BRB No. 13-0572

LONNIE JACKSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORTS AMERICA FLORIDA, INCORPORATED	)	
	)	
and	)	
	)	
PORTS INSURANCE COMPANY, INCORPORATED	)	DATE ISSUED: July 14, 2014
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Nicholas E. Karatinos (Law Office of Nicholas E. Karatinos), Lutz, Florida, for claimant.

Donovan A. Roper (Roper & Roper, P.A.), Apopka, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-00046) of Administrative Law Judge Stuart A. Levin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On March 19, 2009, claimant fell while working in the hold of a vessel during the course of his employment as a casual longshoreman.[1] Following this incident, claimant was hospitalized for three days; he subsequently treated with an orthopedic surgeon and a neurologist for shoulder, elbow, and hip complaints. Claimant was given restrictions on his physical activity; he has not returned to work, and continues to take prescription medication. Employer voluntarily paid claimant temporary total disability benefits until February, 2010 and acknowledges that claimant is unable to return to work as a longshoreman, but employer contends that it established the availability of suitable alternate employment to claimant and therefore, that claimant is not totally disabled.

In his Decision and Order, the administrative law judge found that claimant's work injuries reached maximum medical improvement as of November 9, 2009, and that, while it is undisputed that claimant is unable to perform his usual work as a casual longshoreman, employer established the availability of suitable alternate employment as of that date paying a weekly wage of $258.90. The administrative law judge calculated claimant's average weekly wage at the time of his injury as $110.10. The administrative law judge awarded claimant temporary total disability benefits from March 20 through November 8, 2009, and denied claimant's claim for disability benefits subsequent to that date as his wage-earning capacity exceeded his average weekly wage. 33 U.S.C. §908(b).

On appeal, claimant challenges the administrative law judge denial of his claim for additional disability benefits. Specifically, claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment. In addition, claimant avers that the administrative law judge erred in calculating his average weekly wage. Employer filed a response brief, to which claimant replied.

Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment within the geographic area where claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant contends that he is unable to return to any

[1] Claimant, who was 64 years of age at the time of this incident, supplemented his Social Security retirement income by working both as a longshoreman approximately three days a month and as a skycap at a local airport.

gainful employment as a result of his work injuries. Thus, claimant asserts the administrative law judge erred in finding that employer established the availability of suitable alternate employment.

In addressing the extent of claimant's alleged work-related disability, the administrative law judge credited the opinion of Dr. Henderson, claimant's treating orthopedic surgeon, who opined that claimant should limit his bending and the overhead use of his arms, and not lift weights in excess of 15 to 20 pounds. EX 15. The administrative law judge found that Dr. Craythorne, the orthopedist from whom claimant sought a second opinion, reviewed claimant's medical records, performed a physical examination, and concurred with the restrictions placed on claimant by Dr. Henderson. EX 8. Additional limitations were imposed by the last of claimant's treating physicians, Dr. Kempsen, who restricted claimant from climbing ladders and working at heights. EX 9. The administrative law judge found that none of these limitations was disputed and that Dr. Robinson, employer's vocational expert, was properly guided by these restrictions when he conducted his labor market survey. *See* Decision and Order at 7-8. Contrary to claimant's argument on appeal, the administrative law judge discussed claimant's testimony regarding his use of pain medication and a cane, and his opinion that he is incapable of working in the positions identified by Dr. Robinson as being within claimant's capabilities.[2] *Id.* at 8-10. The administrative law judge observed that no doctors opined that claimant's medication usage prevents him from working and that a cane was not prescribed for claimant. The administrative law judge thus concluded that, considering claimant's physical condition and capacity to work with restrictions, and claimant's age, education and experience, the credible testimony of Dr. Robinson concerning jobs on the open market satisfies employer's burden of establishing the availability of suitable alternate employment. *Id.* at 10-11

We affirm the administrative law judge's finding. While a claimant's credible complaints of pain may be sufficient to establish his inability to return to work, *see generally Eller & Co. v. Golden*, 620 F.2d 71, 8 BRBS 846 (5th Cir. 1980), it is well-established that an administrative law judge is entitled to weigh the evidence and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge fully addressed the medical, vocational and lay evidence of record, and his weighing of the

[2] Dr. Robinson identified nine specific employment opportunities that he opined are both suitable for and available to claimant. EX 21. Dr. Kempsen approved all of these positions, while Dr. Claythorne approved eight. *See* Decision and Order at 4-6. The administrative law judge found that Dr. Robinson's vocational analysis and labor market survey establish that suitable employment opportunities were available to claimant as of November 9, 2009. *Id*. at 10.

evidence is rational and within his authority as the factfinder. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge rationally credited the opinions of Drs. Henderson, Craythorne, Kempsen and Robinson, and as these opinions constitute substantial evidence to support the administrative law judge's findings that claimant is capable of working and work within his restrictions is available, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003). Thus, we affirm the finding that claimant is not entitled to total disability benefits after November 8, 2009.

Claimant also contends the administrative law judge erred in failing to include the value of a rent offset he received from his landlord in the calculation of claimant's average weekly wage. The administrative law judge acknowledged the parties' agreement that claimant received a monthly "advantage" of a $500 rent set-off during the time he performed maintenance work at his housing complex. However, the administrative law judge declined to include that amount in the calculation of claimant's average weekly wage because claimant did not "produce any record that would demonstrate that any tax of any type was withheld" on that amount. *See* Decision and Order at 12-14.

The administrative law judge utilized Section 10(c) of the Act, which states that a claimant's average weekly wage shall be:

> such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).[3] Generally, if a claimant has more than one job at the time of his injury, his average weekly wage should include his earnings from all the jobs. *See Liberty Mutual Ins. Co. v. Britton*, 233 F.2d 699 (D.C. Cir. 1956); *Rex Investigative &*

[3] It was not contended below that claimant's average weekly wage could be calculated pursuant either Section 10(a) or Section 10(b). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

Patrol Agency, Inc. v. Collura, 329 F.Supp. 696 (E.D. N.Y. 1971); *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc*., 24 BRBS 137 (1990); *cf. Harper v. Office Movers/E.I. Kane, Inc.*, 19 BRBS 128 (1986) (injury only affects ability to perform one of two jobs). Section 2(13) of the Act defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes).

33 U.S.C. §902(13).

We affirm the administrative law judge's exclusion of the rent offset from the calculation of claimant's average weekly wage. Pursuant to Section 10(c), claimant did not establish that the rent set-off is equivalent to the "reasonable value of the services of the employee if engaged in self-employment." At most, claimant established that the offset was equal to the reasonable value of claimant's rent. Moreover, claimant did not offer any evidence regarding the nature of his relationship with his landlord, that is, whether an employer-employee relationship existed between the two, whether a "contract of hiring" was in force, or the basis for his contention that his rent offset was a taxable event. Consequently, claimant has not established that his rent offset should be included as "wages" compensated by or received from an employer pursuant to Section 2(13).[4] *See generally Stetzer v. Logistec of Connecticut, Inc.*, 547 F.3d 459, 42 BRBS 55(CRT) (2d Cir. 2008) (claimant failed to establish payments were wages). Therefore, as claimant has not established reversible error in the administrative law judge's conclusion

[4] Thus, we need not wade into the debate concerning the "advantage" clause of Section 2(13) over which there is arguably a split in circuit court precedent concerning the need for "taxability" of the "advantage." *Compare H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000), *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (5th Cir. 1998), and *Wausau Ins. Companies v. Director, OWCP* [*Guthrie*], 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997) *with Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998); *but see Custom Ship Interiors v. Roberts*, 300 F.3d 510, 36 BRBS 51(CRT) (4th Cir. 2002), *cert. denied*, 520 U.S. 1188 (2003). This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, which has not addressed this clause. In a decision issued after *Guthrie*, *McNutt* and *Wright*, but before *Quinones* and *Roberts*, the Board declined to follow *Guthrie* and *McNutt* in a case arising in the Eleventh Circuit. *Story v. Navy Exch. Serv. Ctr.*, 33 BRBS 111 (1999).

that the rent offset should be excluded from the calculation of claimant's average weekly wage, we affirm the administrative law judge's determination of claimant's average weekly wage as $110.10. Thus, as claimant's post-injury wage-earning capacity exceeds his average weekly wage, we affirm the denial of compensation after November 9, 2009. 33 U.S.C. §908(c)(21), (h).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge