BRB Nos. 10-0360
and 10-0360A

CURTIS COFFEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 12/10/2010
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Christopher M. Galichon (Galichon & MacInnes, APLC), San Diego, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Awarding Benefits (2009-LDA-00055) of Administrative Law Judge Alan L. Bergstrom 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and

conclusions of law of the administrative law judge which 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 sustained a crush injury to his right middle finger while working for employer as a senior mechanic in Iraq on April 24, 2008. He received initial treatment at employer's clinic but returned to Atlanta, Georgia, where he sought treatment from Dr. Wilkes. Dr. Wilkes diagnosed a sprain and ligament laxity of the right middle finger which caused a compression of the nerves in that digit, prescribed medication and physical therapy, and opined that claimant was, as of May 2, 2008, incapable of work because of pain. After conservative treatment proved unsuccessful, Dr. Wilkes performed surgery on claimant's right middle finger on June 12, 2008.[1] Dr. Wilkes indicated that his post-surgical examination of claimant showed satisfactory healing with some expected surgical swelling and that the x-rays did not disclose any problems. He thereafter referred claimant to Dr. Platon for pain management.

Dr. Platon, who treated claimant from July 3, 2008, until November 6, 2008, diagnosed chronic regional pain syndrome (CRPS) and reflex-sympathetic dystrophy (RSD), which she treated with a series of stella ganglion blocks. Claimant was also evaluated by Dr. Klugman who stated that claimant's injury was limited to his right middle finger and opined that claimant had reached maximum medical improvement with regard to that injury as of September 5, 2008, with a 75 percent permanent impairment of his right middle finger and corresponding 15 percent permanent impairment of the right hand. On December 17, 2008, Dr. Perry, upon review of claimant's medical records, concluded that claimant does not have CRPS or RSD, and that it did not appear that claimant would be unable to work. Employer's vocational expert, R. J. Durcotte, indentified a number of jobs on April 13, 2009, that Dr. Klugman opined were suitable for claimant.

Employer voluntarily paid claimant temporary total disability benefits from April 27, 2008, to September 5, 2008, as well as compensation under Section 8(c)(9) of the Act, 33 U.S.C. §908(c)(9), for a 75 percent loss of use of his right middle finger, both based on a compensation rate of $394.21. Claimant thereafter alleged entitlement to additional benefits, which employer controverted, and the case was forwarded to the

[1] Dr. Wilkes performed a neurolysis which involves the release of the ulnar and digital nerves. The surgery revealed scar tissue causing narrowing in the area of injury which Dr. Wilkes related to the work injury.

Office of Administrative Law Judges for a formal hearing. In his decision, the administrative law judge found that claimant sustained a work-related injury to his right middle finger, but that he did not establish that he suffers from RSD or CRPS of the right upper extremity or right hand. The administrative law judge found that claimant's work injury precludes him from returning to his pre-injury job as a senior mechanic and that employer established the availability of suitable alternate employment as of September 5, 2008. In addition, he determined that claimant's compensation rate should be $1,160.36, based on the maximum compensation rate set forth by Section 6(b)(1), 33 U.S.C. §906(b)(1), since two-thirds of claimant's calculated average weekly wage under Section 10(c), 33 U.S.C. §910(c), exceeds that statutory maximum compensation rate. Consequently, the administrative law judge awarded claimant compensation for temporary total disability from April 27, 2008, through September 4, 2008, and for permanent partial disability under the schedule for a 75 percent permanent impairment to his right hand. 33 U.S.C. §908(c)(9), (19).

On appeal, claimant challenges the administrative law judge's finding that he does not suffer from RSD or CRPS and the consequent denial of additional disability benefits based upon those conditions. Employer responds, urging affirmance of the administrative law judge's findings with regard to those alleged maladies. Employer, in its cross-appeal, challenges the administrative law judge's decision to calculate claimant's average weekly wage under Section 10(c) of the Act, and moreover, his decision to exclusively use claimant's overseas earnings for that calculation. Claimant responds, urging affirmance of the administrative law judge's average weekly wage determination.

Claimant argues that the administrative law judge erred by crediting the opinion of a reviewing physician, Dr. Perry, over that of claimant's treating pain management physician, Dr. Platon, in finding that claimant does not have CRPS or RSD. Claimant argues that Dr. Platon's opinion is entitled to greater weight since she was the only pain management specialist to examine and treat claimant. Claimant maintains that, in contrast, Dr. Perry never examined claimant and instead relied on an incomplete record review in reaching his conclusion that claimant does not have CRPS or RSD.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Moreover, an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom; he has the prerogative to credit one medical opinion over that of another and is not bound to accept the opinion or theory of any particular medical examiner. *See Del Monte Fresh Produce v. Director, OWCP*, 563

F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In weighing a treating physician's opinion, the administrative law judge must consider its underlying rationale as well as the other medical evidence of record. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

In this case, the administrative law judge rationally accorded greater weight to the medical review of Dr. Perry and no weight to the opinion of Dr. Platon, based on other credible evidence of record. The administrative law judge found that the underlying bases for Dr. Platon's diagnosis of RSD/CRPS, which consisted of her observations of finger pain on stimulation, skin tone change, and claimant's subjective complaints of pain, were not supported by the record. Most significantly, the administrative law judge found that Dr. Platon testified that claimant's ability to ride a motorcycle for long periods of time was absolutely inconsistent with the symptoms claimant had been reporting to her, which had served, in part, as a basis for her diagnosis of RSD/CRPS.[2] Additionally, the administrative law judge noted that Dr. Platon stated that the videotape of claimant riding a motorcycle made it difficult for her to rule out that claimant was malingering, and moreover, led the physician to question her diagnosis. The administrative law judge therefore concluded that Dr. Platon's diagnosis of RSD/CRPS is not a well-reasoned opinion and thus, it is entitled to no weight. In contrast, the administrative law judge credited Dr. Perry's medical review of claimant's pain management treatment, since he specializes in pain management and upper extremity disorders and because his opinion is better supported by the record.[3] The administrative law judge's finding that claimant does not suffer from RSD/CRPS, and conclusion that claimant is not entitled to any benefits relating to this alleged condition, are affirmed as they are supported by substantial evidence. *See generally Mackey v. Marine Terminals Corp.*, 21 BRBS 129

[2] While claimant continually complained of severe pain, which was belied by his motorcycle riding, Dr. Platon also noted, in contrast to the findings related to her initial diagnosis of RSD/CRPS, that claimant exhibited reduced swelling and improved color over time. EX 5, Dep. at 30.

[3] In reaching his opinion, Dr. Perry explicitly outlined the records he reviewed, which, in contrast to claimant's assertion, included office notes by Dr. Platon dated July 3, 7, and 28, 2008, August 25, 2008, September 2 and 8, 2008, as well reports by Dr. Wilkes pertaining to claimant's surgery. EX 1. As Dr. Perry's report, dated December 17, 2008, precedes the dates of the depositions taken of Drs. Wilkes, Klugman and Platon, his opinion did not include a review of those documents. Nonetheless, their deposition testimony supports a finding that claimant's symptoms did not accord with the objective evidence.

(1988). We, therefore, affirm the administrative law judge's award of temporary total disability from April 27, 2008, through September 4, 2008, as well as an award of permanent partial disability under the schedule.

Employer challenges the administrative law judge's calculation of claimant's average weekly wage at the time of his injury, contending that the administrative law judge should have calculated it under Section 10(a) rather than Section 10(c) of the Act. *See* 33 U.S.C. §910(a), (c). Employer avers that since claimant has actual wages for the 52 weeks preceding his injury, and was working in the same or similar employment for this entire time, Section 10(a) is the appropriate provision for calculation of claimant's average weekly wage.

Section 10(a) of the Act, 33 U.S.C. §910(a), looks to the actual wages of the injured worker who is employed for substantially the whole of the year prior to the injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage.

The administrative law judge found that Section 10(a) is inapplicable since claimant's previous work as a tow truck operator in the United States, prior to his employment as a senior mechanic for vehicle recovery in Iraq, failed to represent work of the same nature and type that claimant performed at the time of his injury while employed in Iraq. He thus concluded that Section 10(a) could not be reasonably and fairly applied on the facts of this case and thus that Section 10(c) should be used to calculate claimant's average weekly wage. We reject employer's contention that, on the facts of this case, the administrative law judge was required to calculate claimant's average weekly wage pursuant to Section 10(a) of the Act. In this case, there is no evidence in the record as to the number of days worked by claimant in his pre-Iraq employment and, moreover, claimant was neither a five nor six day per week worker in Iraq, both of which are necessary to determine average weekly wage under Section 10(a).[4] *Proffitt v. Serv. Employers Int'l, Inc.*, 40 BRBS 41 (2006); *see also Wooley v.*

[4] It is undisputed that claimant, in his eight-plus weeks of work for employer in Iraq, worked 12-hour days, seven days a week. EX 12, Dep. at 57; HT at 117. Additionally, while there is evidence of claimant's pre-Iraq earnings, *e.g.*, claimant's W-2s for 2007 and testimony regarding his earnings, there is insufficient evidence from which the administrative law judge could calculate claimant's average daily wage.

Ingalls Shipbuilding, Inc., 33 BRBS 88 (1999), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Section 10(a) therefore is inapplicable in this case. *Id.*; *see also Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). We thus affirm the administrative law judge's decision to utilize Section 10(c), rather than Section 10(a), of the Act to calculate claimant's average weekly wage at the time of his work injury.[5]

Employer further argues that claimant failed to establish the three factors outlined by the Board in *Proffit*, 40 BRBS 41, and *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), for using only his limited overseas earnings to calculate his average weekly wage under Section 10(c).[6] Employer asserts that if Section 10(c) is applicable, the case should be remanded for the administrative law judge to employ a "blended" approach, using all of claimant's earnings from both his pre-deployment and overseas work in the year immediately preceding his work injury.

The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board has held that where, as here, claimant is injured while working overseas in a dangerous environment in return for higher wages under a long-term contract, his annual earning capacity should be calculated based upon the earnings in that job as they reflect the full amount of the earnings lost due to the injury. *Simons*, 43 BRBS 18; *Proffitt*, 40 BRBS 41.

As the administrative law judge determined, the facts in this case establish the requisite factors for exclusive use of claimant's overseas earnings to calculate his average weekly wage under Section 10(c). In particular, the administrative law judge found that claimant undertook employment in Iraq for a one-year period, worked a schedule of 12-

[5] In light of this, we need not address employer's assertion that the administrative law judge erred in determining that claimant's work in truck recovery state-side was not of the same nature and type as that which he performed in Iraq.

[6] Employer argues that in holding that claimant's overseas earnings are to be used exclusively in DBA cases, the Board has deprived the administrative law judge of the broad discretion to which he is entitled in calculating a claimant's average weekly wage under Section 10(c). For the reasons stated in *Simons*, 43 BRBS at 136, we reject this contention.

hour days every day of the week, was trained on personal protective devices and wore such personal protection when outside the Q-West perimeter, and lived, ate, and slept in the facilities in Iraq provided by employer. Decision and Order at 31-33. The administrative law judge found that claimant earned $15,288.96 over the course of the 8-1/7 weeks he worked for employer in Iraq prior to his injury, which the administrative law judge found equates to an average weekly wage of $1,877.59 ($15,288.96 divided by 8-1/7 weeks). *Id.*

We reject employer's contention of error. The administrative law judge properly considered the extrinsic circumstances of claimant's employment in Iraq in basing the average weekly wage calculation solely on claimant's earnings in that employment. *Simons*, 43 BRBS at 137; *S.K. [Khan] v. Service Employers Int'l*, 41 BRBS 123 (2007); *Proffitt*, 40 BRBS 41. Additionally, his inquiry appropriately included consideration of claimant's ability, willingness and opportunity to work, *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *Jackson v. Potomac Temporaries*, 12 BRBS 410 (1980), such that his average weekly wage determination represents a "a fair and accurate assessment" of the amount the employee would have the potential and opportunity of earning absent the injury. *See generally Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Nat'l Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Simons*, 43 BRBS 18; *Khan*, 41 BRBS 136; *Proffitt*, 40 BRBS 41. As the administrative law judge's average weekly wage determination under Section 10(c) represents a reasonable estimate of the employee's annual earning capacity at the time of the injury, and the method he employed is within the discretion afforded him when calculating average weekly wage pursuant to law, it is affirmed. *Simons*, 43 BRBS 18; *Proffitt*, 40 BRBS 41.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge