BRB Nos. 92-1179
and 92-1179A

JAMES E. JOHNSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	DATE ISSUED: _____
Employer-Respondent	)	
Cross-Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Philip A. Costa (Weigand & Associates), New Orleans, Louisiana, for claimant.

Wayne G. Zeringue, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and SHEA, Administrative Law Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Awarding Benefits (90-LHC-3071) of Administrative Law Judge James W. Kerr, 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.* (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);.

*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).

In March 1982, while working for employer as an electrical worker, claimant was injured when he slipped and fell on a piece of pipe and landed on his hip.[1] Since that date, claimant has had three surgeries to his lower back and has received extensive psychological and psychiatric treatment. Claimant has not returned to work since the injury. Claimant sought temporary total and permanent total disability compensation under the Act for his physical and psychological injuries.

The administrative law judge awarded claimant temporary total disability compensation from March 8, 1982 to April 30, 1985, permanent total disability compensation from May 1, 1985 to February 28, 1991, and permanent partial disability commencing March 1, 1991. The administrative law judge further found that claimant was entitled to Section 10(f), 33 U.S.C. §910(f), cost of living adjustments during the period that he was permanently totally disabled.

Claimant appeals the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment based on work available in employer's restrictive work release program (RWRP). Employer cross-appeals, challenging the administrative law judge's finding that claimant's disability is causally related to his employment. Employer also asserts error in the finding that claimant's permanent total disability commenced on May 1, 1985, arguing that claimant reached maximum medical improvement on November 15, 1988. Employer also contends that the administrative law judge improperly found that claimant is only able to work four hours a day and that he improperly determined that claimant was entitled to cost of living adjustments under Section 10(f) during a period of time in which he was not permanently totally disabled.

Initially, we direct our attention to employer's causation argument because it is potentially dispositive. In its cross-appeal, employer contends that the administrative law judge erred in finding Dr. Applebaum's testimony that claimant's L4-5 disc herniation is not causally related to the March 15, 1982 work injury did not provide substantial evidence to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. Employer asserts that the administrative law judge should have resolved the causation issue based on an evaluation of the evidence as a whole. While recognizing that claimant's treating physician, Dr. Llewellyn, opined that claimant's L4-5 disc abnormality was due to the natural progression of the March 15, 1982, work injury, employer asserts that this testimony is not credible and should have been rejected because it conflicts with the findings he made four weeks after the alleged accident. At that time, Dr. Llewellyn indicated that based on a CT scan, EMG, discogram, and the visualization of claimant's back during his April 5, 1982, surgery, claimant's L3 and L4 discs appeared normal. Employer also recognizes that Dr. Llewellyn's opinion relating claimant's L4-5 disc herniation to the work injury was based on the fact that statistically, in 20 percent of all such injuries, multiple disc tears occur simultaneously or subsequently develop. Employer asserts, however, that inasmuch as Dr. Llewellyn's opinion recognizes that multiple disc injuries do not occur in approximately 80 percent of all cases, and as Dr. Applebaum specifically

[1]Claimant alleges that he was injured on March 8, 1982; employer contends that the date of injury was March 15, 1982. Both parties agreed that the exact date is not critical to the resolution of this case.

opined that this injury did not occur in this case, the administrative law judge erred in concluding that claimant's current physical and psychological problems resulting from the L4-5 tear are causally related to the work injury. Employer maintains that as claimant's second and third surgeries to repair the L4-5 disc tear were thus not related to his employment, it cannot be held liable for medical expenses, disability compensation, or Section 10(f) cost of living adjustments relating to this physical injury or claimant's psychological problems resulting therefrom.

Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused the harm. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial countervailing evidence. In order to rebut the presumption, employer must establish that claimant's disability was not caused or aggravated by his employment. *Id.* If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must then weigh all the relevant evidence and resolve the causation issue based on the record as a whole. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985); *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

We reject employer's contention that the administrative law judge erred in analyzing the causation issue in this case. Although, as employer asserts, Dr. Applebaum's opinion could properly support a finding of rebuttal, the administrative law judge acted within his discretion in discrediting it based on Dr. Applebaum's failure to adequately explain his opinion that claimant's L4-5 disc injury was not related to the work injury. The administrative law judge also reasonably discredited Dr. Applebaum's testimony based on the fact that he examined claimant on only one occasion eight years after the original injury and the fact that his testimony was given in response to a hypothetical question posed by counsel.

Moreover, it was within the administrative law judge's discretion to credit Dr. Llewellyn's opinion relating claimant's L4-5 herniation to the work injury, despite the fact that it conflicted with his earlier findings; the trier-of-fact may accept or reject all or any part of any testimony as he sees fit so long as his determinations are rational. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). Inasmuch as Dr. Llewellyn's opinion provides substantial evidence to support the administrative law judge's finding that claimant's L4-5 disc injury, which employer concedes resulted in his psychological condition, is causally related to the March 1982 work injury, his determination that employer is liable for disability compensation and medical benefits relating to these conditions is affirmed. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 52 (1992).

We also reject claimant's assertion that the administrative law judge erred in finding that employer met it burden of establishing the availability of suitable alternate employment based on its offer of work in its Restricted Work Release Program (RWRP) at the hearing. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual

employment due to his work-related injury. Once claimant has established that he is physically unable to return to his pre-injury employment, the burden shifts to his employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If it is shown that claimant can perform alternate employment, he is only partially disabled. *See Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

In the present case, as it is undisputed that claimant is no longer capable of performing his usual employment, the burden shifted to employer to establish the availability of suitable alternate employment. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Employer attempted to establish suitable alternate employment both by providing vocational evidence as to the availability of four full time positions available in Slidell, Louisiana, where claimant relocated following the work injury, and by offering claimant a job in its RWRP program at the hearing. Although the administrative law judge found that the jobs the vocational expert identified were not within claimant's physical restrictions, he concluded that employer had established suitable alternate employment based on the RWRP position which could accommodate claimant's stringent physical limitations and which did not constitute sheltered employment offered by a beneficent employer.

After careful review of the Decision and Order, we affirm the administrative law judge's finding that employer met its suitable alternate employment burden based on its offer of employment in its RWRP facility. The Board has recognized that employer can establish the availability of suitable alternate employment by providing claimant with a job in its facility which is necessary and which claimant is capable of performing. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Under such circumstances, claimant's ability to obtain work on the open market is irrelevant. *Id*. at 277.

In the present case, the administrative law judge reasonably determined based on the testimony of employer's vocational expert, Nancy Favaloro, that the tasks performed at employer's RWRP facility involved meaningful work necessary to employer's operations. Ms. Favaloro explained that the RWRP is a program employer designed to provide work for employees with physical restrictions, and involves the consolidation of sedentary and light duty tasks from various departments at employer's plant within one facility to perform work necessary to employer's operations. Ms. Favaloro testified the work in the RWRP program involves no lifting over 10 pounds and allows alternate sitting and standing. In addition, physical therapists, nurses, physicians, whirlpools, exercise equipment and heat equipment are located on the premises. Moreover, inasmuch as the RWRP program was well-established, it was not unreasonable for the administrative law judge to find that this job was sufficient to meet employer's burden despite the fact that it was not offered to claimant until the time of the hearing. *See generally Carter v. General Elevator Co.*, 14 BRBS 90. 97 (1981).

The administrative law judge also reasonably determined that claimant would be able to perform the work at the RWRP program for four hours per day based on the testimony of Dr. Llewellyn, claimant's treating physician. Dr. Llewellyn initially stated that as to neurosurgical aspects of claimant's condition, claimant was totally disabled and was not even capable of light duty

work for four hours a day. Dr. Llewellyn also noted that few employers would be willing to accommodate claimant's special needs and treatment regime which included taking hot showers or baths, using medications, and taking rest periods during the work day. He further testified that claimant was limited to work which would allow him to alternate sitting and standing at one-hour intervals, which involved simple grasping, and which would involve no more than occasional lifting of 5 - 10 pounds.

At the hearing, however, when presented with a detailed explanation of the RWRP program, including the extent to which employer was willing to accommodate claimant's treatment needs, Dr. Llewellyn indicated that claimant would be able to perform this work. Tr. at 87-88. Inasmuch as Dr. Llewellyn testified that claimant would be able to perform this work, claimant's assertion that it was not suitable because it would cause him undue pain is rejected. Employer's assertion on cross-appeal that the administrative law judge erred in finding that claimant was only able to perform the job at RWRP for four hours a day is similarly rejected as it was not unreasonable for the administrative law judge to infer from Dr. Llewellyn's testimony that claimant was limited to part-time work. Finally, as employer need only establish the availability of suitable alternate work in the vicinity where claimant was injured, we reject claimant's assertion that employer did not met its burden because it failed to prove the availability of work in Slidell, where he relocated. *See Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984).

Turning to employer's remaining arguments on cross-appeal,we reject employer's contention that the administrative law judge erred in determining that employer did not establish the availability of suitable alternate employment until March 1, 1991, when employer offered claimant the RWRP position at the formal hearing. Although employer maintains that the award of permanent partial disability should have commenced in 1987 because Ms. Favaloro initially advised claimant of the RWRP program at that time, we disagree. In considering when the RWRP position became available to claimant, the administrative law judge noted that claimant conceded that Ms. Favalora told him something about the RWRP program when they first met. In light of the absence of evidence in the record as the to dates and details surrounding what transpired and the state of the RWRP program at that time, however, the administrative law judge concluded that the RWRP position did not become available to claimant until it was formally offered to him at the hearing. As such credibility determinations are within the purview of the administrative law judge and as employer has failed to establish that the administrative law judge committed reversible error in weighing the conflicting evidence, his finding that the RWRP position was not available to claimant until March 1, 1991, the date of the hearing, is affirmed. *See generally Director OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991).

In light of our affirmance of the administrative law judge's finding that suitable alternate employment was not established until March 1, 1991, employer's contention that claimant failed to diligently seek employment between 1987 and the March 1, 1991, hearing must necessarily fail. Claimant's due diligence burden does not arise until such time as the availability of suitable alternate employment is established. *Tann v. Newport News Shipbuilding and Dry Dock Co.*, 841 F.2d 540,

21 BRBS 10 (CRT) (4th Cir. 1988); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Accordingly, the administrative law judge's findings regarding the availability of suitable alternate employment and claimant's post-injury wage-earning capacity are affirmed. We note, however, that although the administrative law judge found that suitable alternate employment was established as of March 1, 1991 in the body of his Decision and Order, in the Order portion he erroneously stated that claimant was entitled to permanent total disability compensation through April 30, 1991. As this appears to be a typographical error, the award of benefits is modified to provide that claimant's entitlement to permanent total disability terminated as of February 28, 1991, consistent with the factual findings made by the administrative law judge regarding the availability of suitable alternate employment.

Employer's final argument, that the administrative law judge erred in awarding claimant Section 10(f) cost of living assessments between May 1, 1985, and February 28, 1991, because claimant was not permanently totally disabled during this period, is without merit. Although employer asserts that the administrative law judge erred in finding that claimant's condition became permanent as of May 1, 1985 because additional treatment and surgery was contemplated after that date and because Dr. Llewellyn testified that maximum medical improvement was not reached until November 15, 1988, we disagree.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990), *rev'g Berkstresser v. WMATA Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Leech v. Service Engineering Co.*, 15 BRBS 118 (1982). In the present case, in concluding that maximum medical improvement was reached as of May 1985, the administrative law judge noted that Dr. Llewellyn testified that claimant reached maximum medical response from the third surgical procedure in 1984 at that time. *See* Transcript at 56-57. The administrative law judge also noted Dr. Llewellyn's seemingly contradictory testimony that claimant reached maximum medical response on November 25, 1988, but accepted his explanation of the discrepancy. Dr. Llewellyn testified that when claimant was hospitalized in November 1988, the fact that he had previously reached maximum neurological response from the 1984 surgery was essentially reconfirmed as further surgery had been ruled out because of a possible tumor on claimant's liver. Inasmuch as the administrative law judge finding that claimant reached maximum medical improvement in May 1985 based on Dr. Llewellyn's testimony is rational and supported by substantial evidence, it is affirmed. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990). Moreover, since we have previously affirmed the administrative law judge's finding that the RWRP position was not available to claimant until the March 1, 1991 hearing, employer's assertion that claimant was only partially disabled from the date of maximum medical improvement through February 28, 1991, is also rejected. Accordingly, the administrative law judge's finding that claimant was permanently totally disabled from May 1, 1985 until February 28, 1991 is affirmed, his determination that claimant was entitled to Section 10(f) cost of living

adjustments during this period is also affirmed.

In summary, therefore, we affirm the administrative law judge's determination that claimant is entitled to temporary total disability compensation from March 8, 1982 to April 30, 1985, permanent total disability compensation from May 1, 1985 to February 28, 1991, and permanent partial disability compensation from March 1, 1991, and continuing. 33 U.S.C. §908(a), (b), (c)(21).

Accordingly, the administrative law judge's Decision and Order is modified to reflect that the award of permanent total disability benefits terminated on February 28, 1991, but is, in all other respects, affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge