BRB No. 90-1104

LAMAR HAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OFFSHORE SHIPBUILDING, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
FLORIDA INSURANCE GUARANTY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

David Barish (Cohn, Lambert, Ryan, Schneider & Harman, Ltd.), Chicago, Illinois, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-3076) of Administrative Law Judge Glenn Robert Lawrence awarding benefits 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 10, 1983, claimant injured his back when he slipped and fell into the tank of a ship while he was welding. He was knocked unconscious and taken to the hospital, where he remained for approximately 10 days. Claimant was released to go home but told to return in two days for back surgery. Tr. at 24-26. One day before claimant was to return to the hospital, he was involved in a motorcycle accident, and he spent three months in a coma. After he recuperated from the effects of the coma, claimant underwent back surgery. He has not returned to his usual work. Tr. at 26-28. Employer paid temporary total disability benefits from August 10, 1983, through April 3, 1989, permanent partial disability benefits thereafter, and all medical expenses, terminating benefits

only after claimant moved from Tennessee to Illinois.[1] *Id.* at 57. Consequently, claimant filed a claim for permanent total disability benefits. Employer contends claimant is, at most, permanently partially disabled.

[1]Claimant's injury occurred in Florida. Tr. at 25. After he recovered, he moved to Illinois for vocational rehabilitation at the Pioneer Center. *Id.* at 34, 39, 46, 53. Claimant then moved to Tennessee to attend college where he obtained a two-year degree in food service management. *Id.* at 34, 48. He sought work in Nashville, individually and with the help of a vocational counselor, but claims he was unsuccessful, so he moved back to Illinois. He now works in a sheltered position at the Pioneer Center. *Id.* at 35-38, 48, 51-56.

After a hearing on the merits, the administrative law judge determined that claimant established a *prima facie* case of total disability and cannot return to his usual work. Decision and Order at 5. He concluded that claimant's disability arises as a result of his back injury and, therefore, it is not necessary to consider employer's argument that claimant's motorcycle accident was an intervening cause of claimant's disability. The administrative law judge then stated that, assuming, *arguendo*, it is a relevant issue, he believed the motorcycle accident was an unavoidable result of the work accident, as claimant suffered a head injury in the work accident and then suffered a black-out, which caused the motorcycle accident. Decision and Order at 6. The administrative law judge also found that employer failed to establish the availability of suitable alternate employment and that claimant is entitled to permanent total disability benefits from May 7, 1987, and continuing. *Id.* Employer appeals the decision, contending that the administrative law judge erred in finding claimant permanently totally disabled. Claimant has not responded to the appeal.[2]

Employer first argues that the administrative law judge erred in holding that claimant has a mental deficiency which renders him unemployable. Alternatively, if claimant does have such a disability, employer maintains it was caused by the intervening motorcycle accident and not the work accident. We reject this contention. The administrative law judge did not conclude that claimant has a mental deficiency which renders him unemployable. To the contrary, he stated that "claimant's total disability stems largely from his back injury at work. . . ." Decision and Order at 6. Although the administrative law judge discussed claimant's head injury and any potential resulting impairment therefrom, and he concluded that the motorcycle accident was an unavoidable result of the work injury, he did so in *dicta*, as an alternate conclusion.[3] Inasmuch as employer conceded that claimant sustained a work-related back injury, and has not challenged the administrative law judge's primary finding that claimant is disabled to some degree as a result of the work-related back injury, we affirm the administrative law judge's finding that claimant's disability is work-related. *See* 33 U.S.C. §920(a); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Next, employer contends the administrative law judge erred in awarding claimant permanent total disability benefits. Employer's argument has merit. Initially, we note that employer does not dispute the finding that claimant is unable to return to his usual work. Thus, claimant has established a *prima facie* case of total disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Once a claimant makes such a showing, the burden shifts to the employer to establish the availability of other jobs the claimant can realistically secure and perform given his age, education, physical

[2]All of claimant's exhibits and some of employer's exhibits are missing from the file before the Board. The Board attempted to reconstruct the record; however, its efforts were not completely successful. Therefore, the Board concluded that, in the absence of any objections, it would address employer's appeal, and it would accept the administrative law judge's descriptions and findings regarding the missing exhibits. Order dated June 15, 1994. No party objected to the Board's order.

[3]Counsel for both parties agreed that any mental impairment claimant has is not due to the work accident. Tr. at 80.

restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In this case, employer presented evidence of eight potential jobs for claimant: security guard, food service supervisor, telemarketer, motel desk clerk, shrink wrapper, packager, and two jobs in a boot-making company. Emp. Ex. 1. According to employer, these positions are within claimant's restrictions, considering his youth, his college education, and his physical abilities. Moreover, employer challenges claimant's diligence in seeking work, asserting that his response to employer's location of potential jobs was to move from the state. The administrative law judge rejected employer's arguments, and specifically discussed only the telephone sales position, finding it beyond the restrictions set by Drs. Shah, Alvary and Gentry. Decision and Order at 6. He then discredited the entire vocational report by discrediting Dr. Gavigan's opinion, on whom the vocational expert relied. Further, the administrative law judge determined that claimant's sheltered position at the Pioneer Center, *see* n.1, *supra*, does not constitute suitable alternate employment.

In discrediting Dr. Gavigan's opinion, the administrative law judge stated that it was not current and was rendered without the benefit of the MRI results. Generally, questions of witness credibility are for the administrative law judge 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). However, the Board need not accept such determinations if they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As Dr. Gavigan's report is more recent than that of Dr. Alvary, on which the administrative law judge relied, and as Dr. Gavigan reviewed the medical records, including the MRI results, which he found to be normal, *see* Emp. Ex. 2, it was unreasonable for the administrative law judge to discredit Dr. Gavigan's opinion, and therefore the vocational report, based on these factors.[4] Consequently, although the administrative law judge is correct in concluding that sheltered work is not suitable alternate employment, *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980), we must vacate the award of permanent total disability benefits and remand the case for him to discuss the jobs identified by the rehabilitation counselor and to reconsider whether employer established the availability of suitable alternate employment.

Accordingly, the administrative law judge's award of permanent total disability benefits is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

[4]We note that the administrative law judge relied on Dr. Gavigan's report in setting the date claimant reached maximum medical improvement.

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge