BRB No. 92-722

SHEILA DIANE JENKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED:
	)	
and	)	
	)	
ESIS INCORPORATED	)	
	)	
Self-Insured Employer-Servicing Agent	)	DECISION and ORDER

Appeal of the Decision and Order of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

Sheila D. Jenkins, Jonesboro, Georgia, *pro se*.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, representing herself, appeals the Decision and Order (91-LHC-1268) of Administrative Law Judge Victor J. Chao denying benefits 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). As claimant is appearing without benefit of counsel, we will review the administrative law judge's Decision and Order under our general standard to determine whether his findings of fact and conclusions of law 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

On April 10, 1987, claimant injured her neck and back while working as a checker for employer. Employer voluntarily paid claimant temporary total disability compensation under the Act from the date of her injury until September 22, 1988, 33 U.S.C. §908(b), and temporary partial disability compensation from September 23, 1988, to July 20, 1989, 33 U.S.C. §908(e). Claimant sought continuing permanent partial disability compensation of $70.94 per week under the Act thereafter. 33 U.S.C. §908(c)(21).

In denying the claim, the administrative law judge found that although the opinion of claimant's treating physician, Dr. Banderas, established that claimant is no longer able to perform her usual work as a checker, employer established the availability of suitable alternate employment through the testimony of its vocational expert, Yvonne Parker, and Dr. Banderas's approval of the available alternate jobs she identified in her March 15, 1991, labor market survey. The administrative law judge then summarily concluded that as claimant had not met her burden of proving a loss of wage-earning capacity, her claim must be denied.[1] Claimant, appearing without benefit of counsel, appeals the administrative law judge's denial of benefits. Employer has not responded to claimant's appeal.

Initially, the burden of establishing the nature and extent of disability is on the claimant, who must meet that burden by establishing her inability to perform her usual work due to a work-related injury. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1985). Once claimant's initial burden is met, as in the present case, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156, 161 (5th Cir. 1981).

In the instant case, the administrative law judge found that employer met its suitable alternate employment burden based on the vocational testimony of Yvonne Parker, and Dr. Banderas' approval of the jobs which Ms. Parker had identified in her March 15, 1991, labor market survey. After evaluating claimant, Ms. Parker identified a number of specific available job opportunities which she considered consistent with claimant's age, education and the light duty physical restrictions imposed by Dr. Banderas. These jobs included salesperson, hostess, cashier, and fast-food crew member positions and paid between $4 and $5 per hour at the time of the March 15, 1991 survey. After going out to each job site to observe the physical requirements of the available jobs, Ms. Parker completed a work requirement analysis for each job which she then submitted to Dr. Banderas for approval. Inasmuch as the administrative law judge's finding that employer successfully established the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm this determination. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145-146 (1991).

[1]Although employer argued that any disability which claimant may have had is the result of an intervening June 28, 1989, accident she sustained at home when she lifted something heavy, the administrative law judge did not resolve this issue in light of his determination that there were no objective findings to substantiate claimant's complaints either before or after the alleged intervening incident.

Once employer shows that suitable alternate employment exists, claimant can still establish total disability if she shows that she diligently tried, but was unable to obtain alternate employment. *See Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In the present case, as it is undisputed that claimant did not attempt to obtain alternate employment, claimant has not established that she is totally disabled on this basis.

While we therefore affirm the administrative law judge's finding that suitable alternate employment was established and that claimant was thus not totally disabled, we are unable to affirm his denial of all disability compensation as claimant may be partially disabled; the administrative law judge did not make the appropriate factual findings necessary to support a finding that she had no partial disability. Under Section 8(c)(21) of the Act, an award for permanent partial disability is based on the difference between the claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). 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 these earnings fairly and reasonably represent his wage-earning capacity. Where claimant has no earnings, as in the instant case, the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. *See* 33 U.S.C. §908(h). The objective of the inquiry concerning the claimant's wage-earning capacity is to determine the post-injury wage that would be paid under normal employment conditions to the claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153 (CRT)(9th Cir. 1985). Where, as here, employer successfully establishes the availability of suitable alternate employment, the earnings available to claimant in the alternate employment can establish claimant's post-injury wage-earning capacity. *See Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231, 233-234 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990). In fashioning an award pursuant to Section 8(c)(21), however, the administrative law judge must adjust the wage levels for the post-injury jobs to those paid in that job at the time of claimant's injury to account for the effects of inflation. *See Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980); *see also Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988).

The administrative law judge in the present case properly determined that inasmuch as claimant sustained a back injury Dr. Saba's opinion that claimant has a 10 percent permanent physical impairment was not determinative of whether she had sustained a loss in her wage-earning capacity under Section 8(c)(21). *See Butler v. WMATA*, 14 BRBS 321, 322 n.2 (1981). In denying benefits, however, the administrative law judge summarily concluded that claimant did not sustain a loss in her wage-earning capacity without providing any rationale or identifying the factual basis for this determination in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A).[2] *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 383-387

[2]The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), requires that decisions include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact law or discretion presented in the record."

(1990). Accordingly, in light of the administrative law judge's failure to adequately explain this finding, we must vacate the denial of benefits, and remand for reconsideration of this issue in accordance with the requirements of the APA. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988).[3]

Finally, we note that inasmuch as an injured employee's total disability becomes partial at the earliest date on which employer demonstrates the availability of suitable alternate employment, claimant is entitled to some total disability compensation in this case as a matter of law in any event. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 129-131 (1991); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 1259-1260, 23 BRBS 89, 94 (CRT)(9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 111 S.Ct. 798 (1991). Inasmuch as the administrative law judge found that suitable alternate employment was established based on Ms. Parker's March 15, 1991 survey, consistent with *Rinaldi*, we modify the administrative law judge's Decision and Order to reflect that claimant is entitled to permanent total disability compensation from July 21, 1989, through March 14, 1991. *Rinaldi*, 25 BRBS at 129-131.

[3]In reconsidering claimant's entitlement to disability compensation on remand, the administrative law judge should note that the fact that claimant may have chosen to withdraw from the labor force to take care of her emotionally disturbed daughter does not affect her right to compensation if a loss of wage-earning capacity is established based on the difference between her pre-injury average weekly wage and the wages paid post-injury by the suitable alternate employment. *See Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160, 162 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated insofar as it holds that claimant did not sustain a loss of wage-earning capacity, and the case is remanded for further consideration of this issue in accordance with the APA. The administrative law judge's Decision and Order is also modified to reflect that claimant is entitled to permanent total disability compensation from July 21, 1989 through March 14, 1991, but is, in all other respects, affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge