BRB No. 99-0513

ROSE S. REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MWR FUND, LAUGHLIN AIR FORCE BASE, TEXAS	)	DATE ISSUED:
	)	
and	)	
	)	
AIR FORCE INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Victor Roberto Garcia, Del Rio, Texas, for claimant.

David J. Christenson (Office of Legal Counsel, Air Force Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-1634) of Administrative Law Judge Lee J. Romero, Jr., 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 slipped and fell on May 5, 1989, during the course of her employment as a

bartender, injuring her neck and right shoulder. As a result of her injuries, claimant underwent three neck surgeries and a shoulder operation. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), for 351 weeks, at which time it alleged it established the availability of suitable alternate employment. Claimant has not worked since the date of the accident.

In his Decision and Order, the administrative law judge found it undisputed that claimant is unable to return to her usual employment as a bartender. He next credited claimant's testimony regarding her work limitations, finding that claimant is capable of working no more than 10 hours per week on non-consecutive days. The administrative law judge found that employer did not establish suitable alternate employment by way of labor market surveys conducted in 1994, 1997, and 1998. The 1994 labor market survey was discredited because none of the potential jobs were within claimant's work restriction of no more than 10 hours of work per week on non-consecutive days. The 1997 survey was found insufficient to establish suitable alternate employment because it relied on inaccurate work restrictions and it failed to address all the restrictions found by the administrative law judge. Finally, the jobs in the 1998 labor market survey either required weekly work hours in excess of claimant's 10 hours per week restriction or failed to address this restriction. Accordingly, the administrative law judge awarded claimant benefits for temporary total disability from the date of injury until the stipulated date of maximum medical improvement, November 12, 1996, and, thereafter, continuing benefits under the Act for permanent total disability, 33 U.S.C. §908(a).

On appeal, employer contends the administrative law judge erred by crediting claimant's testimony as to her work restrictions and in finding that employer failed to establish the availability of suitable alternate employment through its labor market surveys. Claimant responds, urging affirmance.

Where, as here, it is uncontested that claimant is unable to return to her usual employment as a bartender, claimant has established a *prima facie* case of total disability and the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience and physical or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge may rely on labor market surveys and the testimony of vocational counselors that job openings exist to establish the availability of suitable jobs. *Jones v. Genco, Inc.*, 21 BRBS 12 (1985). However, a labor market survey may be rationally discredited if the survey fails to take into consideration all relevant restrictions found by the administrative law judge. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1992). In this regard, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer

in order to determine whether employer has met its burden of proof. *See Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Employer contends that the administrative law judge erred by crediting claimant's testimony in determining her work restrictions, rather than relying only on the work restrictions assigned by her treating physician, Dr. Denno. Claimant testified that she is limited to working six hours on Saturdays at a flea market and two hours on Mondays and Wednesdays at a grocery store where she sells professional yo-yos. Tr. at 95-98. Moreover, due to pain from her neck and shoulder conditions, claimant testified that she requires a full day's rest following the days she works. Tr. at 56-57. On November 12, 1996, Dr. Denno restricted claimant to sedentary or very light-duty work with no repetitive bending, stooping, squatting or overhead work. He also opined that claimant would need appropriate periods of rest. EX 3; CX 9.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, we hold that the administrative law judge's decision to credit claimant's testimony that she is only able to work 10 hours per week on non-consecutive days is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir.1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, as employer does not challenge the administrative law judge's finding that none of the jobs identified by its labor market surveys is within these restrictions, we affirm his conclusion that employer failed to establish the availability of suitable alternate employment.[1] *See Canty v. S.E.L. Maduro*, 26 BRBS 147, 151-152 (1992).

[1]We note claimant's testimony that she does not earn any money from her business endeavor, Tr. at 96, and the absence of any conflicting evidence in this regard.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge