U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 15-0441
and 15-0441A

JOSE J. GARCIA	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	DATE ISSUED: Aug. 31, 2016
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of William Dorsey, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter and Kim Ellis, San Diego, California, for claimant.

Barry W. Ponticello and Renee C. St. Clair (England, Ponticello & St. Clair), San Diego, California, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits (2011-LHC-02075, 2011-LHC-02076, 2011-LHC-02077, 2011-LHC-02078) of Administrative Law Judge William Dorsey 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer from 1974 to 2006 as a welder. Claimant sustained injuries to his back, both knees, and both shoulders working for employer between 2002 and 2006.[1] Due to his injuries, claimant worked in a light-duty capacity with employer from July 26, 2005 through December 1, 2006, when he was let go because light-duty work was no longer available. Claimant began a vocational program approved by the Department of Labor on December 14, 2006, which was suspended between March 30 and November 19, 2007, due to claimant's left shoulder surgery and recovery therefrom. Claimant resumed his program from November 19, 2007, through April 12, 2008, and he obtained a security guard job with Allied Barton on May 1, 2008. However, due to the deterioration of his left knee condition and the need for surgery, claimant left Allied Barton on September 15, 2008.[2] Claimant did not work again until he secured a part-time position with World Private Security (WPS) on April 2, 2010. However, claimant quit this job on April 17, 2010, due to back and knee pain, and he has not worked since. Claimant filed claims for his various injuries. *See* n.1, *supra*.[3]

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[1]Before the administrative law judge were claims for benefits related to the following: a right knee injury on October 2, 2002; a cumulative trauma injury to both knees from work between May 1974 and October 9, 2002; right shoulder and lower back injuries on June 26, 2004; and a cumulative trauma injury to the left shoulder from work through September 11, 2006.

[2]Claimant was released to work on March 2, 2009; however, Allied Barton declined to rehire him.

[3]Previously, claimant had filed a claim for a January 2000 left knee injury (OWCP No. 18-72922), which resulted in a stipulated 12.25 percent permanent impairment to his left lower extremity. Claimant also had filed a claim for a cumulative trauma injury to both knees from 1974 through March 2000 (OWCP No. 18-75864), which resulted in a stipulated two percent permanent impairment to his right lower extremity. These claims were resolved pursuant to a compensation order on August 10, 2001, approving the parties' Section 8(i), 33 U.S.C. §908(i), settlement agreement. EX 11 at 157, 160 B-C. Subsequently, claimant suffered a right knee injury on October 2, 2002; he filed a claim

Before the administrative law judge, the parties disputed a number of issues: employer's liability for additional compensation and medical benefits for claimant's 2002 right and left knee injuries; whether the 2006 left shoulder injury was a "new" injury or "sprang" from the 2004 right shoulder injury; the availability of suitable alternate employment; claimant's entitlement to total disability benefits during his vocational program; and, employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.[4] In response to an argument employer raised in opposition to claimant's claim for additional benefits for his left knee injury, the administrative law judge interpreted claimant's claim for additional benefits for his 2002 knee injuries as a Section 22, 33 U.S.C. §922, motion for modification of the 2006 Compensation Order. *See* n.3, *supra*. The administrative law judge found that the 2002 claim for a cumulative trauma injury to the left knee could not be modified under Section 22 because the final payment under that order would have been made over one year prior to claimant's new claim. Nevertheless, the administrative law judge awarded claimant temporary total disability benefits for his left knee injury following the 2008 surgery. Decision and Order at 17, 54. Further, although the administrative law judge found that claimant's claim for a specific right knee injury on October 2, 2002, remained open because it had not been addressed in the district director's 2006 order, he found that employer had fully compensated claimant for the ten

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for that injury (OWCP No. 18-79298) as well as for cumulative trauma to both knees from May 1974 through October 9, 2002 (OWCP No. 18-79299). Based on the parties' agreement that claimant sustained a ten percent impairment due to cumulative trauma to the right leg and no additional impairment to the left leg, the district director issued a Compensation Order on September 28, 2006, awarding claimant 28.80 weeks of benefits retroactive to March 31, 2004, in the amount of $14,190.05, less a credit for the prior two percent impairment award of $2,518.85, for the October 2, 2002, right knee injury. The Compensation Order bore the OWCP Numbers 18-79299 and 18-79270; however, the Order does not state what injury OWCP No. 18-79270 refers to. *See* discussion, *infra* at 6.

[4]Pertinent to the appeal before us, the administrative law judge accepted the following stipulations made by the parties: 1) claimant injured both knees in 2002 while working for employer; 2) claimant injured his back and right shoulder in 2004 while working for employer; 3) claimant injured his left shoulder in 2006 while working for employer; 4) claimant's 2002 knee conditions first reached maximum medical improvement on March 21, 2004; however, claimant underwent left knee surgery in 2008 for the 2002 injury, and his left knee condition thereafter reached maximum medical improvement on March 2, 2009; 5) claimant's 2004 back and right shoulder conditions reached maximum medical improvement on August 1, 2006; and 6) claimant's 2006 left shoulder condition reached maximum medical improvement on September 10, 2007. Decision and Order at 2-3.

percent impairment to his right leg due to a cumulative injury as a result of work up to October 9, 2002, such that claimant is not entitled to additional compensation under the schedule for his right knee. *Id*. at 18, 22. The administrative law judge also found that claimant's September 2006 left shoulder injury was a separate injury caused by cumulative trauma while working for employer, rather than an extension of claimant's 2004 right shoulder injury.[5] Decision and Order at 15.

As the parties agreed that claimant's back and shoulder injuries prevent him from returning to his usual work with employer, and as employer no longer had light-duty work available for claimant as of December 2, 2006, the administrative law judge found claimant established a prima facie case of total disability as of that date. Decision and Order at 3, 22, 36-37, 55, 58. Although the administrative law judge acknowledged that employer established the availability of suitable alternate employment during all periods claimant was unemployed and capable of working (December 2, 2006 – March 2007; September 11, 2007 – April 30, 2008; March 2, 2009 – April 1, 2010; and April 18, 2010, onward), *id.* at 37, the administrative law judge awarded claimant total disability benefits for the entire period between December 2, 2006 and April 1, 2010. Concluding that claimant did not diligently search for employment after he left his job with WPS on April 17, 2010, and as all of claimant's work injuries had reached maximum medical improvement, the administrative law judge found claimant was permanently partially disabled as of this date.

Thus, the administrative law judge awarded claimant temporary total disability benefits from January 31, 2003 through March 20, 2004, for claimant's right knee surgeries and recovery periods; from August 17, 2004 to July 25, 2005, and from January 5 to July 31, 2006, for claimant's back and right shoulder injuries; and from September 15, 2008 through March 1, 2009, for claimant's left knee surgery and recovery period. Decision and Order at 57-58. The administrative law judge awarded claimant permanent total disability benefits from December 2, 2006, the date light-duty work with employer ended, through April 30, 2008, the day before claimant began work with Allied Barton; and from March 2, 2009, the date Dr. Bernicker placed claimant's left knee at maximum medical improvement, through April 1, 2010, when claimant began work with WPS. Additionally, the administrative law judge awarded claimant permanent partial disability benefits from April 18, 2010, onward for a loss in wage-earning capacity due to his

[5]With respect to claimant's 2004 back and right shoulder injuries, the parties agreed claimant is entitled to temporary total disability benefits from August 17, 2004 to July 25, 2005, and from January 5 to July 31, 2006. Accordingly, the administrative law judge addressed the amount of compensation owed to claimant only for these time periods and employer's entitlement to credit for its overpayment of benefits under the Act and for payments made under the California workers' compensation statute. Decision and Order at 54-55; *see* 33 U.S.C. §§903(e), 914(j).

unscheduled injuries.[6] *Id.* at 57-60. Lastly, the administrative law judge denied employer's request for Section 8(f) relief. *Id.* at 37-57.

Employer appeals the administrative law judge's award of benefits on various grounds and his denial of Section 8(f) relief. Claimant responds, urging the Board to reject employer's arguments. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of Section 8(f) relief. Employer filed a reply brief. BRB No. 15-0441. Claimant cross-appeals the decision, asserting the administrative law judge erred in finding the Section 22 statute of limitations applies to his left knee claim and in failing to account for inflation in awarding ongoing permanent partial disability benefits. Employer responds, urging the Board to reject claimant's arguments. Claimant filed a reply brief. BRB No. 15-0441A.

October 2002 Left Knee Injury

Employer contends the administrative law judge erred in awarding additional benefits following the 2008 surgery for claimant's 2002 left knee injury in view of the administrative law judge's finding that the claim is barred by Section 22.[7] Employer asserts that it made its final payment pursuant to the September 2006 Compensation Order on September 21, 2006, and that claimant's "motion for modification" for additional left knee benefits is untimely. Claimant contends on cross-appeal that the administrative law judge erred in finding his "request for modification" untimely.[8]

The administrative law judge found that the only left knee claim before him was claimant's claim for a cumulative trauma injury through October 9, 2002 (OWCP No. 18-79299), which was resolved by the September 2006 Compensation Order. He concluded that the claim constituted a motion for modification and that it was untimely filed because benefits pursuant to the Compensation Order were paid in 2006 and the claim was not

[6]The administrative law judge awarded permanent partial disability benefits based on the difference between claimant's stipulated average weekly wage and his actual earnings during his periods of employment with Allied Barton and WPS.

[7]Employer initially asserted it is not liable for medical benefits for claimant's left knee condition. However, employer subsequently acknowledged that its stipulation that claimant's 2008 left knee surgery is related to his 2002 left knee injury renders it liable for medical benefits. Emp. Resp. Br. at 29; *see, e.g., Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).

[8]Claimant did not file a "motion for modification" per se, and the administrative law judge addressed *sua sponte* whether claimant's request for additional left knee benefits was a timely request for modification.

filed until 2010. Decision and Order at 16-17. Despite finding claimant's request untimely, however, the administrative law judge awarded claimant additional temporary total disability benefits for the period of claimant's 2008 left knee surgery and recovery. *Id.* at 57-58.

Section 22 of the Act provides in relevant part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, *at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim,* review a compensation case . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

33 U.S.C. §922 (emphasis added). Thus, a request for modification under Section 22 must occur within one year of the last payment of compensation, or within one year of a denial of a claim, under an order. *See, e.g., Moore v. Int'l Terminals, Inc.,* 35 BRBS 28 (2001). If no order adjudicating a claim has been issued, it remains open. *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975) (Section 22 does not apply to timely filed claims that have not been acted upon by the district director or administrative law judge).

We agree with employer that the administrative law judge's award of additional benefits on claimant's 2002 claim for a cumulative trauma injury to his left knee is inconsistent with the finding that claimant's request for modification is untimely. *Moore,* 35 BRBS 28. In addressing the issue of timeliness, raised on his own initiative, the administrative law judge looked to employer's last payment of benefits under the 2006 Compensation Order to assess the timeliness of claimant's 2010 request for benefits. However, the September 2006 Compensation Order did not explicitly award or deny benefits for claimant's left knee injury. *See* n.3, *supra*. Thus, the administrative law judge's analysis erroneously compared the date of employer's last payment of benefits under the Compensation Order for a cumulative *right* knee injury to the date of the claim for additional benefits for claimant's cumulative *left* knee injury to determine that the claim for additional benefits for the *left* knee injury was untimely filed. Accordingly, we must vacate the administrative law judge's finding that Section 22 bars the current left knee claim and remand the case for further consideration. On remand, the administrative law judge must reconsider whether Section 22 applies to preclude claimant's 2010 claim for benefits for his left knee condition. In so doing, the administrative law judge must explicitly address whether the September 2006 Compensation Order "acted upon"

claimant's 2002 claim for an injury to his left knee such that the time limit of Section 22 applies.[9] *Walter*, 422 U.S. 1, 2 BRBS 3; *Moore*, 35 BRBS 28. The administrative law judge may reinstate his temporary total disability award if claimant's claim is not barred by Section 22.

October 2002 Right Knee Injury

Employer next contends the administrative law judge erred in awarding claimant temporary total disability benefits for disability to his right knee from January 31, 2003 through March 20, 2004. Employer asserts that claimant was employed between January 31 and February 6, 2003, and after January 13, 2004, and that its employment records, submitted as EX 58, support this fact. The administrative law judge premised his finding on the dates claimant was entitled to temporary total disability benefits on the absence of employment and payroll records and inferences he drew from claimant's medical records. Decision and Order at 52. However, as employer avers, the transcript of the formal hearing reflects that EX 58 was made part of the record. Tr. at 11. Thus, we must vacate the administrative law judge's award of temporary total disability benefits from January 31, 2003 through March 20, 2004. On remand, the administrative law judge must ascertain whether EX 58 contains the data alleged by employer and address whether claimant is entitled to temporary total disability benefits for his right knee condition during the period in question.

Diligence in Seeking Suitable Alternate Employment

Employer contends the administrative law judge erred in awarding claimant permanent total disability benefits for the following periods: December 2, 2006 – January 13, 2008; January 14 – April 30, 2008; and March 2, 2009 – April 1, 2010. Employer asserts it established the availability of suitable alternate employment during these periods and that claimant did not diligently seek work. Thus, employer contends claimant is limited to an award of permanent partial disability benefits.

[9]As the administrative law judge raised this issue on his own motion, he must give the parties the opportunity to address this issue. 20 C.F.R. §702.336(b). Moreover, if necessary, the administrative law judge should address the assertion claimant raises on appeal, which is that employer voluntarily paid additional permanent partial disability benefits for claimant's left knee on April 30, 2009, and Dr. Bernicker's March 2, 2009 report advised employer of a change in claimant's left knee condition such that a timely motion for modification was made within one year of employer's final payment on April 30, 2009. Employer responds that the payments in 2009 were not made pursuant to the 2006 Compensation Order but were made under the California workers' compensation statute.

Where, as in this case, the claimant has established a prima facie case of total disability by demonstrating his inability to return to his usual employment due to his work injury, the burden shifts to the employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, the employer must establish the existence of realistically available job opportunities within the geographic area in which the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities, but was unable to secure a position. *Edwards*, 999 F.2d at 1376 n.2, 27 BRBS at 84 n.2(CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). A "claimant, in proving due diligence, is not required to show that he tried to get the identical jobs the employer showed were available," but instead "merely must establish that he was reasonably diligent in attempting to secure a job, 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, 937 F.2d at 74, 25 BRBS at 7(CRT) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 156 (5th Cir. 1981)).

Alternatively, a claimant can establish his entitlement to total disability benefits if suitable alternate employment is not reasonably available due to his participation in a vocational program sponsored by the Department of Labor (DOL). *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The claimant, however, bears the burden of proving that the jobs identified by the employer cannot reasonably be secured while he is enrolled in a DOL-approved vocational training program. *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26(CRT). A claimant can meet this burden by establishing, *inter alia*, that the time needed for commuting, classes, and studying effectively precludes him from obtaining suitable alternate employment. *See Castro*, 401 F.3d at 972, 39 BRBS at 19-20(CRT); *Brown v. Nat'l Steel & Shipbuilding Co.,* 34 BRBS 195 (2001).

The administrative law judge found, and claimant does not dispute, that employer established the availability of suitable alternate employment during the critical periods of

claimant's disability.[10] Decision and Order at 37; EXs 22-24. The administrative law judge further found, however, that claimant rebutted employer's showing of suitable alternate employment for all relevant periods. Consequently, the administrative law judge awarded claimant permanent total disability benefits for the aforementioned periods.

December 2, 2006 – January 13, 2008

In addressing whether claimant established the unavailability of suitable alternate employment for this period, the administrative law judge found that claimant's light-duty job with employer ended on December 1, 2006, claimant was enrolled in a vocational program from December 14, 2006 until March 30, 2007, when he underwent surgery on his left shoulder, and claimant resumed his vocational program on November 19, 2007. Although the administrative law judge rejected claimant's argument that he is entitled to temporary total disability benefits during his enrollment in the vocational program,[11] and claimant's assertion that his applying for three jobs was a diligent search, the administrative law judge nevertheless found that claimant's "participation in the program during this period was diligent pursuit of employment." Decision and Order at 37-38. Specifically, the administrative law judge found that claimant's program included his taking a transferrable skills test and attending security guard training courses for one week. *Id.* at 38 n.295. In addition to claimant's being medically totally disabled for a substantial period of time, the administrative law judge explained that it was reasonable for claimant to wait to actively seek new employment because the purpose of the early stages of the vocational program was to identify the types of jobs claimant should be searching for and to prepare him for that type of work. "Scattershot" job applications prior to the job placement stage of the program would have ignored the very reason claimant entered the program. *Id.* at 38. Thus, despite finding that claimant did not conduct a diligent job search or devote his full efforts to actively seeking new

[10]David Morgan, employer's vocational counselor, submitted four labor market surveys, dated October 13, 2006, December 16, 2007, October 30, 2008, and April 18, 2012. The surveys identified a variety of jobs he deemed suitable for claimant, such as assembler, security/gate guard, and parking lot attendant/cashier. As claimant does not challenge the administrative law judge's finding that employer established suitable alternate employment for all relevant periods, the finding is affirmed. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[11]The administrative law judge found that claimant's vocational program was a job-placement program, unlike the program in *Abbott*, in which the claimant attended college in order to obtain new skills. The administrative law judge stated that claimant "cannot succeed in a circular argument: that he was unable to take a job because he was too busy trying to find a job." Decision and Order at 38 n. 295.

employment during this period, and despite that claimant was not enrolled in the vocational program for all periods he was released to work,[12] the administrative law judge awarded claimant total disability benefits from December 2, 2006 until January 13, 2008.

Employer asserts that the administrative law judge did not place the proper burden on claimant. We agree. Although the purpose of claimant's vocational program may have been to identify appropriate jobs for claimant, it was claimant's burden to show either a diligent job search or that his participation in the vocational program precluded work. *Kee*, 33 BRBS at 223. The administrative law judge specifically found that claimant's own job search during this period was "far from an exhaustive search," Decision and Order at 37, but that the job-placement program essentially absolved claimant of his obligation to show a diligent job search until the program was complete. While *Abbott* and its progeny do not preclude an award of total disability benefits where the vocational program is a job-placement program, the correct inquiry is whether the time demands of the program render suitable alternate employment reasonably unavailable. *Castro*, 401 F.3d at 972, 39 BRBS at 19-20(CRT); *Kee*, 33 BRBS at 223. Accordingly, we vacate the administrative law judge's award of permanent total disability benefits from December 2, 2006 through March 29, 2007, and from September 11, 2007 through January 13, 2008.[13] *Edwards*, 999 F.2d at 1376 n.2, 27 BRBS at 84 n.2(CRT). On remand, the administrative law judge must reconsider whether claimant established a diligent job search or an inability to work during these periods in light of the applicable law.

January 14 – April 30, 2008 and March 2, 2009 – April 1, 2010

Employer also disputes the award of permanent total disability benefits for these periods. We, however, affirm the administrative law judge's finding that claimant established a diligent job search between January 14, 2008, the start of the job placement services portion of his program, and April 30, 2008, the day before claimant began work with Allied Barton, as well as between March 2, 2009 and April 1, 2010. With regard to the first period, the administrative law judge rationally credited the testimony of Colleen

[12]Dr. Bernicker placed claimant's left shoulder at maximum medical improvement on September 10, 2007, but claimant did not resume his vocational program until November 19, 2007.

[13]We affirm the administrative law judge's award of total disability benefits from March 30, 2007, the date claimant left the program and underwent left shoulder surgery, through September 10, 2007, the date Dr. Bernicker placed claimant's left shoulder condition at maximum medical improvement as claimant was unable to work at all during this period. Decision and Order at 3, 38.

Harmon, the vocational counselor, with whom claimant worked, that she provided claimant with between four and seven job leads each week during his placement period and had no doubts that claimant followed through with those leads, and that claimant generated his own leads. The administrative law judge also rationally credited claimant's testimony that he began to look for work after completing security guard training in February 2008, and that he followed up with every lead provided by Ms. Harmon. Decision and Order at 38-39; CX 37; Tr. at 40-42, 143-144. The administrative law judge is entitled to determine the weight to be accorded to the evidence. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Substantial evidence supports the administrative law judge's finding that claimant was diligent in pursuing suitable alternate work between January 14 and April 30, 2008, and we affirm the award of total disability benefits for this period. *Fortier v. Electric Boat Co.*, 38 BRBS 75 (2004). With regard to the second period, the administrative law judge rationally credited claimant's job search timeline, showing that he applied for numerous jobs between March 2, 2009 and April 1, 2010. Decision and Order at 40; CXs 33, 37 at 441-463. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's award of permanent total disability benefits from January 14 through April 30, 2008, and from March 2, 2009 through April 1, 2010. *Fortier*, 38 BRBS 75.

Wage-earning Capacity

Both employer and claimant challenge some aspect of the administrative law judge's award of permanent partial disability benefits commencing April 18, 2010. Employer asserts that the administrative law judge arrived at an unreasonably low 2010 residual wage-earning capacity by failing to factor into his calculation the average wages for all positions found to be suitable. Claimant asserts that the administrative law judge erred in failing to adjust the 2010 wage-earning capacity to the wages paid at the time of injury to account for inflation.

Under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), a claimant is compensated for the amount of wage-earning capacity lost as a result of his work-related injury based on two-thirds of the difference between his average weekly wage at the time of injury and his post-injury wage-earning capacity. Section 8(h) of the Act, 33 U.S.C. §908(h), provides that the claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. If such earnings do not reasonably represent the claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity in his injured capacity. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). Among the factors to be considered in determining whether the claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity are his physical condition, age, education,

industrial history, the beneficence of a sympathetic employer, earning power on the open market, and any other reasonable variables that could form a factual basis for the decision. *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). Additionally, in calculating a claimant's post-injury wage-earning capacity, the administrative law judge must adjust post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In calculating claimant's wage-earning capacity as of April 18, 2010, the administrative law judge found the following wages to be relevant: 1) claimant's 2008 wages of $9.00 per hour while he was employed as a security guard for Allied Barton; 2) claimant's 2010 wages of $9.20 per hour while he was employed as a security guard for WPS; 3) the lowest and average wages of gate guards from employer's 2008 labor market survey of $8.50 and $10.06 per hour, respectively; and 4) the lowest and average wages of gate guards from employer's 2012 labor market survey of $9.00 and $10.45 per hour, respectively. Although the administrative law judge found assembly jobs to be suitable for claimant, he did not use their wages to calculate claimant's post-injury wage-earning capacity as he found claimant would earn more as a gate guard, given that claimant has several months of experience as a security guard, but no relevant experience as a small products assembler.[14] Decision and Order at 43. Thus, the administrative law judge approximated claimant's 2010 wage-earning capacity to be $9.50 per hour, or $380 per week.

Employer contends it was erroneous for the administrative law judge to surmise that claimant would earn a wage at or near the bottom of the small products assembler wage range and to exclude the average wages of the assembler positions from the calculation of post-injury wage-earning capacity. Employer asserts that the assembler positions were entry-level positions that were found to be suitable for claimant, and their wages should have been included in the calculation. We reject employer's contentions.

[14]The administrative law judge explained that claimant's experience as a security guard would allow him to function as an effective gate guard more readily than someone without experience, thus claimant was likely to earn a wage above the very bottom of the wage range for gate guards (8.50_{2008}; 9.00_{2012}); however, as claimant's experience was limited to approximately five months, he was likely to earn less than the average entry-level wage (10.06_{2008}; 10.45_{2012}) for the position. Decision and Order at 43-44. In contrast, the administrative law judge found that without any relevant experience as a small products assembler, claimant was likely to earn a wage at the very bottom of the wage range (10_{2008}; $8-$9_{2012}$).

From the evidence, the administrative law judge inferred that experience in a position would be a factor in claimant's starting wages in entry-level positions. The administrative law judge accurately observed that Mr. Morgan, who conducted employer's labor market surveys, "testified that he only reports wages for entry level positions" and that experience is one factor that may account for differences in starting pay. Decision and Order at 41; Tr. at 183. The administrative law judge is entitled to weigh the evidence and draw inferences therefrom, and it was reasonable for him to infer that experience factors into the starting wage when a range of wages is given. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). As substantial evidence supports the administrative law judge's finding that claimant had no experience as a small products assembler, he rationally concluded claimant would earn a lower entry wage in an assembly position and thus rationally excluded those wages from his calculation of claimant's 2010 wage-earning capacity. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Fulks v. Avondale Shipyards, Inc.*, 10 BRBS 340 (1979), *aff'd*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981).

We also reject employer's assertion that the administrative law judge erred in finding that claimant would earn a below-average wage as a gate guard. Claimant's actual wages as a security guard in 2008 and 2010 were less than the average wages for gate guard positions reported in employer's 2008 and 2012 labor market surveys, and this fact supports the administrative law judge's conclusion. *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992) (party contending that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity). Substantial evidence also supports the administrative law judge's finding that claimant's relevant security guard experience was "short-lived," as it was limited to approximately five months, and, thus, would not weigh too heavily in raising claimant's starting wage. The administrative law judge acted within his discretion in finding that this limited experience would likely result in claimant's earning a wage in the lower half of the identified wage range. Thus, contrary to employer's assertion, the administrative law judge did not err in declining to calculate claimant's wage-earning capacity using the average wage of the gate guard positions. *Abbott*, 40 F.3d 122, 29 BRBS 22(CRT); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990). Accordingly, we affirm the administrative law judge's finding that claimant's 2010 wage-earning capacity is $380 per week as it is rational, supported by substantial evidence, and in accordance with law. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT).

Claimant contends, however, that the administrative law judge erred in failing to account for inflation when calculating claimant's post-injury wage-earning capacity. We agree. The administrative law judge must compare the claimant's average weekly wage

at the time of his injury with the wages his post-injury job would have paid at the time of the injury. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Bethard*, 12 BRBS 691. This assures that the calculation of lost wage-earning capacity is not distorted by inflation or depression. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *see also Richardson*, 23 BRBS 327. Contrary to employer's assertion, the administrative law judge must account for inflation in some manner. *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *see generally Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Mangaliman v. Lockheed Shipbuilding Co*., 30 BRBS 39 (1996). However, as employer correctly points out, the administrative law judge need not use the percentage change in the National Average Weekly Wage to adjust for inflation where the labor market surveys provide the actual wages the suitable jobs paid at the time of claimant's injury. *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

In arriving at claimant's 2010 post-injury wage-earning capacity, the administrative law judge relied on the wages listed in employer's 2008 and 2012 labor market surveys, as well as on claimant's actual wages earned in 2008 with Allied Barton and in 2010 with WPS. Decision and Order at 42-44. Although employer correctly asserts that its 2008 and 2012 labor market surveys indicated the wages paid at the time of claimant's 2004 and 2006 injuries for some of the jobs identified therein, the administrative law judge did not use those wages in his calculation. Thus, the award based on a wage-earning capacity of $9.50 per hour, $380 per week, does not account for inflation, and we vacate it. On remand, the administrative law judge must calculate claimant's 2010 wage-earning capacity using an inflation adjustment.[15] *Sestich*, 289 F.3d 1157, 36 BRBS 15(CRT); *Hundley*, 32 BRBS 254.

Section 8(f) Relief

Employer lastly contends the administrative law judge erred in denying it Section 8(f) relief by finding that it did not establish the contribution element necessary for Special Fund relief. The Director responds, urging affirmance. Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest, pre-existing

[15]Claimant asserts the administrative law judge should adjust the 2010 wage-earning capacity to 2004 dollars because claimant's injuries to his right shoulder and lower back cause his loss in wage-earning capacity. Employer asserts that, if claimant's wage-earning capacity is to be adjusted for inflation, it should be adjusted to 2006 dollars because claimant last worked for employer in 2006, and the administrative law judge found claimant's 2006 left shoulder injury to be a new work injury.

permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and is "materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor [Quan],* 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP,* 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied,* 520 U.S. 1155 (1997).

To establish the contribution element, the employer must show that the current disability is not due solely to the work injury. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d 664, 33 BRBS 204(CRT). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has not found it necessary to precisely define the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f). The court has held that this element may be met by medical evidence or other evidence, *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT); *Sproull*, 86 F.3d 895, 30 BRBS 49(CRT), and has held that evidence demonstrating that the current level of disability is the result of a combination of the pre-existing condition and the work injury may be sufficient.[16] *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998).

The administrative law judge found that claimant suffered from pre-existing permanent partial disabilities to his knees, back, and shoulders, and that these conditions were manifest to employer. In addressing whether employer established that claimant's pre-existing disabilities materially and substantially contributed to his overall disability, however, the administrative law judge applied the law of the United States Court of Appeals for the Fourth Circuit to find Dr. Dodge's opinion insufficient to carry employer's burden because Dr. Dodge did not quantify the degree of claimant's disability arising from the work injury alone.[17] Decision and Order at 51. Because the

[16]*Compare with Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 433, 37 BRBS 29, 33(CRT) (4th Cir. 2003); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997) (United States Court of Appeals for the Fourth Circuit set forth its requirement for specific quantification).

[17]Dr. Dodge opined that claimant's pre-existing back injury resulted in a 40-to-50-pound lifting limitation and an impairment of approximately one percent under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Tr. at 226-227. Following the work injury in 2004, Dr. Dodge stated he would have imposed a 30-pound lifting limitation due to claimant's back condition and assessed a six percent impairment. *Id*. at 228. Dr. Dodge stated that claimant's shoulder "disability is also materially and substantially greater than it would have been from his current work injury

administrative law judge did not apply the applicable law of the Ninth Circuit, we vacate the denial of Section 8(f) relief and remand this case for further consideration under the proper standards.[18] *Coos Head,* 194 F.3d 1032, 33 BRBS 131(CRT); *Quan,* 203 F.3d at 668, 33 BRBS at 207(CRT).

Instructions on Remand

Accordingly, we vacate the finding that claimant's "motion for modification" with regard to the left knee claim is time-barred pursuant to Section 22, as well as the award of temporary total disability benefits from September 15 through March 1, 2008, for the left knee injury. *See* p. 6-7, *supra.* We vacate the award of temporary total disability benefits for the right knee injury from January 31, 2003 through March 20, 2004. *See* p.7, *supra.* We vacate the award of permanent total disability benefits from December 2, 2006 through March 29, 2007, and from September 11, 2007 through January 13, 2008. *See* p.10, *supra*. We vacate the denial of Section 8(f) relief. *See* p.16, *supra.* We remand the case for reconsideration of the foregoing issues consistent with this decision, as well as for the administrative law judge to address an inflation adjustment to claimant's post-injury wage-earning capacity as of April 18, 2010. *See* p.13-14, *supra.* In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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alone[,]" as his work restrictions would have increased after the 2006 injury. EX 1 at 21; Tr. at 223, 225, 228-229.

[18]We reject the Director's assertion that, although the Ninth Circuit in *Quan,* 203 F.3d at 669-670, 33 BRBS at 207(CRT), explicitly declined to adopt a standard for establishing whether a pre-existing condition contributes materially and substantially to a permanent partial disability, the decision in *Quan* fully supports the principle of quantification set forth by the Fourth Circuit's decisions in *Winn* and *Carmines.* Although the vocational evidence in *Quan* quantified the effects of the claimant's work injury absent any pre-existing disability, the case does not mandate that an employer quantify the extent of a claimant's current disability absent any pre-existing disability. In fact, the court's decision in *Coos Head,* 194 F.3d 1032, 33 BRBS 131(CRT), suggests otherwise as, therein, the court affirmed the administrative law judge's award of Section 8(f) relief based on a doctor's opinion that the combination of the claimant's pre-existing compression fracture of the back and the work injury resulted in a greater impairment.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge