BRB No. 08-0654

D.U.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 02/26/2009
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Lance G. Proctor, Westerly, Rhode Island, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2006-LHC-1760, 1761, 1762, 1763) of Administrative Law Judge Colleen A. Geraghty rendered on claims 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 supported by substantial evidence, are rational, and are 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 sustained a series of back injuries over the course of his nineteen years of work for employer as a welder between September 13, 1976, and May 18, 1995.[1] The

[1] Claimant has been deaf since he was three and one-half years of age. He attended the Rhode Island School for the Deaf, and the American School for the Deaf, where he received vocational training and learned American Sign Language.

first incident, a slip and fall accident which occurred in 1978, resulted in injuries to claimant's back and neck and kept him from his regular work as a welder for approximately eight weeks. Claimant stated that he sustained several other back injuries over the course of the next sixteen years at work, and that after each instance he sought treatment at employer's medical dispensary and returned to his regular job as a welder. In 1994, claimant began seeing his primary care physician, Dr. Kerzer, for complaints of low back and neck pain. Dr. Kerzer recommended physical therapy which, claimant stated, was not helpful in resolving his back and neck pain.

Claimant testified that while welding on May 16, 1995, he bent over and felt a sharp and significant increase of pain in his lower back. Hearing Transcript (HT) at 70-71. He first went to employer's dispensary, and then to Dr. Kerzer, who diagnosed degenerative disc disease, took claimant out of work, prescribed medication, and imposed work restrictions precluding heavy lifting, bending, squatting, crawling, climbing and working in confined spaces. Claimant stated that employer had notified its workers in April 1995 that a layoff was coming, which, in part, prompted claimant to ask for and receive a voluntary layoff because he was experiencing substantial back and neck pain, as well as difficulty with his hands. HT at 73-75. Claimant maintained that he continues to have the same work restrictions as when he was laid off from employer and that he has not worked since that time.

Claimant filed separate claims under the Act for repetitive traumatic injuries to his hands/arms, cervical spine, and lumbar spine on August 24, 2004,[2] for which he alleged, in each instance, a July 1, 2004, date of injury. Claimant also filed a fourth claim dated July 29, 2005, in which he alleged injuries to his hands/arms, cervical spine, and lumbar spine. Employer controverted the claims, and moved for summary decision on the ground that all four injury claims were not timely filed pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a). The administrative law judge denied employer's motion for summary decision by Order dated March 2, 2007.

In her decision, the administrative law judge found that claimant's August 24, 2004, claims relating to his alleged injuries to his hands and neck are time-barred, but that the August 24, 2004, claim relating to his alleged back injury is not barred by the one-year statute of limitations set forth in Section 13(a) of the Act. In finding that claimant's back claim was timely filed, the administrative law judge noted that claimant first became aware or should have been aware of the relationship between his employment, disability, and that injury as of July 1, 2004, which she found is the date

[2] Claimant sustained work-related injuries to his hands in the late 1980's and to his right elbow in either 1991 or 1992, which formed the basis of his other claims.

upon which Dr. Meyer stated that claimant's back condition was related to his work for employer. The administrative law judge next found, based on the opinion of claimant's vocational expert, Mr. Barchi, that claimant is unable to work in a competitive, productive capacity because of his post-injury back condition, his hearing impairment and resulting limited reading and writing capabilities.[3] Consequently, the administrative law judge concluded that claimant is entitled to a continuing award of permanent total disability benefits commencing from May 17, 1995.

On appeal, employer challenges the administrative law judge's findings that claimant's back injury claim was timely filed and that claimant established that he is totally disabled. Claimant responds, urging affirmance.[4]

Employer contends the administrative law judge erred in finding that claimant's claim for a back injury was not timely filed pursuant to Section 13(a). Employer maintains that Dr. Kerzer's notations from July 1995, as well as claimant's testimony regarding his awareness as to the relationship between his injuries and work for employer, establish that claimant was aware or should have been aware of the work-related nature of his injuries at that time.

Section 13(a) of the Act provides that a claim for compensation must be filed within one year after the claimant is aware, or with the exercise of reasonable diligence should have been aware, of the relationship between his traumatic injury and his employment.[5] The courts of appeals have uniformly held that the statute of limitations

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[3] The administrative law judge alternatively found that assembly positions identified by employer's vocational expert, Mr. Calandra, at Tasco and Talent Tree may constitute suitable alternate employment, but concluded that claimant rebutted employer's showing of suitable alternate employment through his testimony that he contacted both prospective employers only to learn that neither employer had any open positions.

[4] The administrative law judge's findings that the claims for the hand/arm and neck injuries were not timely under Section 13(a), 33 U.S.C. §913(a), are affirmed as those conclusions are not challenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[5] 33 U.S.C. §913(a), states, in relevant part, that:

> Except as otherwise provided in this section, the right to compensation for disability or death benefits under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is

begins to run only after the employee is aware or reasonably should have been aware of the full character, extent, and impact of the work-related injury. This inquiry encompasses the claimant's awareness that he sustained a work-related injury that causes a loss in earning capacity. *See C & C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008); *Paducah Marine Ways v. Thompson*, 82 F.3d 130, 30 BRBS 33(CRT) (6th Cir. 1996); *Duluth, Missabe & Iron Range Ry. Co. v. Heskin*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *Marathon Oil Co. v. Lunsford*, 733 F.2d 1139, 6 BRBS 100(CRT) (5th Cir. 1984); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970); *see also Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979) (applying a similar standard to construe identical language in Section 12 of the Act, 33 U.S.C. §912). The purpose of requiring the claimant's awareness of an impairment of earning capacity is to avoid claimants' having "to protect their rights by filing claims for aches and pains that are not disabling and thus not compensable." *Paducah Marine Ways*, 82 F.3d at 134, 30 BRBS at 36(CRT). Indeed, the Ninth Circuit has stated that, "Public policy is served by not discouraging workers' attempts to return to work and by not encouraging premature claims of permanent disability." *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 184, 23 BRBS 127, 130(CRT) (9th Cir. 1990). When a claimant receives a misleading diagnosis, which reasonably leads him to believe that either his condition is not serious or work-related or would not affect his wage-earning capacity, the Section 13 statute of limitations does not begin to run until claimant receives the proper diagnosis. *See generally Grant v. Interocean Stevedoring, Inc.*, 22 BRBS 294 (1989) (Lawrence, J., G., dissenting); *Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986).

The administrative law judge found that claimant reasonably relied on Dr. Kerzer's 1995 statement that there was no relationship between his back condition and his work for employer. The administrative law judge found that claimant's belief that there was a relationship between his ongoing back condition and his work injury was dispelled by Dr. Kerzer. In this regard, Dr. Kerzer stated, in a letter dated July 13, 1995, to an insurance carrier, that claimant "has a diagnosis of degenerative joint disease," and that while claimant "has just informed me that he injured his back at work on 5/16/95 [, I]

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aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

do not feel that [claimant's] symptoms are due to a work-related injury since I have been treating him for back problems since 1994 and the pain has unchanged."[6] EX 9.

Dr. Kerzer's statements provide substantial evidence supporting the administrative law judge's finding that claimant was not aware, or should have been aware, of the relationship between his post-May 1995 back condition and his work for employer at that time. *See Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990); *Pittman*, 18 BRBS at 214. Dr. Kerzer specifically addressed and dismissed claimant's belief that there was a causal relationship between claimant's work and his back condition.[7] Thus, we affirm the administrative law judge's finding that claimant did not have the requisite awareness that his back condition was work-related in 1995, due to Dr. Kerzer's July 1995 opinion explicitly dismissing any connection between the two.

Moreover, the record supports the administrative law judge's finding that claimant did not become aware of the relationship between his repetitive back injury and his work for employer until Dr. Meyer made that correlation following claimant's first visit with him on July 1, 2004. While claimant stated that he continued to receive treatment for his back condition from the time he stopped seeing Dr. Kerzer in 1995, until the time he began treating with Dr. Handel in 2003, the record is devoid of any evidence establishing a causal link between claimant's back injury and his work for employer during this time. Thus, the record contains no evidence contradicting Dr. Kerzer's opinion that there was no causal relationship until Dr. Meyer stated, based upon his July 1, 2004, examination of claimant and review of his records, that claimant's work duties with employer in 1995, "would be a substantial contributing factor" in his overall back condition. CX 2, Dep. at 19. Consequently, substantial evidence supports the administrative law judge's finding

[6] Dr. Kerzer previously commented, in his office notes from July 12, 1995, that claimant "is now stating that he had an injury at work 05/16/95 which is causing all his pain." EX 9. Dr. Kerzer added that "I informed [claimant] that his symptoms are that of DJD [degenerative joint disease]," and opined that "I find it highly unlikely that his symptoms are all related to injury on 5/16/95," particularly since "he had back pain prior to this injury which persisted afterwards." EX 9.

[7] Claimant answered "yes" when asked, both during his deposition and at the hearing, as to whether he was aware, at the time he left employer in May 1995, that all of the problems claimant had with his back, neck and hands were related to his employment and his injuries at Electric Boat? HT at 110; CX 24, Dep. at 24. While, as employer asserts and the administrative law judge acknowledged, this testimony establishes that claimant may have believed there was a causal connection between his work for employer and his back condition in May 1995, claimant's belief was subsequently altered by Dr. Kerzer's July 1995 statements.

that claimant did not become aware of the causal relationship between his work for employer and his disabling back condition until July 1, 2004, when Dr. Meyer reached that conclusion. Thus, the administrative law judge's finding that claimant's claim for his back condition, dated August 28, 2004, is timely pursuant to Section 13(a) of the Act is affirmed. *Bellows*, 538 F.3d 293, 42 BRBS 37(CRT); *Lunsford*, 733 F.2d 1139, 6 BRBS 100(CRT); *see generally Bivens*, 23 BRBS 233; *Pittman*, 18 BRBS at 214.

Employer alternatively argues that the administrative law judge erred in finding that claimant's disability was total rather than partial. Employer contends that the administrative law judge's finding that the testimony of claimant's vocational expert is entitled to greater weight than that of employer's expert is contrary to the limited evidentiary analysis required for employer to establish the availability of suitable alternate employment pursuant to the decision of the United States Court of Appeals for the First Circuit in *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). Employer maintains that the evidence compiled by its vocational expert, Mr. Calandra, is sufficient to establish that entry-level jobs were reasonably available to claimant such that this evidence meets employer's burden to establish the availability of suitable alternate employment.

In establishing the availability of suitable alternate employment, the burden rests with employer to demonstrate that specific job opportunities, which claimant can perform considering his age, education, background, work experience, and physical and mental restrictions, are realistically and regularly available in claimant's community. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Air America*, 597 F.2d 773, 10 BRBS 505; *see generally Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). The United States Court of Appeals for the First Circuit, within whose jurisdiction the current case arises, has referred to this burden as requiring the "precise nature, terms and availability of the job[s]." *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 433, 24 BRBS 202, 208(CRT) (1st Cir. 1991).

In *Air America*, 597 F.2d 773, 10 BRBS 505, the First Circuit held that where an injured employee's medical impairment affects only a specialized skill that is necessary in the claimant's former employment, the employee's resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him; in such a situation, the court stated that it would not put the burden of proof on an employer to establish specific employment opportunities when it is obvious that there are available jobs for claimant. *Id.* The court added, however, that such a standard is inapplicable where the claimant's medical impairment and job qualifications are such that his suitable job prospects would be expected to be very limited, if existent at all, and that it did not mean to suggest that in

many, perhaps all, cases it is not proper to place a substantial burden to show alternative employment opportunities upon an employer. *Id.*, 597 F.2d at 779-781 10 BRBS at 513-515; *Dixon v. John J. McMullen & Associates, Inc.*, 19 BRBS 243 (1986). In this case, the administrative law judge found that claimant's limited reading and writing capabilities, his hearing impairment, and his medically documented conditions, limitations and pain all combine to render him incapable of working in a competitive, productive capacity. Thus, unlike his counterpart in *Air America*, claimant's inability to work in this case is a result of the entirety of his condition such that it is not obvious that there are available jobs for claimant. We therefore reject employer's assertion that its mere proffer of alternative jobs is sufficient, in and of itself, to alter the extent of claimant's disability from total to partial in this case. *Air America*, 597 F.2d 773, 10 BRBS 505.

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, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As credibility determinations are solely within the purview of the administrative law judge, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and as her decision to credit the more thorough vocational report of Mr. Barchi over the contrary report of Mr. Calandra is rational,[8] *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), we affirm the administrative law judge's conclusion that claimant is incapable of performing any work in a competitive, productive capacity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). We therefore affirm the administrative law judge's finding that claimant is entitled to permanent total disability from May 18, 1995, as it is rational and supported by

[8] In crediting Mr. Barchi's opinion that claimant is unable to perform any gainful employment, the administrative law judge found that in contrast to Mr. Calandra, Mr. Barchi interviewed claimant, performed a vocational assessment, specifically considered claimant's complaints of pain, and had a complete and thus better understanding of claimant's limited reading and writing capabilities as a result of his hearing impairment. Decision and Order at 14-15. The administrative law judge also observed that Mr. Barchi relied, in part, on Dr. Meyer's assessment that claimant is permanently and totally disabled as a result of the entirety of his injuries and profound deafness. CX 1; *see also* CX 2, Dep. at 28-29.

substantial evidence.[9] *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT)*; see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

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

[9] The administrative law judge's finding that claimant is incapable of performing any employment renders employer's vocational evidence, consisting of the labor market survey of Mr. Calandra, moot. *See generally J.R. v. Bollinger Shipyard, Inc.*, __ BRBS__, BRB No. 08-0508 (Dec. 16, 2008). The administrative law judge did, in the interest of efficiency, evaluate the jobs in this survey, finding two jobs potentially suitable. However, the administrative law judge found claimant contacted both employers and no positions were available and concluded claimant made a diligent but unsuccessful effort to obtain employment. Thus, this alternative analysis also resulted in a finding of permanent total disability.