BRB No. 08-0832

G.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GROUP 4 FALCK SECURITY SUPPORT SERVICES	)	DATE ISSUED: 07/23/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Jerry R. McKenney, James L. Azzarello, Jr., and Billy J. Frey (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LDA-00322) of Administrative Law Judge Lee J. Romero, Jr., 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant worked for employer as a civilian force protection specialist providing security for Army troops in Kosovo at Camp Monteith under a one-year contract beginning March 17, 2004. On January 18, 2005, claimant notified employer that he had injured his left leg in a work-related slip and fall on that date. Decision and Order at 2, stips. 1-4; CX 4; EX 3 at 28. On February 5, 2005, claimant was evaluated by Dr. Georgiev after his knee/leg continued to be bruised and swollen approximately three weeks after his work accident. The doctor diagnosed claimant with "knee edema, ballottement positive at left patella, edema on the dorsal region of the left foot." CX 1 at 3. Dr. Georgiev gave claimant some pills for pain, ointment to rub on his leg, and elastic bandages, and assured him that his leg "would naturally heal in time." Tr. at 25; CX 1 at 3; EX 3 at 28-30.

Claimant's one-year employment contract ended on March 17, 2005, and was not renewed. In this regard, claimant testified that he was able to finish his contract only because, after his fall, employer provided him "special duty" in a guard tower near headquarters, where he worked his eight-hour day. Tr. at 26. After inquiring about a job with another employer, claimant was offered a position in Quatar as a force protection specialist. CX 10 at 1. Claimant testified he declined the position because his injury had not healed sufficiently for him to pass the running portion of his pre-employment physical examination. CX 10 at 2. Claimant then moved to the Czech Republic, where he was examined by Dr. Pelnar, an orthopedic surgeon, on December 29, 2005. Dr. Pelnar diagnosed claimant with a distortion of the left knee joint, rupture of the front cruciate ligament, loosening of the outer ligament, and enthesiopathy of the quadriceps tendon. CX 1 at 5. On January 6, 2006, claimant filed a claim for benefits alleging that his knee was permanently injured in his January 2005 work accident with employer. CX 4.

On March 2, 2007, Dr. Zeman confirmed Dr. Pelnar's diagnosis. Dr. Zeman assessed claimant's permanent impairment as a 50 percent disability of the left lower limb. Tr. at 30; CX 1 at 7; EX 4 at 3. Dr. Zeman reexamined claimant in 2008, and, after reviewing a recent MRI, reconfirmed his original diagnosis. CX 17 at 2. Employer's expert, Dr. Thomann, evaluated claimant in Frankfurt, Germany, in November 2007, and opined that claimant has a permanent impairment of 11 percent for his left leg under the American Medical Association *Guide to the Evaluation of Permanent Impairment.* Tr. at 15; CX 1 at 58-59. Employer paid claimant permanent partial disability benefits for an 11 percent impairment. EX 7.

The administrative law judge found that claimant was unable to perform his usual employment as a force protection specialist as a result of his January 2005 work accident, and that employer did not establish the availability of suitable alternate employment. Therefore, the administrative law judge awarded claimant total disability benefits. The administrative law judge found that claimant has an 11 percent leg impairment for which claimant is entitled to permanent partial disability benefits should his total disability end. Decision and Order at 15-16, 18. Nonetheless, in the "Order" portion of his decision, the administrative law judge ordered employer to pay claimant both permanent total disability benefits and the scheduled permanent partial disability award. *Id.* at 25.

On appeal, employer argues that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Employer also argues that that the administrative law judge erred in awarding claimant permanent total disability benefits as his injury was to a scheduled member. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in awarding claimant permanent total disability benefits for his left knee injury concurrent with a permanent partial disability award under the schedule for the same injury. Employer argues that once claimant's condition reached permanency, he was limited to a permanent partial disability award under the schedule. Contrary to employer's contention, it is well settled that where claimant is totally disabled due to an injury to a scheduled member, he is not limited to a permanent partial disability award if the injury results in permanent total disability. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366 n.17 (1980); *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986).

Nonetheless, employer is correct that a claimant is not entitled to concurrent permanent total disability and permanent partial disability benefits as awarded by the administrative law judge. *Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987). Therefore, we next address employer's contention that claimant is not totally disabled and is limited to a schedule the award. Once, as here, a claimant has shown his inability to return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. In order to meet its burden, employer must show the realistic availability of jobs that claimant can perform given his restrictions, age, and vocational and educational background. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Employer contends that claimant's actual post-injury self-employment constitutes suitable alternate employment, and that the administrative law judge erred in finding that such work had to be "substantial and gainful" employment. Employer contends that if claimant is actually

working, claimant is not entitled to total disability benefits as he is not working in spite of excruciating pain.

Employer did not submit any evidence, such as a labor market survey or testimony of a vocational rehabilitation specialist, regarding the availability of suitable alternate employment. Employer relied on claimant's self-employment as a day trader, an English-language real estate agent in the Czech Republic, and a teacher of English in the Czech Republic to mitigate claimant's benefits to the scheduled partial disability award already paid.

The administrative law judge found that claimant's sporadic work in the Czech Republic is not suitable alternate employment, noting that the only evidence of claimant's earnings is his testimony that he earned $50 per month from teaching English. Decision and Order at 17, 20. The administrative law judge stated in this regard that claimant's work was not "substantial gainful employment." Employer ascribes error to the use of this standard, and contends, moreover, that claimant ability to earn any particular wage is not relevant to the suitable alternate employment issue. Employer contends that if claimant is underemployed, it is volitional and not because of his work injury.

We reject employer's contention of error. Although the administrative law judge stated that claimant was not engaged in "substantial gainful" employment, the administrative law judge did not purport to apply such a test to claimant's post-injury employment. *See* Decision and Order at 20. Moreover, employer's burden to establish evidence of suitable alternate employment encompasses the duty to establish that the claimant's earnings in post-injury employment are sufficiently regular to establish a true earning capacity. In *Edwards v. Director,* OWCP, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994), the United States Court of Appeals for the Ninth Circuit reversed the Board's decision in *Edwards v. Todd Shipyard Corp.*, 25 BRBS 49 (1991), on which employer relies. The court held that claimant's short-lived post-injury employment of l1 weeks from which he was laid-off for reasons unrelated to his injury did not establish that suitable alternate employment was "realistically and regularly" available on the open market, deferring to the Director's position that Section 8(h) of the Act, 33 U.S.C. §908(h), requires that post-injury earnings be sufficiently regular in order to constitute the claimant's true post-injury wage-earning capacity. 999 F.2d at 1375-1376, 27 BRBS at 83(CRT). The Fourth Circuit, in *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988), stated that employer's burden is to establish that the employee "retains the capacity to earn wages in a regular job." Similarly, the Board has held, in a case involving an injury to a scheduled member, that post-injury self-employment, including business ventures, can constitute suitable alternate employment if claimant's earnings realistically signify a continuing wage-earning capacity. *Sledge v. Sealand Terminals, Inc.*, 14 BRBS 334 (1981). Thus, while

employer need not obtain a job for claimant, employer must establish the availability of jobs, to include self-employment if applicable, in which claimant can earn regular wages. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, therefore, the administrative law judge rationally found that claimant's self-employment does not meet employer's burden of establishing suitable alternate employment. Claimant's personal investment work is not relevant to his ability to earn wages on the open market. Claimant testified that he was unable to earn wages as a real estate broker. Tr. at 37-38. Claimant also testified that he primarily gave English lessons in exchange for Czech lessons and that he earned only an average of $50 per month in this endeavor. Employer asserts that the standard of living may be lower in the Czech Republic. However, employer has not established that these earnings are sufficient to establish a regular wage-earning capacity. Therefore, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment as it is supported by substantial evidence, rational and in accordance with law.[1] *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT); *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT). Consequently, we affirm the administrative law judge's award of continuing permanent total disability benefits beginning March 3, 2007. As we have affirmed the administrative law judge's award of permanent total disability benefits, claimant is not entitled to a concurrent scheduled award. *Korineck*, 835 F.2d 42, 20 BRBS 63(CRT). Thus, to the extent that the administrative law judge awarded concurrent benefits, we vacate the administrative law judge's award of scheduled permanent partial disability benefits. *See* Decision and Order at 18, 25.

[1] We note that, as claimant has worked in various places in Europe, employer was not necessarily restricted to establishing suitable alternate employment in the Czech Republic. *See Patterson v. Omniplex World Services*, 36 BRBS 149 (2003).

Accordingly, the administrative law judge's award of permanent partial disability benefits under the schedule is vacated. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge