, 1995, and continuing. The administrative law judge found that claimant established his *prima facie* case of total disability, that employer established the availability of suitable alternate employment, and that claimant failed to establish diligence in pursuing alternate employment. Consequently, the administrative law judge found claimant entitled to permanent partial disability benefits from December 8, 1993, through May 14, 1995, but did not award additional benefits because he found that employer had already paid claimant more compensation than that to which he was entitled. Moreover, the administrative law judge terminated claimant's permanent partial disability benefits on May 14, 1995, after finding that as a result of employer's light duty job offer, which claimant refused, claimant sustained no post-injury loss in wage-earning capacity. The administrative law judge further found claimant's request for future medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, premature. The administrative law judge denied claimant an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), and employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's decision. Employer responds, urging affirmance.

Initially, the administrative law judge determined that claimant reached maximum medical improvement on December 8, 1993. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement based on the medical evidence. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *see also Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). We hold that the administrative law judge acted within his discretion in determining that claimant reached maximum medical improvement on December 8, 1993, based on the opinions of Drs. Cope and McCloskey, and therefore affirm this determination. *See Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); Decision and Order at 18; Emp. Exs. 15, 16; Tr. at 56-57.

The administrative law judge also determined that employer established suitable alternate employment on December 8, 1993. Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to

demonstrate the availability of realistic 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. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, the administrative law judge credited the labor market survey of Ms. Hutchins, employer's vocational expert, which identified various positions available to claimant on December 8, 1993, within the restrictions set forth by Dr. McCloskey. He also noted that all doctors of record opined that claimant is not totally disabled and can perform certain jobs of a sedentary nature. Decision and Order at 19-21; Emp. Ex. 21. Ms. Hutchins identified the positions of janitorial supervisor, pizza maker/order taker, loss prevention specialist at K-mart, cashier at a gas station, and a taxi cab dispatcher. Decision and Order at 20; Emp. Ex. 21. As the administrative law judge rationally relied on Ms. Hutchins' labor market survey identifying jobs within claimant's restrictions, we affirm the administrative law judge's finding that employer established suitable alternate employment as of December 8, 1993. *See Fox v. West State, Inc.*, 31 BRBS 118 (1997); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

The administrative law judge next determined that claimant did not establish diligence in pursuing employment. In order to defeat employer's showing of suitable alternate employment, the burden is on claimant to establish reasonable diligence in attempting to secure some type of suitable alternate employment. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. If claimant establishes diligence in pursuing alternate employment, employer's showing of suitable alternate employment is rebutted, and claimant is entitled to total disability benefits. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). The administrative law judge found that claimant did not establish diligence in pursuing alternate employment as he rationally concluded that claimant appeared to apply to places of employment which were not hiring and applied only to one or two jobs per month. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 21-23; Cl. Ex. 8. Moreover, the administrative law judge acted within his discretion in finding claimant's testimony that he applied to the positions identified by Ms. Hutchins unpersuasive in light of claimant's foggy recollections and lack of supporting documentation. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); Decision and Order at 21-23; Tr. at 64, 67-73. Consequently, the administrative law judge's finding that claimant did not establish diligence in pursuing alternate employment is affirmed.

Despite his determination that claimant was permanently partially disabled

from December 8, 1993, through May 14, 1995, the administrative law judge did not award claimant additional benefits as he found that employer had overcompensated claimant with its voluntary payments. An award for permanent partial disability compensation in a case not covered by the schedule 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(c)(21), (h); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988). If employer establishes suitable alternate employment, as here, the wages which the alternate jobs would have paid at the time of injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss in wage-earning capacity as a result of his injury. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). If the wages of the post-injury jobs available to claimant are unknown, the administrative law judge must compute claimant's benefits by applying the increase in the national average weekly wage downward to the actual wages paid at the time of injury. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996); *Richardson*, 23 BRBS at 327.

In the instant case, the administrative law judge noted that claimant was entitled to temporary total disability benefits from June 16, 1989, through December 8, 1993, at $383.89 per week (two-thirds of claimant's average weekly wage), for approximately 233 weeks, for a total of $89,446.37, and that claimant was entitled to permanent partial disability benefits from December 9, 1993, through May 14, 1995, at $268.69 per week (two-thirds of pre-injury average weekly wage of $575.83 - post-injury wage-earning capacity of $172.80) for 75 weeks, for a total of $20,151.75. Decision and Order at 26. The administrative law judge concluded that claimant was overcompensated by $2,977.81 ($112,575.93-$109,598.12). Decision and Order at 26 n. 5. Thus, the administrative law judge denied claimant additional disability benefits. Decision and Order at 26. In finding that claimant's post-injury wage-earning capacity was $172.80 based on the average starting hourly wage of the suitable alternate jobs, the administrative law judge may have erred in using the 1990 average starting hourly wage set out in Ms. Hutchins' February 2, 1998, report.[1] *See Quan*, 30 BRBS at 124; *Richardson*, 23 BRBS at 327; Decision and Order at 24 n. 5; Emp. Ex. 33. Any error is harmless in this regard as when the post-injury wages are adjusted downward to pre-injury wages according to the percentage increase in the national average weekly wage, claimant was still overcompensated by employer in excess of $2,000.

[1]The 1989 wages of these jobs was not known.

The administrative law judge subsequently found that claimant suffered no loss in post-injury wage-earning capacity after May 14, 1995, when claimant was offered a job at employer's facility, which he refused. Consequently, he denied claimant permanent partial disability benefits after May 14, 1995. If the employee is offered a job at his pre-injury wages, the administrative law judge can find that there is no lost wage-earning capacity and that the employee therefore is no longer disabled. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985). Here, employer offered claimant a light duty job to start on May 15, 1995.[2] Emp. Ex. 22; *see Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996). The administrative law judge noted that the light duty position offered by employer was within claimant's restrictions as it was approved by both of claimant's treating physicians, Drs. Cope and McCloskey, and by two vocational experts, Ms. Hutchins and Mr. Sanders. Decision and Order at 25; Emp. Exs. 15, 16, 21, 25. Based on employer's post-injury light duty job offer to claimant at the same wage rate as claimant worked pre-injury, we hold that the administrative law judge rationally concluded that claimant suffered no loss in wage-earning capacity after May 14, 1995. *See Swain*, 17 BRBS at 145. We thus affirm the administrative law judge's denial of disability benefits after May 15, 1995.

Next, the administrative law judge found that claimant's request for future medical benefits was premature. Claimant is entitled to medical benefits for a work-related injury if the treatment is necessary for his work-related injury. *Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). The administrative law judge rationally found claimant's request for future medical benefits premature in view of the speculative nature as to claimant's possible future surgery. Decision and Order at 27-29; Emp. Exs. 15, 28; Tr. at 46. As a medical benefits claim is never time-barred, claimant may file a claim for payment of medical expenses by employer. *See Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). Thus, we affirm the administrative law judge's finding that claimant's claim for future medical benefits is premature.

Lastly, we affirm the administrative law judge's denial of a Section 14(e) assessment, as it in accordance with law. The administrative law judge accurately noted that employer timely instituted voluntarily payment of benefits, and filed its

[2]Based on employer's notice of controversion and notice of final payment, Emp. Exs. 6, 10, employer's light duty job offer to claimant was at the same rate of pay as his pre-injury job.

notices of controversion in a timely manner. *See* 33 U.S.C. §914(b), (d), (e); *Pullin v. Ingalls Shipbuilding, Inc.*, 27 BRBS 45 (1993)(order on recon.), *aff'd on recon.*, 27 BRBS 281 (1993); Decision and Order at 29; Emp. Ex. 6.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge