BRB No. 14-0041

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| CURTIS W. SMITH | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| AQUARIUS MARINE, LLC | ) | DATE ISSUED: Oct. 27, 2014 |
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| and | ) | |
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| ZURICH AMERICAN INSURANCE COMPANY | ) | |
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| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Curtis W. Smith, Lexington, Kentucky, *pro se.*

Jonathan A. Tweedy (Brown Sims), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2012-LHC-00912) of Administrative Law Judge Joseph E. Kane 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 representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On June 15, 2010, claimant experienced heat-related symptoms while working for employer as a crane operator on a barge.[1] Claimant completed his shift, but testified that his symptoms remained during his drive home. The following day, June 16, 2010, claimant sought medical care for what he believed were the residual effects of the "heat stroke" he had experienced the previous day. Claimant proceeded to seek medical care with physicians throughout the summer of 2010 for a multitude of symptoms he believed were related to the heat exposure on June 15, 2010. No physician, however, diagnosed claimant with heat stroke. Although claimant had been hired by employer to work on a project lasting approximately one week, and claimant had not returned to work following his single day of employment, employer continued to pay claimant his weekly salary until November 14, 2010. On September 28, 2010, claimant filed a claim for benefits under the Act, alleging that he continued to experience symptoms as a result of his exposure to excessive heat while working for employer on June 15, 2010.

In his Decision and Order, the administrative law judge, inter alia, found that claimant sustained no work-related disability subsequent to August 31, 2010, the date on which his work-related condition fully resolved. The administrative law judge awarded claimant temporary total disability benefits from June 15 through August 31, 2010, based upon an average weekly wage of $1,512.49, and medical benefits. The administrative law judge granted employer a credit pursuant to Section 14(j), 33 U.S.C. §914(j), for the $23,030 it paid claimant between June 20 and November 14, 2010.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for ongoing benefits under the Act. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

As claimant has appealed without representation by counsel, we will address those findings of the administrative law judge which are adverse to claimant. Consequently, we first address the administrative law judge's finding that claimant is not entitled to any disability benefits after August 31, 2010. In order to establish a prima facie case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998). We affirm the administrative law judge's finding that claimant did not sustain a compensable, work-related impairment subsequent to August 31, 2010.

The administrative law judge relied on the opinion of Dr. Zerga, a neurologist, who examined claimant on July 13, August 10, and August 31, 2010, and who, after reviewing claimant's subsequent medical records, issued a supplemental report on

[1] Claimant's symptoms included dizziness, nausea, and tightness in his chest.

September 21, 2012. Following his July 13, 2010 examination, Dr. Zerga diagnosed claimant with having experienced an episode of heat exhaustion on June 15, 2010. EX 11 at 4. Following his August 31, 2010 examination, Dr. Zerga stated that claimant's neurological examination was normal, that claimant exhibited no definite physical symptoms, that claimant's condition had reached maximum medical improvement and that, as there were no objective findings prohibiting his return to work, claimant should attempt to return to his previous employment duties. *Id*. at 11-13. Following his review of claimant's medical records through September 2012, Dr. Zerga, on September 26, 2012, issued a supplemental report wherein he reiterated his opinion that claimant did not have any symptoms of permanent damage from any heat-related event.[2] *Id*. at 14-18. The administrative law judge, while crediting claimant's description of his subjective symptoms, declined to give probative weight to claimant's interpretation of those symptoms, specifically that he continues to experience hot spells, periods of mental confusion, and anxiety as a result of his heat exposure. Decision and Order at 24. In declining to rely on the May 2011 opinion of Dr. Miers that claimant developed a heat intolerance that prevents him from working as a crane operator, the administrative law judge rationally found Dr. Miers' records to be inconsistent and lacking in a sophisticated discussion of claimant's medical history and a well-reasoned conclusion based on claimant's medical testing.[3] *Id*. at 21, 27.

Although a claimant's credible complaints may be sufficient to establish his inability to return to his usual work, *see 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). In this case, the administrative law judge's weighing of the medical evidence and credibility determinations are rational and within his authority as a factfinder. *See Marathon Ashland Petroleum*, 733 F.3d at 188, 47 BRBS at 48(CRT). As the administrative law judge acted within his discretion in crediting the opinion of Dr. Zerga and as this opinion constitutes substantial evidence to support the administrative law judge's conclusion, we

[2] The administrative law judge further found that Dr. Zerga's opinion, that claimant's subjective complaints did not preclude his ability to return to work, supported by the opinions of Drs. Vann and Anderson, who had opined earlier that claimant had recovered from his heat exposure incident. *See* EXs 17 at 9; 19 at 78.

[3] Specifically, the administrative law judge found that Dr. Miers did not provide a reason for his opinion that claimant continued to experience symptoms related to the heat exhaustion. Moreover, the administrative law judge noted that Dr. Miers opined that there was no medical literature linking heat exhaustion to claimant's pituitary gland disorder.

affirm the administrative law judge's finding that claimant was not disabled by his work injury subsequent to August 31, 2010.[4]

We next address the administrative law judge's average weekly wage calculation. The administrative law judge calculated claimant's average weekly wage for compensation purposes as $1,512.49. Section 10(c) of the Act, 33 U.S.C. §910(c), provides a general method for determining average weekly wage where Section 10(a) or (b), 33 U.S.C. §910(a), (b), cannot fairly or reasonably be applied to calculate claimant's annual earning capacity at the time of his injury.[5] The object of Section 10(c) is to arrive at a sum that reasonably represents the claimant's annual earning capacity at the time of his injury. *See Hall v. Consol. Employment Sys., Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998). The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

In this case, claimant worked for employer for one day, June 15, 2010. The administrative law judge found that claimant had been employed in the year preceding his injury in work similar to that which he performed on June 15, 2010. The administrative law judge determined that claimant's annual earning capacity was best represented by the wages claimant earned during the 20 weeks of comparable work for a different employer. Using this method, the administrative law judge found that claimant's average weekly wage was $1,512.49, resulting in a weekly compensation rate of $1,008.33. Decision and Order at 41. The result reached by the administrative law judge constitutes a reasonable estimate of claimant's annual earning capacity based on the limited evidence presented, is supported by substantial evidence, and is in accordance with law. *See generally Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh'g*, 237 F.3d 409, 34 BRBS 105(CRT) (5th Cir. 2000); *Hall*, 139 F.3d 1025, 32 BRBS 191(CRT). We, therefore, affirm the administrative law judge's calculation of claimant's average weekly wage.

We additionally affirm the administrative law judge's finding that employer is entitled, pursuant to Section 14(j) of the Act, to credit the wages it paid claimant between

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[4] At the formal hearing, claimant testified he had been awarded benefits by the Social Security Administration, *see* Tr. at 57-58, and he subsequently provided the administrative law judge with his award letter documenting that he had been awarded benefits for a disorder of the pituitary gland. This award does not constitute evidence that claimant is disabled by the heat-related work injury.

[5] The administrative law judge properly found that neither Section 10(a) or (b) is applicable in this case as the necessary information for their use is not in the record.

June 20 and November 14, 2010, against its liability for temporary total disability compensation due claimant. Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, [it] shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j); *see Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992). Where an employer continues a claimant's regular salary during the period of claimant's disability, employer will not receive a credit unless it can show the payments were intended as advance payments of compensation. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997); *see Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009); *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002).

In this case, employer hired claimant as a crane operator to work on a salvage project estimated by employer to take approximately one week. *See* Tr. at 123-128. Claimant commenced this employment on Tuesday, June 15, 2010, and, following claimant's heat-related injury that day, never returned to work for employer. Employer, however, continued to pay claimant wages from June 20 through November 14, 2010. The administrative law judge concluded that the wages employer paid to claimant post-injury were intended as advance payments of compensation, and thus were to be credited against claimant's award of temporary total disability compensation, because: 1) two of employer's representatives provided affidavits wherein they attested that its payments to claimant during this period were in place of compensation due claimant, EXs 7, 8; 2) claimant continued to receive payments from employer post-injury for approximately five months after his one-week term of hiring would have ended; and 3) the record does not support a finding that claimant was entitled to these monetary payments irrespective of his work-related disability. Decision and Order at 41-42. As substantial evidence supports the administrative law judge's finding that employer's payments were intended compensation, we affirm the administrative law judge's finding that employer is entitled to a credit for the amounts it paid claimant from June 20 through November 14, 2010, against any disability compensation due claimant. *See Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge