

BRB No. 01-0818

JAMES B. PLOURDE )  
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 Claimant-Petitioner )  
 )  
 v. )  
 )  
 BATH IRON WORKS ) DATE ISSUED: July 17, 2002  
 CORPORATION )  
 )  
 and )  
 )  
 BIRMINGHAM FIRE INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION AND ORDER

Appeal of the Decision and Order on Remand of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (Cleveland & Chowdry), Topsham, Maine, for claimant.

Nelson J. Larkins (Prete, Flaherty, Beliveau, Pachios & Haley, L.L.C.), Portland, Maine, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (98-LHC-1638, 1639) of Chief Administrative Law Judge John M. Vittone 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for a second time. To recapitulate, claimant sustained an

injury to his left wrist and elbow on May 20, 1988, while working for employer. He subsequently developed problems with both upper extremities, and his upper back and neck. Claimant stopped working in March 1990. Employer paid claimant total disability benefits under the Maine Workers' Compensation Act, 39 ME. REV. STAT. ANN. §1 *et seq.* (1989)(amended 1993), from March 1990 until November 15, 1996, except for a period in 1994-1995, when claimant worked temporarily for employer. Following a hearing upon consolidation of petitions from both parties before the State of Maine Workers' Compensation Board (the State Board), the hearing officer reduced claimant's benefits to 75 percent of his average weekly wage, based on his finding that claimant has some residual work capacity. Cl. Exs. 4 at 12, 5 at 14; Emp. Exs. 6 at 15, 7 at 17. Claimant filed a claim under the Longshore Act on February 18, 1997, seeking permanent total disability and medical benefits from November 16, 1996, the date the State Board decision reduced his disability award to partial.

The administrative law judge in the Longshore Act proceeding found that collateral estoppel precludes claimant from relitigating the issue of disability under the Longshore Act, and he therefore did not make any findings on the merits of the claim. Claimant appealed this decision to the Board. In its decision, the Board reversed the administrative law judge's application of the doctrine of collateral estoppel, holding that the allocation of the burdens of production and proof on the issue of extent of disability differs materially under the two schemes. *Plourde v. Bath Iron Works Corp.*, 34 BRBS 45 (2000). Consequently, the Board remanded the case to the administrative law judge to consider the merits of claimant's claim. *Id.*

On remand, the administrative law judge found that claimant has reached maximum medical improvement and that it is undisputed that claimant cannot return to his former duties. After reviewing the testimony and labor market survey report of Mr. Stevens, a vocational counselor, the administrative law judge found that employer established suitable alternate employment. Finding that claimant did not demonstrate reasonable diligence in seeking alternate employment, the administrative law judge concluded that claimant is entitled to permanent partial disability benefits from the date of maximum medical improvement, based on a residual wage-earning capacity of \$135.20. The administrative law judge stated that while there was no stipulation as to claimant's pre-injury earnings, it is undisputed that claimant's average weekly wage was \$310.87, and he thus found that claimant has a loss in wage-earning capacity of \$175.67 per week. 33 U.S.C. §908(c)(21).

On appeal, claimant contends that the administrative law judge erred in finding that the parties agreed to a pre-injury average weekly wage of \$310.87, when claimant consistently alleged that his average weekly wage was \$545.75. In addition, claimant contends that the administrative law judge erred in finding that claimant was not totally disabled from June 10, 1993, and continuing, and in failing to give the Maine award

collateral estoppel effect on this issue. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, claimant contends that the administrative law judge erred in finding that it was undisputed that claimant's average weekly wage prior to the injury was \$310.87. Employer responds that claimant did not raise this issue in his appeal of the administrative law judge's original decision and thus is precluded from raising this issue now. We reject employer's contention, as the administrative law judge denied benefits in the original decision and did not reach the issue of claimant's average weekly wage. The Board remanded the case to the administrative law judge to consider the merits of the claim, including the extent of claimant's disability, and thus claimant's average weekly wage implicitly was an issue for consideration. Claimant's appeal of this issue is thus properly before the Board.

The record indicates that the Maine Workers' Compensation Award was based on the average weekly wage of \$545.75, Cl. Ex. 4, and that claimant's claim for compensation under the Act indicated an average weekly wage of \$545.75. Claimant contends that this figure represents his actual earnings for the 52-week period preceding the injury. Although the administrative law judge correctly noted that the parties did not stipulate as to average weekly wage, there is no support for his finding that the parties agreed that claimant's average weekly wage was \$310.87. In light of record evidence that claimant alleged an average weekly wage of \$545.75, we vacate the administrative law judge's average weekly wage finding.

The record indicates that claimant worked for employer for only a few months prior to his injury in 1988, and that at the time of the injury he was earning \$7.76 per hour.<sup>1</sup> Both parties stated in their pre-hearing summary of the claim that claimant's average weekly wage was \$545.75. *See* Claimant's Prehearing Summary at 3; Employer's Prehearing Summary at 2. Section 10 sets forth three alternative methods for determining claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. 33 U.S.C. §910. The computation methods are directed towards establishing claimant's earning power at the time of the injury. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998). Sections 10(a) and 10(b), 33 U.S.C. §§910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot

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<sup>1</sup>This hourly wage represents an average weekly wage of \$310.40, for a 40-hour week.

be reasonably and fairly applied. *See Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997). An administrative law judge may rely on a stipulation as to average weekly wage. *See generally Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Fox v. Melville Shoe Corp., Inc.*, 17 BRBS 71 (1985). However, in the instant case, as there is no indication how the figure of \$545.75 was derived, and the administrative law judge erred in stating that the parties agreed to an average weekly wage of \$310.87, we remand the case to the administrative law judge for further consideration of this issue.<sup>2</sup> *See generally Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997)(Brown, J., concurring).

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<sup>2</sup>Claimant urges the Board to hold that the Maine award has collateral estoppel effect as to this issue, but there is no indication how the average weekly wage was determined in the state forum, or whether the issue was actually and necessarily litigated in that forum. Therefore, collateral estoppel is not appropriate on the record before us. *See Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999).

Claimant also contends on appeal that the administrative law judge erred in finding that claimant was not totally disabled from August 4, 1986<sup>3</sup> through November 11, 1996. Initially, we reject claimant's contention that the administrative law judge was bound to give collateral estoppel effect to the 1994 Maine award. The Maine award cited by claimant does not address claimant's ability to work, but rather indicates that claimant sustained a 23 percent physical impairment due to his May 20, 1988, work-related injury. Cl. Ex. 2. Moreover, the Maine award dated November 15, 1996, states that claimant was receiving "accepted" total disability benefits from employer under the Maine Act, denied claimant continuing total disability benefits, and awarded benefits for a 75 percent partial impairment. Cl. Ex. 4. Thus, contrary to claimant's contention, claimant was never "awarded" total disability benefits under the Maine Act following a consideration of the facts and issues by an adjudicating official. Thus, collateral estoppel is not appropriate as to this issue. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); *Chavez v. Todd Shipyards Corp.*, 28 BRBS 185 (1985)(*en banc*)(Brown & McGranery, JJ., dissenting), *aff'g on recon.* 27 BRBS 80 (1993)(McGranery, J., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9<sup>th</sup> Cir. 1998). In addition, in its previous decision, the Board extensively considered whether the state decision precluded relitigation under the Longshore Act. The Board held that "while the general definition of 'disability' appears to be similar under the state and federal schemes, the allocations of the burdens of production and proof differ materially under the two schemes." *Plourde*, 34 BRBS at 49. The Board cited the holding of the United States Court of Appeals for the First Circuit in *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31BRBS 109(CRT) (1<sup>st</sup> Cir. 1997), that "if the burdens of proof are different in the two forums, collateral estoppel may not apply. Only if application of the differing burdens affects the result is the doctrine inapplicable." *Plourde*, 34 BRBS at 49, citing *Acord*, 125 F.3d at 21, 31 BRBS at 111 (CRT). The Board concluded that in this case, "the differing burdens clearly affect the result, as the parties are required to produce different types and quantum of evidence at different steps in the proceedings."<sup>4</sup> *Plourde*, 34 BRBS at 49. Therefore, we reject claimant's

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<sup>3</sup>This date appears to be in error as claimant was not injured until May 1988.

<sup>4</sup>Specifically, the Board reviewed the requirements of the Maine Act, stating that employer must initially show only that the claimant is no longer physically totally disabled based, in most cases, solely on medical evidence. 39 ME. REV. STAT. ANN. §100(2)(B)(1989)(repealed). Once employer has made this initial showing, the burden is on the worker to come forward with evidence bearing on whether his work-related injury is causing remunerative work in the marketplace to be unavailable to him. *Poitras v. R.E. Glidden Body Shop, Inc.*, 430 A.2d 1113 (Me. 1981). Once the worker meets his burden of production, employer has the burden of proof that it is more probable than not that the persisting effects of the worker's work-related injury lacked causative relation to the worker's opportunities for remunerative work in the work market of his community. *Ibbitson*

contention that the administrative law judge erred in failing to give the state award collateral estoppel effect with regard to the extent of claimant's disability prior to November 11, 1996, and hold that the administrative law judge properly considered the claim under the Longshore Act from the date of the injury, applying the burden of proof required under the Act, as instructed in the Board's decision.

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*v. Sheridan Corp.*, 422 A.2d 1005 (Me. 1980). The Board compared the Longshore Act's requirement that the employer establish suitable alternate employment and held that it is manifestly insufficient under the Longshore Act for the employer to show merely that the claimant has some capacity to work or that the claimant can perform certain tasks. *Plourde*, 34 BRBS at 48. Moreover, the Board stated that under the Longshore Act, claimant does not bear the burden of establishing reasonable diligence in attempting to secure alternate employment until employer has established the realistic availability of actual jobs that the claimant can perform in order to meet its burden of establishing the availability of suitable alternate employment. The Board concluded that the differing burdens clearly affect the result in the instant case and thus collateral estoppel does not apply. *Plourde*, 34 BRBS at 49.

