

EZELL TOOMER)	BRB Nos. 02-0486
)	and 02-0486A
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>MAR 25, 2003</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured-Employer)	
Petitioner)	
Cross-Respondent)	
)	
)	
EZELL TOOMER)	BRB No. 02-0514
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeals of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals, BRB No. 02-0486, and claimant cross-appeals, BRB No. 02-0486A, the Decision and Order of Administrative Law Judge Richard K. Malampy 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). In addition, claimant has filed a timely motion for reconsideration of the Board's December 10, 2002, Order dismissing his appeal in BRB No. 02-0514. 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407.

In his Decision and Order, the administrative law judge accepted the stipulation of the parties that claimant sustained work-related bilateral carpal tunnel syndrome (CTS) in 1995, and that claimant's average weekly wage for this injury is \$863, resulting in a compensation rate of \$533.35.¹ The parties also stipulated that claimant sustained a work-related back injury on September 1, 1997, and that his average weekly wage at the time of this injury was \$636.20, resulting in a compensation rate of \$424.13. Claimant sought permanent total disability benefits, apparently on the basis of both the CTS and back injuries. The administrative law judge found that claimant's back injury results in disabling symptoms, that claimant cannot return to his usual work, and that employer did not establish the availability of suitable alternate employment. He thus ordered employer to pay temporary total disability benefits from "the last day after [claimant's] last day of employment (presumably December 3, 1997) through May 26, 2000 at the compensation rate of \$533.35." Decision and Order at 13 (parenthetical in original). The administrative law judge also awarded claimant permanent total disability benefits from May 27, 2000, and continuing, and found that employer is entitled to a credit in excess of \$14,000 for the overpayment of benefits paid for claimant's CTS. *See* n.1, *supra*. Both employer and claimant appealed this decision. BRB Nos. 02-0486/A.

¹In a 1998 Decision and Order, Judge Sarno awarded claimant permanent partial disability benefits for a four percent right arm impairment and a seven percent left arm impairment for this injury, which is less than employer had voluntarily paid. 33 U.S.C. §908(c)(1), (19).

Meanwhile, by letter to the administrative law judge dated March 14, 2002, employer's counsel requested "errata modification" of the Decision and Order. Employer stated that claimant's last day of work for employer was February 23, 1999; claimant concurred in this statement. Employer also requested that the administrative law judge clarify whether the total disability award was for claimant's back injury, for which the compensation rate is \$424.13, or the CTS, for which the compensation rate is \$533.35. Claimant responded to employer's letter, stating that he is totally disabled due to the back injury, but contending that the compensation rate should be \$535.35 and that employer is not entitled to the credit awarded. The administrative law judge issued an "Errata Order," stating that as claimant conceded is he totally disabled due to the back impairment rather than to the CTS, total disability benefits are to be paid at the rate of \$424.13 per week commencing February 26, 1999. Errata Order at 3. The rest of the administrative law judge's original decision was unchanged. Claimant filed an appeal of the administrative law judge's Errata Order. BRB No. 02-0514.

Claimant moved to dismiss employer's appeal in BRB No. 02-0486, contending that the April 11, 2002, Errata Order significantly modified the administrative law judge's prior Decision and Order, and that the Errata Order therefore constitutes the final order of the administrative law judge. Claimant thus contended that employer was required to file an appeal after the Errata Order was issued, and that employer's prior appeal should be dismissed as prematurely filed. Employer responded that claimant's motion should be denied, as the administrative law judge's Errata Order did not substantively change the underlying decision which employer sought to appeal.

The Board denied claimant's motion to dismiss employer's appeal. Order at 4 (Dec. 10, 2002). The Board stated that the issue of the prematurity of employer's appeal turned on whether employer's request for "errata modification" constituted a motion for reconsideration. If so, the regulation at 20 C.F.R. §802.206(f) would require dismissal of employer's appeal as premature. Analogizing to cases decided under Federal Rule of Civil Procedure 60(a), which provides relief from judgment based on clerical mistakes arising from oversight or omission and which does not suspend the finality of the original decision, the Board held that the administrative law judge's Errata Order was issued to correct a clerical mistake arising from oversight or omission, citing *Graham-Stevenson v. Frigitemp Marine Div.*, 13 BRBS 558 (1981) (correction of award to multiply by 66 2/3% is clerical correction); *cf. Aetna Casualty & Surety Co. v. Director, OWCP [Jourdan]*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996) (motion to address employer's liability for current and future benefits is not request for clerical correction); *Grimmett v. Director, OWCP*, 826 F.2d 1015 (11th Cir. 1987) (amended order setting forth evidence that rebutted interim presumption of total disability due to pneumoconiosis did not correct clerical error). Thus, the Board denied claimant's motion to dismiss

employer's appeal, holding that the original appeal was not premature as employer's request for "errata modification" was not a motion for reconsideration that suspended the time for appealing the underlying decision. Moreover, the Board dismissed claimant's appeal of the administrative law judge's Errata Order, BRB No. 02-0514, on the ground that claimant did not raise any issues concerning the Errata Order, but only issues regarding the propriety of findings in the administrative law judge's original decision.

In his motion for reconsideration of the Board's December 10, 2002, Order, claimant again contends that employer's appeal should be dismissed as premature. Claimant reiterates the contentions regarding employer's motion to the administrative law judge which the Board has fully considered and rejected. In addition, however, claimant contends that in response to employer's motion for "errata modification," he requested that the administrative law judge reconsider the credit awarded to employer because, in his opinion, no credit is due for the overpayment of scheduled benefits for CTS against employer's liability for total disability benefits for the back injury. Claimant contends that the administrative law judge "denied" his "motion" on this issue by maintaining the credit award from his initial decision. Thus, claimant contends that the administrative law judge's Errata Order denied his motion for reconsideration, indicating that employer's appeal should be dismissed as premature pursuant to 20 C.F.R. §802.206(f). Claimant also contends that the Board erred in dismissing his appeal in BRB No. 02-0514, because he is challenging the Errata Order's award of a credit to employer. Employer responds that claimant's motion for reconsideration should be denied.

We reject claimant's contentions that the Board erred in retaining employer's appeal in BRB No. 02-0486 and in dismissing his appeal in BRB No. 02-0514. The administrative law judge did not reconsider the credit issue in the Errata Order in response to claimant's response to employer's motion for "errata modification." He merely noted claimant's response, changed the date of claimant's last employment and the average weekly wage/compensation rate and reinstated the rest of his original order, including the award of the credit to employer. Thus, employer's appeal was not prematurely filed pursuant to 20 C.F.R. §802.206(f). Moreover, claimant filed an appeal of the administrative law judge's initial decision in which he awarded the credit to employer. This was the only issue decided adversely to claimant and thus is properly addressed in the context of claimant's appeal in BRB No. 02-0486A. We therefore deny claimant's motion for reconsideration of the Board's December 10, 2002, Order. 20 C.F.R. §802.409.

We turn now to the merits of the parties' appeals. Employer contends the administrative law judge erred in finding that claimant's 1997 back injury is the cause of claimant's current disability. In this regard, employer contends that the administrative law judge erred in failing to discuss all the relevant evidence and to assess the credibility of claimant in relation to objective evidence of record. Employer also contends the

administrative law judge erred in finding that it did not establish the availability of suitable alternate employment, and that, if it did, in finding that claimant engaged in a diligent job search. Claimant responds, urging affirmance. In his appeal, claimant contends the administrative law judge erred in awarding employer a credit for its overpayment of scheduled benefits for CTS against its liability for benefits for the back injury. Employer has not responded to this appeal.

Employer first contends that the administrative law judge erred in finding that claimant's back injury is disabling. Employer contends that the doctors' disability findings rest solely on claimant's subjective complaints and that these complaints are suspect given claimant's failure to tell the doctors about the back pain he sustained as a result of a 1996 car accident. Employer also contends that the administrative law judge should have credited Dr. Baddar's opinion that claimant was exaggerating his symptoms.

The administrative law judge properly applied the Section 20(a) presumption, 33 U.S.C. §920(a), to the issue of "whether or not [claimant] has chronic residuals attributable to the 1997 injury." Decision and Order at 11; *Kubin v. Pro-Football Inc.*, 29 BRBS 117 (1995). The administrative law judge found the presumption rebutted by Dr. Baddar's opinion, and proceeded to weigh the evidence as a whole, crediting the opinions of Drs. Byrd and Stiles over that of Dr. Baddar and finding that claimant is disabled due to the 1997 back injury. The administrative law judge found that Dr. Baddar's opinion is not as well-explained and is less detailed than those of the other physicians.

Claimant was in a car accident on January 21, 1996. He complained of neck and low back soreness, and was diagnosed with an acute strain in the neck, thoracic and lumbar regions. Claimant underwent about two months of physical therapy, and upon discharge was noted to have made steady progress. EX 11. At the hearing, claimant denied having sustained back pain as a result of the car accident, stating that the primary pain was in his neck. Tr. at 31-33. When shown the medical notes to the contrary, claimant admitted that his back hurt somewhat, but that the pain was gone "after two months." Tr. at 33. There are no other reports of back pain until September 5, 1997, when claimant reported to employer's clinic with back pain. Claimant told the clinic the pain started several months previously, and recurred again in the previous two days when he pulled himself into the cab of the crane. EX 3, 15. The physical therapist to whom the clinic referred claimant stated that claimant had a lower lumbar muscular strain. EX 16.

Dr. Stiles, who had been treating claimant for his CTS, noted on September 8, 1997, that claimant was reporting back pain due to an injury at work. Dr. Stiles continued to treat claimant's back pain and ultimately imposed permanent work restrictions as a result of this pain. CX 18. Dr. Wardell examined claimant on October 27, 1997, and noted valid subjective complaints. He diagnosed a lumbar strain and stated that claimant likely

aggravated his degenerative arthritis at work and may need permanent restrictions to prevent reoccurrences. EX 17; CX 17.

Dr. Baddar examined claimant on behalf of employer on April 10, 2001. Dr. Baddar noted that claimant's MRI was normal for a man of his age, and he stated that claimant's exam revealed inconsistencies between subjective complaints and objective factors, and that claimant exhibited some signs of psychogenic pain. He stated claimant is "quite capable" of performing sedentary to light work under DOL standards, and that claimant probably could perform medium work. EX 20. Dr. Byrd examined claimant on referral from Dr. Stiles, and noted tenderness in the lumbar spine. EX 29; CX 21. He imposed permanent restrictions against lifting more than five pounds and of limited bending and climbing. CX 21. Employer subsequently deposed Dr. Byrd, who stated that the work restrictions are a "result of the work injury that exacerbated the pre-existing degenerative changes in his back and that the purpose of the work restrictions are (sic) to prevent overloading of the spine to try to lessen the pain so it will enable him to continue working." EX 29 at 8-9. When made aware of the car accident, Dr. Byrd stated that claimant's pain "possibly" could date from that incident, *id.* at 17, and that it is difficult to state the cause of claimant's current pain. *Id.* at 19. He also stated, however, that claimant's injuries are cumulative and that claimant's work contributed to his pain. *Id.* at 11.

We reject employer's contention that the doctors' lack of awareness of claimant's car accident necessitates that we set aside the administrative law judge's finding that claimant's work injury has caused disabling pain and requires restrictions. There is no indication in the record that claimant missed any time from work due to back pain prior to September 1997, and the opinions of Drs. Stiles and Byrd support the finding that claimant has restrictions stemming from the work injury. The administrative law judge did address Dr. Byrd's deposition testimony regarding the car accident, but rationally relied on that portion of his opinion regarding the cumulative and chronic nature of claimant's back pain. Decision and Order at 9-10,12. Furthermore, Dr. Wardell found valid subjective complaints of pain. As the administrative law judge rationally credited the opinions of Drs. Stiles and Byrd over that of Dr. Baddar,² *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.

²Employer contends the administrative law judge erred in not permitting it to take Dr. Baddar's deposition post-hearing, especially in light of his subsequent finding that Dr. Baddar's opinion is less detailed and not as well-reasoned as the other opinions of record. We reject employer's contention. Dr. Baddar was its witness and employer could have anticipated the need for Dr. Baddar's deposition at an earlier juncture in the case. *See generally Sam v. Loffland Bros. Co.*, 19 BRBS 63 (1986). The fact that the administrative law judge gave claimant the opportunity to depose Dr. Baddar after the hearing, a right claimant chose not to exercise, was due to claimant's right to cross-examine employer's expert concerning his opinion. *See Longo v. Bethlehem Steel Corp.*, 11 BRBS 654 (1979).

1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and as substantial evidence supports the administrative law judge's conclusion, we affirm his finding that claimant's 1997 back injury resulted in permanent work restrictions.

We next address employer's contention that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Once, as here, claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to employer to demonstrate the availability of a range of jobs suitable for claimant given his physical restrictions, age, education, and vocational history.³ See *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). The administrative law judge stated that claimant's lifting restriction is set at no more than five pounds. Decision and Order at 12. He observed that "physicians" have approved jobs in security work (Drs. Stiles and Baddar), as a parking lot cashier (Dr. Stiles), and as a

Moreover, that Dr. Byrd's records and deposition were permitted into evidence post-hearing does not demonstrate error on the administrative law judge's part. Claimant submitted Dr. Byrd's records and report, and employer, appropriately, was given the opportunity to cross-examine the doctor concerning his opinion. The administrative law judge did not commit error in not allowing employer to bolster the opinion of its expert, as no new issues were raised by virtue of Dr. Byrd's opinion. See generally *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

³Employer provided claimant with suitable work at the shipyard until February 23, 1999, when it had no more work available within claimant's restrictions. It thus became incumbent upon employer to establish the availability of other suitable alternate employment in order to avoid liability for total disability. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

donation center attendant (Drs. Stiles, Dr. Baddar). *Id.* The administrative law judge also noted that Dr. Stiles did not approve the greeter job at Walmart, although Dr. Baddar did. The administrative law judge further stated that Carl Hanbury, claimant's vocational consultant, testified that parking lot and donation center jobs require occasional lifting of 15 pounds or more, and that many of the security positions were seasonal or part-time. The administrative law judge then briefly mentioned claimant's job search, noting only claimant's testimony that he contacted the employers identified in employer's labor market survey and that none was hiring in early 2001. The administrative law judge concluded from the foregoing that employer did not establish suitable alternate employment. Decision and Order at 12-13.

We agree with employer that the administrative law judge's findings cannot be affirmed. The administrative law judge did not determine the weight to be accorded the testimony and report of employer's vocational consultant William Kay. Mr. Kay opined that, based on Dr. Stiles's restrictions and claimant's educational and vocational background, claimant could perform several jobs that were available in the local community from February 26, 1999 through the date of the hearing. Tr. at 44 *et seq.*; EX 21. He went on to describe the jobs and their requirements, *id.*, and, as discussed above, two doctors approved some of the jobs identified by Mr. Kay. EX 20, 23, 27; CX 20. Mr. Kay attached to his labor market survey forms signed by the prospective employers expressing the jobs' requirements. EX 23. In contrast, Mr. Hanbury stated that in view of claimant's age (52), physical restrictions, and limited education,⁴ claimant is unlikely to be able to return to any type of competitive employment. CX 11; EX 24; Tr. at 82. Mr. Hanbury also testified that, based on his contacts with prospective employers, some of the jobs identified by employer have requirements that exceed claimant's restrictions. Tr. at 83, 87-88, 90-91.

As the administrative law judge did not discuss all the relevant evidence of record or resolve the conflicts in this evidence, we must vacate his finding that employer did not establish the availability of suitable alternate employment. See *Gremillion v. Gulf Coast Catering Co.*, 31 BRBS 163 (1997) (Brown, J., dissenting on other grounds), quoting *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 356 (3d Cir.1997) (remanding because of an inability to conclude whether the administrative law judge "simply disregarded significant probative evidence or reasonably failed to credit it"); see also 5 U.S.C. §557(c)(3)(A). On remand, the administrative law judge must fully address the opinions of both Mr. Kay and Mr. Hanbury regarding

⁴Claimant's reading tested at the fourth grade level, his spelling tested at the second grade level and his math skills tested at the fifth grade level. CX 14.

claimant's employability. He should identify all of claimant's restrictions and compare them to the jobs identified, see *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998), and also state why he is or is not crediting the vocational and medical opinions regarding the appropriateness of the jobs for claimant. See generally *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Moreover, as employer contends, the fact that some of the jobs may be part-time or seasonal does not prevent them from being suitable for claimant or from establishing that he retains a capacity to earn wages in his injured condition. See *Royce v. Elrich Constr. Co.*, 17 BRBS 157 (1985); see generally *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985).

If the administrative law judge finds that employer established the availability of suitable alternate employment, claimant may retain eligibility for total disability benefits by demonstrating that he diligently, yet unsuccessfully, sought alternate work of the type shown by employer to be suitable and available. See *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); see also *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2^d Cir. 1991). Claimant is not required to show that he tried to get the identical jobs which employer established were available. The claimant must establish that he was reasonably diligent in attempting to secure a job of the type shown to be "reasonably attainable and available," and the administrative law judge must make specific findings regarding the nature and sufficiency of claimant's efforts in seeking employment. *Palombo*, 937 F.2d at 75, 25 BRBS at 9(CRT).

Claimant submitted into evidence a "work search record," CX 8, in which he stated he went to each prospective employer identified by employer in its labor market survey. The employers were not hiring or taking applications. Claimant also testified as to his attempts to apply for these jobs in person. Tr. at 19, 23-26. Claimant testified he did not look for work until Mr. Kay provided him with the names of prospective employers. The administrative law judge stated only that claimant "testified that he contacted these employers in early 2001 and none of the firms were (sic) hiring at that time." Decision and Order at 12. As the administrative law judge did not discuss the "nature and sufficiency" of claimant's job search, we remand the case for further findings on this issue. See *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). If the administrative law judge finds on remand that employer established suitable alternate employment and that claimant's job search was not diligent, he must determine claimant's entitlement to permanent partial disability benefits consistent with Section 8(c)(21), (h). 33 U.S.C. §908(c)(21), (h).

Lastly, we address claimant's appeal of the administrative law judge's award of a credit to employer for its overpayment of permanent partial disability benefits for

claimant's CTS. It is uncontested that employer overpaid claimant pursuant to the schedule for his CTS, as Judge Sarno awarded claimant benefits for lower impairment ratings than those for which employer was paying. Section 14(j) of the Act states that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). In *Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993), the Board held that employer is not entitled to credit an overpayment made on one injury against benefits due for a second, unrelated injury. The Board held that Section 14 of the Act, *in toto*, references a single compensable injury, and that therefore an overpayment made for one injury cannot be used to offset liability for an unrelated injury. Moreover, the Board accepted the interpretation of the Director, Office of Workers' Compensation Programs, that overpayments made on an earlier injury cannot be "advance payments" for an injury that had yet to occur. *Vinson*, 27 BRBS at 223.

On appeal, claimant concedes that assuming he is totally disabled, it is due to the back injury with its concomitant lower compensation rate. Under these facts, the award of a credit is contrary to law, and we therefore reverse it. *Vinson*, 27 BRBS at 223. If, on remand, the administrative law judge finds that claimant is only partially disabled, this holding stands as any loss in wage-earning capacity would be due solely to the back impairment under Section 8(c)(21), (h), as permanent partial disability due to CTS is compensable only under the schedule. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Accordingly, claimant's motion for reconsideration in BRB No. 02-0514 is denied. 20 C.F.R. §802.409. We vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, and we remand this case for further findings consistent with this decision. In addition, the administrative law judge's award of a credit pursuant to Section 14(j) for the overpayment of scheduled benefits for CTS is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge