BRB No. 11-0277

JASON Y. TERUYA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAE SYSTEMS/CORROSION ENGINEERING	)	DATE ISSUED: 11/30/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Jason Y. Teruya, Honolulu, Hawaii, *pro se*.

James P. Aleccia (Aleccia, Socha & Mitani), Long Beach, California, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without representation, appeals the Decision and Order Awarding Benefits (2009-LHC-0338, 2009-LHC-2030) of Administrative Law Judge Gerald M. Etchingham 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). In an appeal by a claimant without legal representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained an injury to his back on September 8, 2005. He took two days of leave from work and returned to work on September 13, 2005, to fill out an injury report and go to the medical center. Claimant returned to light-duty work on September 14 but continued to receive conservative treatment for his back. While working in a light-duty capacity, claimant injured his right hand on January 6, 2006. He testified that he took four hours of leave and then, with the exception of February 27 and 28, 2006, he continued to work in his light-duty position until March 2, 2006.[1] The parties stipulated that these injuries occurred during the course of claimant's employment with employer, that claimant's average weekly wage is $893.60, and that his back condition reached maximum medical improvement on February 9, 2006. Decision and Order at 2. Employer voluntarily paid claimant temporary total disability benefits for his back condition from September 29 through October 5, 2005, and from March 2, 2006, through October 24, 2008, and permanent partial disability benefits for that injury from October 25, 2008, through December 3, 2010.[2] ALJ Ex. 15; Emp. Ex. 4.[3] The parties disputed claimant's entitlement to benefits for his hand and back injuries, as well as claimant's residual wage-earning capacity as a result of his back condition, the nature and extent of

[1]Claimant's brief on appeal indicates that he took extended leave from March 3, 2006, through June 9, 2006, and that his position was terminated on May 17, 2006. Cl. Brief at 3. It is unclear whether the position was abolished or whether claimant was terminated from employment and for what reason.

[2]Employer's brief and the district director's calculation sheet attached to claimant's brief, indicate employer paid temporary total and permanent partial disability benefits to claimant in the total amount of $102,534.50. *See also* Emp. Ex. 4 (showing $93,715.46 paid as of January 5, 2010).

[3]Employer's notice of final payment indicates that claimant did not lose pay because of his back injury until September 26, 2005. Emp. Ex. 4.

claimant's disability related to his back and hand conditions, and claimant's entitlement to reimbursement for his litigation costs. Employer sought Section 8(f), 33 U.S.C. §908(f), relief.

The administrative law judge determined that claimant is entitled to temporary total disability benefits for his back injury from September 9 through September 13, 2005, and from February 27 through February 28, 2006, and he is entitled to permanent partial disability benefits from February 9, 2006, and continuing, in the amount of $250.67 per week for disability related to his back, as he has a residual wage-earning capacity of $517.60. The administrative law judge found that claimant has no disability related to his hand injury, that he is entitled to future medical benefits for his back condition, that he is entitled to reimbursement of his litigation costs, and that employer is entitled to Section 8(f) relief. Claimant, without the benefit of counsel, appeals the administrative law judge's decision; employer responds, urging affirmance.[4]

Initially, we reject claimant's challenge to the stipulated date of maximum medical improvement. The Board generally will not review a factual issue raised on appeal where the facts were stipulated before the administrative law judge; the general rule is that stipulations are binding on the parties. *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986). Thus, the stipulated date of maximum medical improvement is binding on both parties. In any event, the stipulation that claimant's back condition reached maximum medical improvement on February 9, 2006, is supported by the opinions of Drs. Kienitz and London, which were credited by the administrative law judge. Emp. Exs. 6, 10. Accordingly, we affirm the finding that claimant's back condition became permanent on February 9, 2006. *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981).

[4]To the extent claimant challenges the administrative law judge's determination that employer is entitled to a credit for benefits paid, we reject claimant's challenge. Regardless of whether an employer has underpaid or overpaid compensation, it is entitled to a credit for all benefits it paid prior to the award of benefits. 33 U.S.C. §914(j). That credit does not detract from the total amount of the claimant's entitlement. *See generally Estate of C.H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009). To the extent claimant is challenging the administrative law judge's order of reimbursement, the administrative law judge ordered that the Special Fund, not claimant, is to reimburse employer for amounts paid in excess of its liability. *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 900 F.2d 506, 23 BRBS 40(CRT) (2d Cir. 1990).

Next, we affirm the administrative law judge's finding that claimant's right hand injury is not compensable. The administrative law judge found that the diagnosis of carpal tunnel syndrome was equivocal and, when combined with claimant's lack of credibility and the conclusion that Dr. McCaffrey's 2010 opinion is at odds with the opinions of virtually every other doctor, the administrative law judge determined that claimant does not have any work restrictions or permanent impairment related to the hand injury. Decision and Order at 18, 21. Although there was a diagnosis of "mild carpal tunnel syndrome" by Dr. Yee and "probable carpal tunnel syndrome" based on claimant's subjective complaints by Dr. Singer in 2006, Dr. Singer concluded at claimant's next appointment that the carpal tunnel syndrome diagnosis was equivocal. Further, the later reports of Drs. Singer, London, Tang, and Davenport each concluded that claimant's symptoms were atypical for carpal tunnel syndrome, there were no objective findings to support such a diagnosis, clinically, neurologically, or radiologically, and as the condition did not respond as it should have to an injection, they concluded that claimant does not have carpal tunnel syndrome. Cl. Ex. 4 at 122; Emp. Exs. 8-11. The administrative law judge rationally credited the opinions of these doctors over the contrary opinion of Dr. McCaffrey, given over four years after claimant sustained his hand injury, that claimant had carpal tunnel syndrome with nerve entrapment. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 21.[5] The administrative law judge concluded that claimant did not establish that he is unable to perform his usual work or that he has any permanent impairment because of his hand injury. Thus, the administrative law judge's finding that claimant is not entitled to benefits for his hand injury is supported by substantial evidence. *See Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998); *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1448 (9th Cir. 1990); *see generally King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990). Further, the administrative law judge rationally credited the opinions of Drs. Davenport, Singer, and London to find that employer is not liable for additional medical treatment for the 2006 hand injury as there is no need for further treatment. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). Therefore, as it is rational,

[5]The administrative law judge found Dr. McCaffrey's opinion not credible because it was based on claimant's statements, which were also deemed not credible, and it was contradicted by most other medical opinions. The administrative law judge also found it suspicious that claimant asked him to credit only those parts of Dr. Tang's opinion that support his position that he has carpal tunnel syndrome but to ignore the negative objective findings.

supported by substantial evidence, and in accordance with law, we affirm the denial of both future medical benefits and compensation for claimant's 2006 hand injury.[6]

We next address the administrative law judge's findings concerning the benefits to which claimant is entitled for disability related to his back injury. Once, as here, a claimant establishes that he cannot return to his usual work because of his injury, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). A claimant's condition becomes permanent upon the showing of maximum medical improvement and partial upon the showing of the availability of suitable alternate employment. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

We affirm the administrative law judge's findings that claimant is entitled to temporary total disability benefits from September 9 through September 13, 2005, when he took off work because of his back injury, 33 U.S.C. §906(a), and that he returned to light-duty work as of September 14, 2005, and remained employed in this capacity beyond the date of maximum medical improvement, February 9, 2006, and until March 2, 2006. However, because the administrative law judge did not address evidence that claimant's injury "affected" his pay as of September 26, 2005, *see* Emp. Ex. 4, we remand the case for the administrative law judge to determine the degree, if any, to which claimant's wage-earning capacity, and/or his ability to perform the light-duty work, was affected by his back injury. Thus, the administrative law judge must determine whether claimant is entitled to any additional temporary benefits prior to February 9, 2006.[7]

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[6]With the exception of the four hours of leave claimant took immediately following his hand injury, it does not appear he lost any time from work due to the hand injury. Thus, claimant is not entitled to compensation under the Act for this injury. 33 U.S.C. §906(a).

[7]Claimant contends he is entitled to additional compensation under Section 14(e) of the Act, 33 U.S.C. §914(e), because employer did not commence timely payment of compensation. Under Section 14(e), an employer must pay compensation within 14 days after it becomes due under Section 14(b), 33 U.S.C. §914(b), and it becomes due on the 14th day after the employer receives notice of the injury. Thus, timely payment must be made 28 days from the date the employer knew of the injury unless employer timely files

With regard to the extent of claimant's disability, the administrative law judge found that claimant's restrictions, as related to his back injury, are: no lifting over 35 pounds, no repetitive bending or stooping, and no prolonged work in awkward positions. As claimant had not been given any restrictions against standing or sitting, the administrative law judge declined to include those, rejecting claimant's testimony that he is limited in that regard. Decision and Order at 20. These findings represent a reasonable interpretation of the medical evidence, are supported by substantial evidence of record, and are affirmed. Cl. Ex. 2; Emp. Exs. 8-11; *see generally Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

Based on these restrictions, the administrative law judge found that employer demonstrated the availability of suitable alternate employment as it presented evidence of six different types of employment with approximately sixteen different companies. Decision and Order at 22; Cl. Ex. 3; Emp. Exs. 14-15. The record contains labor market surveys from two vocational counselors who found numerous jobs they deemed suitable for claimant given his restrictions. Jobs included positions as a machine operator, a tool room attendant or manager, a dispatcher, a customer service agent, and an electrician. Emp. Exs. 14-15. The administrative law judge rejected the electrician positions that required a state license but found that the remaining positions are within claimant's geographic area, are within his physical restrictions, and are suitable for him. This finding is supported by substantial evidence. *See J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009). The administrative law judge's finding that claimant did not diligently seek post-injury employment also is supported by substantial evidence, as claimant testified that he did not look for work. Decision and Order at 23. Consequently, we affirm the administrative law judge's finding that claimant is not entitled to total disability benefits following the demonstration of suitable alternate employment but is limited to permanent partial disability benefits for his loss in wage-earning capacity. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *see, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988).

We also affirm the administrative law judge's finding that claimant's entitlement to continuing partial disability benefits is retroactive to February 9, 2006, the date of maximum medical improvement, as the labor market surveys both specifically state that

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a notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d). *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Although the administrative law judge did not address this issue, it may be raised at any time. *McKee v. D.E. Foster Co.*, 14 BRBS 513 (1981). The administrative law judge should address this contention on remand. *Browder*, 24 BRBS 216.

suitable alternate employment was available to claimant at that time.[8] *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on reconsideration); *see also Stevens*, 909 F.2d 1256, 23 BRBS 89(CRT); *Tann*, 841 F.2d 540. We reject claimant's contention that he is entitled to total disability benefits between August 18 and November 15, 2008, while he was involved in a vocational rehabilitation plan. The agreement claimant signed with the vocational counselor involved a plan for securing claimant a job in the security field. Consequently, it was a placement plan, not a training plan, and claimant was not precluded from seeking and obtaining work during this period. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); Cl. Ex. 3 Report R-3.[9] Accordingly, any partial disability benefits to which claimant is entitled prior to August 18, 2008, would continue through and beyond this period.

Under Section 8(c)(21), 33 U.S.C. §908(c)(21), a claimant is entitled to compensation for his partial disability in the amount of two-thirds of the difference between his average weekly wage and his residual wage-earning capacity. *See also* 33 U.S.C. §908(h); *Devillier v. National Steel & Shipbuilding Co.*, 14 BRBS 598 (1981). The administrative law judge averaged the hourly wages for each suitable alternate position identified and then took the overall average of those wages, resulting in a finding that claimant has a post-injury wage-earning capacity of $517.60 per week. Decision and Order at 24. While we affirm this as a reasonable method for determining claimant's post-injury wage-earning capacity, *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *see Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002), the administrative law judge did not adjust the figures to reflect any inflationary effects. In order to account for inflation, the claimant's post-injury earning capacity must be adjusted downward to the rate paid at the time of injury. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Morgan v. Marine Corps Exchange*, 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exchange v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). The wage rates paid for the alternate jobs at the time of claimant's back injury must be compared with the wages claimant was earning at the time of his injury. *See Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Deweert*, 272 F.3d 1241, 36 BRBS 1(CRT). Therefore, we vacate the administrative law

[8]We affirm the finding of temporary total disability benefits for February 27-28, 2006, as the record supports the administrative law judge's finding that claimant's back condition caused him to miss work those two days.

[9]Mr. Fleck, the vocational counselor, reported on November 19, 2008, that he terminated the plan because claimant preferred not to return to work and would not commit to seeking any employment.

judge's calculation of claimant's loss in wage-earning capacity; on remand, the administrative law judge must make the proper calculation to determine claimant's compensation rate.[10]

Accordingly, the administrative law judge's calculation of claimant's loss of wage-earning capacity is vacated. The case is remanded for the administrative law judge to make the necessary inflationary adjustments to the loss of wage-earning capacity calculations and for further consideration of claimant's entitlement to temporary benefits prior to February 9, 2006.[11] In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[10]Mr. Stauber's report includes the wages the alternate jobs paid in 2005-2006. Mr. Kegler's addendum provides general mean and median wages paid in May 2005 for the occupations he deemed suitable for claimant; however, the averages include jobs across all industries and are not specific to the jobs the administrative law judge found to be suitable for claimant. Emp. Exs. 14-15. If the pertinent evidence is not in the record, the administrative law judge may use the percentage change of the national average weekly wage as a means of adjusting the post-injury wages downward to account for inflation. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

[11]As the administrative law judge determined that employer is entitled to Section 8(f) relief, and that finding is affirmed as unchallenged on appeal, *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007), he must determine if the amounts of the Special Fund's liability or employer's reimbursement therefrom are affected by any of his findings on remand.