BRB No. 92-1760

KEISHA SMART-BEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAVY EXCHANGE	)	
	)	
and	)	
	)	
GATES McDONALD AND COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Keisha Smart-Bey, San Diego, California, *pro se*.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff & Tichy), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order - Awarding Benefits (91-LHC-668) of Administrative Law Judge Steven E. Halpern 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). In reviewing this *pro se* appeal, 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).

On September 4, 1984, while working as a cashier for employer, claimant sustained an injury to her lower back while lifting milk crates. Claimant sought temporary total disability compensation through February 19, 1991, and permanent total disability compensation thereafter. The parties stipulated that claimant cannot return to her usual employment as a cashier because of the lifting and carrying which was required.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from September 4, 1984 to July 11, 1985, based upon an average weekly wage of $120.21. Finding that claimant reached maximum medical improvement on July 12, 1985, the administrative law judge also awarded permanent total disability benefits from July 12, 1985, until August 11, 1985, and permanent partial disability benefits from August 12, 1985, to March 28, 1988, based on the difference between claimant's average weekly wage and his post-injury earnings while working as a sales clerk at K-Mart from August 12, 1985, until September 11, 1995. The administrative law judge, however, denied claimant compensation after March 28, 1988, as he found that employer established suitable alternate employment on the open market at that time which paid more than claimant's pre-injury average weekly wage. Claimant, representing herself, appeals, and employer responds, urging affirmance.

Average Weekly Wage

The administrative law judge's determination that claimant's average weekly wage was $120.21 is affirmed. Claimant's average weekly wage is determined at the time of injury by utilizing one of the methods set forth in Section 10 of the Act, 33 U.S.C. §910. Claimant, who was represented by an attorney below, contended that her average weekly wage should be calculated under Section 10(a), 33 U.S.C. §910(a).[1] Claimant argued that she worked a 40-hour week and made $4.08 per hour. Claimant then calculated her average daily wage as $32.48, and determined that this would yield an annual compensation rate of $8,444.80 ($32.48 x 260). The administrative law judge, however, rationally chose not to apply Section 10(a) as that subsection requires evidence of the number of days actually worked to calculate the average daily wage, and such evidence was not available. *See Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1981).[2] Section 10(c) provides a general method for determining average weekly wage where, as here, Section 10(a) or (b) cannot fairly or reasonably be applied. *Lobus v. I.T.O. Corporation of Baltimore, Inc.*, 24 BRBS 137, 139 (1990). Under Section 10(c), the administrative law judge should determine claimant's average annual earnings by arriving at a figure approximating an entire year of work and then dividing this figure by 52. *See Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990). In determining that claimant's average weekly wage is $120.21, the administrative law judge divided claimant's $6,250.80 in actual earnings for the 52 week period prior to her accident by 52 weeks. Inasmuch as this determination is rational and supported by substantial evidence, it is affirmed. *See Lobus*, 24 BRBS at 139.

[1]There is no argument that Section 10(b) of the Act, 33 U.S.C. §910(b), could be applied.

[2]The administrative law judge also rationally determined that the more reliable evidence showed that claimant worked only 29 hours per week. *See* Claimant's Exhibit 23.

Maximum Medical Improvement

We also affirm the administrative law judge's finding that claimant's condition became permanent as of July 11, 1985. An employee is considered permanently disabled if she has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1980). Although claimant argued below that she did not reach permanency until February 19, 1991, at the earliest, the administrative law judge reasonably determined that maximum medical improvement was reached on July 11, 1985, based on the opinion of claimant's treating physician, Dr. Schultz. *See* Employer's Exhibit 23; Transcript at 140. As the administrative law judge's finding that maximum medical improvement was reached as of July 11, 1985, is rational and supported by substantial evidence, it is affirmed. *See also Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 417 (1989).

Disability

The administrative law judge's award of permanent partial disability compensation for the period between August 12, 1985 and March 28, 1988 is also affirmed. Inasmuch as the parties stipulated that claimant was unable to perform her usual employment with employer due to her work-related injury, claimant established a *prima facie* case of total disability. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Accordingly, the burden shifted to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that employer must establish that suitable alternate work was realistically and regularly available on the open market in order to meet its burden. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994). *See also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). One way employer may meet this burden is by showing a suitable job that claimant actually performed after her injury. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986).

In the present case, the administrative law judge found that the sales clerk job claimant held at K-Mart from August 12, 1985 until September 11, 1985, constituted suitable alternate employment which reasonably represented her post-injury wage-earning capacity prior to March 28, 1988, and that she had been terminated from this job for reasons unrelated to her work injury. Claimant argued below that she quit this job because she could not handle it due to her back problem, asserting that although she did not have to do any lifting, she was on her feet all day. The administrative law judge, however, credited a separation report introduced by employer and signed by the claimant over claimant's testimony and concluded that claimant stopped working at K-Mart because she was fired for smoking in the stockroom. The administrative law judge acted within his

discretion in rejecting claimant's testimony, the only evidence of record which suggests that the job at K-Mart was unsuitable. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Inasmuch as the administrative law judge's conclusion that claimant stopped working at K-Mart for reasons unrelated to the subject work injury is supported by substantial evidence, his finding that this job was sufficient to meet employer's burden of establishing suitable alternate employment for the period from August 12, 1985 until March 28, 1988 is affirmed. *See Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). *See generally Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100, 101 (CRT) (4th Cir. 1993).

The administrative law judge's finding that claimant's actual weekly earnings of $75.30 in the job at K-Mart reasonably represented her post-injury wage-earning capacity until March 28, 1988, is also affirmed. Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. Section 8(h) of the Act provides that claimant's wage-earning capacity shall be her actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent her post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The burden of proof is on the party seeking to prove that actual post-injury wages are not representative of claimant's wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). In the present case, the administrative law judge reasonably rejected claimant's evidence and found claimant's earnings at K-Mart established her wage-earning capacity. Accordingly, his finding that claimant sustained a $44.91 loss in her wage-earning capacity for the period between August 12, 1985, and March 28, 1988, is also affirmed.[3]

[3]Although Sections 8(c)(21) and 8(h) of the Act require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects, *see Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990), the administrative law judge's failure to do so in the present case is harmless. As only one year had passed from the time of claimant's injury and the time she worked at K-Mart, any inflationary effect would be negligible.

The administrative law judge's determination that as of March 28, 1988, employer identified suitable alternate employment opportunities available to claimant which paid more than claimant's pre-injury average weekly wage is also affirmed. In so concluding, the administrative law judge reasonably inferred from Dr. Shultz's 1985 report, Claimant's Exhibit 39, and hearing testimony, Tr. at 145-146, 170-172, that claimant is capable of performing full time "light work."[4] After disqualifying several positions as being either physically or vocationally unsuitable, the administrative law judge found that the following jobs identified by employer's vocational expert, Ms. Malamed, in March 1988 constituted suitable alternate employment: Check Cashers Inc., National Pen Corporation, Curtis Mathes, Kraft Moceri, Neostyle and Padre Molding. He further found that the average hourly rate paid for these jobs in 1984 was $3.45 per hour.

The administrative law judge's finding that the positions identified at Check Cashers Inc., National Pen Corporation, Curtis Mathes, Kraft Moceri, Neostyle and Padre Molding were both physically and vocationally suitable for claimant is supported by the testimony of employer's vocational consultant, Ms. Malamed, Tr. at 230-231, the medical opinion of Dr. Schultz, Tr. at 146, and in part by the opinion of claimant's vocational consultant, Dr. Fair. *See also* Employer's Exhibit 60 at 197; Employer's Exhibit 61 at 203; Employer's Exhibit 65; Employer's Exhibit 68 addendum; Tr. at 231.[5] As no salary information was ever provided in connection with the order clerk positions at Kraft Moceri, Padre Molding, and Neostyle, the administrative law judge erred in finding these jobs sufficient to establish claimant's

[4]Dr. Schultz outlined claimant's physical restrictions as including intermittent sitting, walking, squatting, twisting, and standing 6 hours per a day, intermittent lifting a maximum of between 10 and 20 pounds, bending, climbing and kneeling 4 hours per day. Claimant's Exhibit 39. Moreover, at the hearing, Dr. Schultz testified that claimant is capable of performing full-time work and may stand, walk, and sit as much as she'd like as well as lifting up to 15 pounds intermittently, but should avoid heavy lifting, bending, continuous squatting or kneeling.

[5]Claimant argued below that the alternate jobs identified were not geographically suitable because claimant had moved from Mira Mira, where she lived at the time of her injury, to San Ysidro. Based on the opinion of Ms. Malamed that a 25-30 mile radius from claimant's home would provide a reasonable commuting distance, Tr. at 223, and the distances indicated in the *Thomas Guide*, a San Diego street guide and directory, the administrative law judge reasonably determined that employer established suitable alternate employment in the relevant geographic area inasmuch as all of the suitable alternate jobs identified were located within a reasonable commuting distance of one or both of claimant's residences. *See Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 253 (1986).

wage-earning capacity. The precise, nature and terms of the positions identified must be identified before a job constitutes suitable alternate employment. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988). Inasmuch, however, as Ms. Malamed testified at the hearing that the cashier jobs would have paid the minimum wage of $3.35 and that the receptionist jobs would have paid between $3.50 and $5.50 per hour, Tr. at 240-243, the administrative law judge's finding that employer established suitable alternate employment based on the cashier job at Check Cashiers, Inc. and the receptionist jobs at National Pen and Curtis Mathis is affirmed. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995). Inasmuch as this evidence is sufficient to establish that claimant's wage-earning capacity exceeded her pre-injury average weekly wage,[6] his denial of further compensation after March 28, 1988, is affirmed.

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

NANCY S. DOLDER
Administrative Appeals Judge

[6]Once employer shows that suitable alternate employment exists, a claimant can still prevail in establishing total disability by demonstrating that she diligently tried but was unable to secure a job, *see Palombo v. Director, OWCP*, 927 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *CNA Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1045, 14 BRBS 156, 165 (5th Cir. 1981). In the present case, however, the administrative law judge rationally determined that claimant was not diligent in seeking alternate employment.