Claimant also contends that the administrative law judge erred in finding that employer established suitable alternate employment pursuant to applicable law. Once the claimant has shown his inability to return to his usual work under the Act, the burden shifts to the employer to establish the availability of suitable alternate employment. The employer must show the realistic availability of jobs that the claimant can perform in order to meet its burden of establishing the availability of suitable alternate employment under the Act. *See generally New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5<sup>th</sup> Cir. 1981). The United States Court of Appeals for the First Circuit, in whose jurisdiction the current case arises, has referred to this burden as requiring the “precise nature, terms and availability of the job[s].” *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 433, 24 BRBS 202, 208(CRT) (1<sup>st</sup> Cir. 1991). In the present case, the administrative law judge cited the First Circuit’s decision in *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1<sup>st</sup> Cir. 1979),<sup>5</sup> but also stated that employer must show the existence of realistic job opportunities that claimant is capable of performing. The administrative law judge then reviewed the positions identified by Mr. Stevens in a labor market survey, Emp. Exs. 12, 13, comparing claimant’s restrictions with the duties of the jobs, and concluded that employer has met its burden of proving suitable alternate employment.<sup>6</sup> *See generally*

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<sup>5</sup>The First Circuit held in *Air America* that it will not put the burden of proving that actual available jobs exist on the employer when it is “obvious” that there are available jobs that someone of claimant’s age, education and experience can do. *Air America*,, 597 F.2d at 780, 10 BRBS at 515.

<sup>6</sup>The administrative law judge found that, based on the opinions of both Dr. Kois and Ciembroniewicz, claimant is able to return to work with the limitation that he can only lift up to twenty pounds, and that he should avoid repetitive actions with his arms. *See* Cl. Ex. 16,

*Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Therefore, contrary to claimant's contention, the administrative law judge did not rely solely on the First Circuit's decision in *Air America*, but rather reviewed the vocational evidence submitted by employer and determined that the vocational counselor identified a number of positions which fit claimant's restrictions and are within claimant's own ten minute driving limitation.<sup>7</sup>

Claimant does not contest the finding that the jobs are suitable, and substantial evidence supports the administrative law judge's conclusion. Thus, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997).

If employer establishes the availability of suitable alternate employment, claimant can rebut that showing by demonstrating that, despite a diligent effort, he was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2<sup>d</sup> Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 479 U.S. 826 (1986). In the instant case, the administrative law judge reviewed claimant's testimony and concluded that claimant's search was "sporadic." Decision and Order at 9. Claimant testified that he had declined to submit an application for a number of the identified positions for various reasons which the administrative law judge did not find convincing. In addition, the administrative law judge found that while claimant testified that he had been conducting an independent search, he did not submit any evidence to corroborate his testimony. On appeal, claimant does not contest the administrative law judge's finding that claimant did not demonstrate reasonable diligence in finding suitable alternate employment. Therefore, as claimant did not refute the evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant is limited to an award of permanent partial disability benefits under the Act.

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Emp. Ex. 11. Moreover, the administrative law judge rationally found that claimant has the experience necessary to perform these jobs as they are mostly entry level sales positions. Decision and Order at 9

<sup>7</sup>Dr. Kois suggested that claimant work in a situation that does not involve prolonged driving. Cl. Ex. 16. Claimant has determined that 10 minutes is the limit that he can comfortably drive. H. Tr. at 36.

However, we vacate the administrative law judge's finding that as claimant reached maximum medical improvement on June 10, 1993, this was the effective date of the award of permanent partial disability benefits. Claimant's entitlement to total disability benefits continues until the date suitable alternate employment is found to be first available to claimant, and not from the date of maximum medical improvement, and such a showing may not be applied retroactively so as to commence partial disability status before suitable alternate employment is shown to exist. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5<sup>th</sup> Cir. 1991); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9<sup>th</sup> Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). In the present case, the administrative law judge relied on the labor market surveys produced by Mr. Stevens dated July 13, 1998 and October 9, 1998 to establish suitable alternate employment. Decision and Order at 8-9; Emp. Exs. 12, 13. Mr. Stevens testified that the labor market at the time of the hearing was stable and that it was improving "over the last three or four years." H. Tr. at 84. In addition, he noted that his job search encompassed sources dating from August 1995 through December 1997. Emp. Ex. 12. There is no evidence that he considered the job market prior to 1995. The administrative law judge did not weigh this evidence or render findings as to its probative value in determining the date claimant's disability became partial. Therefore, we vacate the administrative law judge's finding that claimant was entitled to partial disability benefits on the date his disability became permanent, and instruct the administrative law judge on remand to render further findings consistent with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *Gremillion*, 31 BRBS 163.

Accordingly, the administrative law judge's finding that the parties agreed that claimant's pre-injury average weekly wage was \$310.87 is vacated, and the case is remanded for further consideration of this issue. In addition, while the administrative law judge's finding that claimant is entitled to continuing permanent partial disability benefits is affirmed, the administrative law judge is instructed on remand to render findings regarding the date claimant's disability became partial rather than total in accordance with this opinion. In all other respects, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief

Administrative Appeals Judge

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**ROY P. SMITH**

Administrative Appeals Judge

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**BETTY JEAN HALL**

Administrative Appeals Judge