BRB No. 91-349

JOHN F. JOHNSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Petition for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Petition for Reconsideration (89-LHC-2185) of Administrative Law Judge James W. Kerr, Jr., denying 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 findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant, on January 27, 1988, sustained a back injury while in the course of his employment as a spray painter with employer. Employer voluntarily paid claimant compensation for temporary total disability, based on an average weekly wage of $276.60, from January 28, 1988 through November 13, 1988. 33 U.S.C. §908(b). Claimant returned to work for employer in a light duty position on November 14, 1988, but terminated this employment on November 28, 1988, due to complaints of back pain.

In his Decision and Order issued September 10, 1990, the administrative law judge accepted

the stipulations offered by the parties in this case, including, *inter alia*, stipulations that claimant suffered a disability as a result of his work-related injury and that claimant's average weekly wage for compensation purposes was $317.14. Next, the administrative law judge found that claimant reached maximum medical improvement on May 17, 1988. After acknowledging that the parties agree that claimant is unable to perform the employment held at the time of his injury, the administrative law judge determined that the light duty position which employer offered claimant on November 14, 1988, constitutes suitable alternate employment. As this light duty job was offered to claimant at the same rate of pay and hours as claimant's pre-injury position, the administrative law judge determined that claimant suffered no loss of wage-earning capacity. Accordingly, the administrative law judge denied the claim for permanent partial disability benefits. In an Order dated October 9, 1990, the administrative law judge summarily denied claimant's Petition for Reconsideration.

On appeal, claimant challenges the administrative law judge's determination that the light duty job offered by employer constitutes suitable alternate employment. Claimant additionally assigns error to the administrative law judge's failure to find claimant entitled to payment of past due compensation based on the difference between the average weekly wage of $276.60 on which employer's voluntary payments of compensation were based and the average weekly wage of $317.14 stipulated to by the parties. Employer responds, urging affirmance.

Where, as in the instant case, it is undisputed that the claimant is unable to perform his usual employment and, therefore, has established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the availability of realistic job opportunities which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedore, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet its burden of establishing the availability of suitable alternate employment by providing light duty work in its own facility which is necessary to employer's enterprise and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

In the instant case, the administrative law judge specifically determined that the work performed in the light duty position offered to claimant was necessary and did not constitute sheltered employment. He also found, based on the testimony of Dr. Cope and claimant's co-workers, that the requirements of the light duty position were within claimant's physical restrictions. Specifically, claimant's treating physician, Dr. Cope, testified that the light-duty position offered to claimant was within the restrictions that he placed on claimant. *See* RX-8. Additionally, the administrative law judge noted the testimony of employer's workers who stated that this position was suitable for claimant. *See* Decision and Order at 5. Claimant's argument that the administrative law judge erroneously evaluated the evidence regarding claimant's ability to perform the light duty job is without merit. It is the role of the administrative law judge, as factfinder, to make credibility

determinations and determine the weight to be accorded to evidence.[1] *Mendoza v. Marine Personnel Company, Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Mijangos v. Avondale Shipyards*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). As the administrative law judge's credibility determinations are rational and his ultimate findings are supported by substantial evidence, we affirm the administrative law judge's determinations that employer satisfied its burden of establishing the availability of suitable alternate employment and that claimant, therefore, suffered no loss of wage-earning capacity subsequent to November 13, 1988. *See Mendoza*, 46 F.3d at 498, 29 BRBS at 79 (CRT); *Darden*, 18 BRBS at 224.

Claimant next contends that he is entitled to additional disability compensation based on the difference between the average weekly wage on which employer's voluntary payments of compensation were made, and the higher average weekly wage to which the parties stipulated at the formal hearing. We agree.

Subsequent to the issuance of the administrative law judge's decisions in this case, the Board held in *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *modifying on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished), that an injured employee's total disability becomes partial on the earliest date that employer establishes the availability of suitable alternate employment. While the administrative law judge in the case at bar did not make an explicit finding regarding the date upon which the availability of suitable alternate employment was established, our review of the record reveals no affirmative evidence which could establish the availability of the light duty job at any time prior to November 14, 1988, the date on which claimant returned to work with employer in a light-duty capacity.[2] Consistent with our decision in *Rinaldi*, we hold that claimant remained eligible to receive compensation for total disability until November 14, 1988, at which time claimant returned to work at his usual wage rate and hours. Thus, pursuant to *Rinaldi* and the parties' stipulation as to claimant's average weekly wage, which was expressly accepted by the administrative law judge, the administrative law judge's Decision and Order is modified to provide that claimant is entitled to compensation based on the difference between the stipulated average weekly wage of $317.14 and the average weekly wage of

$276.60 on which employer based its voluntary payments of compensation, for the period of claimant's eligibility for total disability.

Accordingly, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to additional disability compensation through November 13, 1988. In all

[1]We note that the administrative law judge acted within his discretion in declining to credit claimant's subjective complaints of pain. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge rationally discredited claimant's testimony which was contrary to the weight of the medical and other evidence of record.

[2]Although employer summarily asserts that the evidence indicates that the light duty job was available as early as May 1988, *see* Emp. Response Brief at 26 n.3, we note that employer cites to no specific evidence in the record in support of its assertion.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge