

BRB No. 99-0444

RONALD L. WEBB)
)
 Claimant-Petitioner)
)
 v.)
)
 INDUSTRIAL MARINE) DATE ISSUED:
)
 and)
)
 RISCORP/THE ZENITH)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Douglas E. Daze, Jacksonville, Florida, and John E. Houser, Thomasville, Georgia, for claimant.

Michael C. Crumples and Dale J. Stone (McConnaughay, Duffy, Coonrod, Pope & Weaver, P.A.), Jacksonville, Florida, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-0786) of Administrative Law Judge Vivian Schreter-Murray 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, a safety director, suffered an injury to his back while lifting a radiator

during the course of his employment on May 6, 1994. Claimant subsequently underwent surgery for an anterior/posterior interbody fusion on January 15, 1995. Released by his treating physician to part-time, light duty work on August 2, 1995, claimant returned to work with employer as a purchasing agent, working four hours per day. Claimant was released to full-time, light duty work on October 11, 1995. When required to work eight hours per day by employer, claimant terminated his employment. Thereafter, claimant sought continuing temporary total disability compensation commencing February 16, 1995, and medical benefits.

In her decision, the administrative law judge found that claimant's idiopathic coccydynia is unrelated to either the work accident or resultant surgery and that employer had established the availability of suitable alternate employment within its own facility. Accordingly, she awarded claimant temporary total disability compensation from February 16, 1995, to October 11, 1995, and permanent partial disability compensation thereafter based upon his post-injury wage-earning capacity as a purchasing agent. *See* 33 U.S.C. §908(c)(21).

On appeal, claimant argues that the administrative law judge erred in considering the post-hearing reports of Dr. Fessler and employer's rehabilitation consultant and in weighing the medical evidence. Claimant asserts that he is entitled to compensation for a continuing total disability.¹ Employer responds, urging affirmance of the administrative law judge's decision.

¹Claimant's original counsel, Mr. Houser, filed an initial Petition for Review and brief which the Board accepted. Claimant then obtained new counsel, who requested and was granted leave to file an amended brief. This decision addresses issues raised in both pleadings. We reject claimant's allegation in his first brief that the administrative law judge in the instant case demonstrated prejudicial bias; adverse rulings alone are insufficient to demonstrate bias. *See Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988).

We consider, first, claimant's contention that the administrative law judge's admission into evidence of Dr. Fessler's post-hearing report as well as the report of employer's vocational counselor constitutes reversible error.² We disagree. The transcript of the formal hearing held on May 12, 1998, indicates that the administrative law judge held the record open for the submission of Dr. Fessler's evidence.³ See HT at 56. Thereafter, on September 25, 1998, the administrative law judge issued an Interim Order reiterating that the record remained open for the submission of Dr. Fessler's report and the parties' briefs until October 5, 1998. The reports at issue here were thereafter submitted to the administrative law judge, and claimant, who was represented by counsel, raised no objections to their submission.

It is well-established that the administrative law judge has broad discretion in determinations pertaining to the admissibility of evidence, and that the administrative law judge may hold the record open after a hearing for the receipt of additional evidence. See, e.g., *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993); *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. See *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). In the instant case, the record reflects the parties' agreement to allow the record to remain open for the admission of Dr. Fessler's post-hearing testimony; claimant has thus failed to establish that the administrative law judge abused her discretion in admitting Dr. Fessler's testimony into the record. Accordingly, claimant's contention of error is rejected.⁴ See *Smith*, 22 BRBS at 50.

²The file transmitted to the Board does not contain copies of the post-hearing depositions of Dr. Hogshead, Dr. Fessler, or the vocational counselor, and efforts to obtain them have not been successful. As there is no contention that the administrative law judge did not accurately describe the contents of these documents, Decision and Order at 5-6, 9-10, they are not necessary to our review. All other documents, including the vocational reports of Ms. Hellier, Emp. Ex. 4, and the office notes and reports of Dr. Hogshead, Cl. Ex. 40-87, are in the file transmitted.

³Contrary to claimant's contention that the parties only stipulated to continued compensation payments until Dr. Fessler's examination, the transcript reflects that the administrative law judge ordered the continuation of such payments until at least the "receipt of Dr. Fessler's report and submission by the parties." HT at 56.

⁴As the administrative law judge found that employer established the availability of suitable alternate employment within its facility, see discussion *infra*, any error committed by the administrative law judge in admitting Ms. Hellier's deposition into evidence is harmless.

Claimant next argues that the administrative law judge erred in relying upon the opinions of Drs. Hogshead and Fessler over those of Drs. Smith and Downing to find that claimant had reached maximum medical improvement and that the position of purchasing agent proffered by employer constituted suitable alternate employment. We disagree.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge determined that claimant reached maximum medical improvement as of October 11, 1995, based on Dr. Hogshead's opinion rendered that day. CX 78c. The determination of when maximum medical improvement is reached is a question of fact based on the medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). On October 11, 1995, Dr. Hogshead found claimant had a nine percent permanent impairment and was capable of performing light-duty work on an eight-hour day basis, CX 78c; the date upon which a physician assesses claimant with a disability rating is sufficient to determine the date of permanency. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's determination of the date of maximum medical improvement based upon the opinion of claimant's treating physician. *Diosdado v. Newport Shipbuilding & Repair Inc.*, 31 BRBS 70 (1997).

We next address claimant's challenge to the administrative law judge's findings regarding the extent of his disability. Where, as in the instant case, claimant is unable to perform his usual employment duties with employer due to a work-related injury, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to establish the availability of jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). An employer can establish suitable alternate employment by offering claimant a light duty job at its facility which is tailored to claimant's physical limitations, so long as the job is necessary and claimant is capable of performing it. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Larson v. Golten Marine Co.*, 19 BRBS 54 (1986).

In the instant case, the administrative law judge found that employer established the availability of suitable alternate employment within its own facility; specifically, the administrative law judge found that the evidence of record establishes that claimant was capable of working for employer full-time in the light-duty purchasing agent position which

he performed part-time post-injury. In arriving at this determination, the administrative law judge relied upon the opinion of Dr. Hogshead, claimant's treating physician, that as of October 11, 1995, claimant had reached maximum medical improvement and was capable of returning to full-time work with a 50 pound lifting restriction, CX 78c. The administrative law judge found Dr. Hogshead's opinion was well-reasoned and consistent with the findings of Dr. Fessler, who based his conclusions on the entire existing medical record plus new films and a physical exam. The administrative law judge rejected the opinions of Drs. Smith and Downing, upon whom claimant relies, finding their opinions that claimant's fusion had failed lacked support in the early or most recent x-ray films, which Drs. Hogshead and Fessler, respectively, interpreted as showing a solid fusion and stable spine. In addition, the administrative law judge found that claimant's testimony regarding debilitating pain lacked credibility.

It is well-established that the administrative law judge is entitled to weigh the credibility of all witnesses and to draw his own inferences from the evidence. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir.1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Claimant has not shown that the administrative law judge's credibility determinations are inherently incredible or patently unreasonable. *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). The administrative law judge rationally credited Drs. Hogshead and Fessler, and their opinions constitute substantial evidence in support of the findings that claimant was capable of performing the work of a purchasing agent for eight hours a day. As employer established the availability of suitable alternate employment in this job at its facility as of August 2, 1995, we affirm the administrative law judge's determinations that claimant was capable of light duty work as of August 2, 1995, and that employer, as of that date, established the availability of regular and continuous work as a purchasing agent within claimant's restrictions, and his consequent finding that claimant is not totally

disabled.⁵ See *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

⁵In his initial brief, claimant raises general allegations regarding the administrative law judge's finding that his coccyx condition, *i.e.*, idiopathic coccydynia, is unrelated to either his work accident or resulting surgery. The administrative law judge did not discuss this issue in any detail, summarily stating the condition was not work-related. Any error in this regard is harmless, however, based on the credited medical evidence. Dr. Hogshead opined that claimant's coccydynia was not related to his work accident or surgery. Moreover, Dr. Hogshead felt that claimant's complaints in this regard did not warrant a change in either his date of maximum medical improvement or in his restrictions; the doctor's office notes of January 31 and April 16, 1997, reflect his belief that claimant could return to work. Thus, even if causally related, the medical evidence credited by the administrative law judge establishes that this condition has resulted in no additional disability, and there is no argument on appeal that any medical treatment was not paid.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge