BRB No. 98-1335

JIMMY RODGERS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRIDE OFFSHORE, INCORPORATED	)	DATE ISSUED: July 8, 1999
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

James E. Cazalot, Jr., New Orleans, Louisiana, for claimant.

Jefferson R. Tillery and Scott A. Decker (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2036) of Administrative Law Judge Clement J. Kennington 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*(the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

Claimant alleged he sustained a back injury during the course of his employment with employer as a roustabout on August 12, 1995. Claimant received emergency room care for a lumbar strain. He began treating the next day with Dr. Cenac, who diagnosed a soft tissue injury. Subsequent MRI testing revealed a bulging disc at L1-2, a disc protrusion at L4-5 and degenerative disc disease. Claimant was treated conservatively by Dr. Cenac, an orthopedist, through April 17, 1996. Claimant, however, continued to complain of radiating lower back pain. Dr. Cenac could not find objective evidence consistent with claimant's symptomatology. He subsequently opined that claimant's back condition reached maximum medical improvement in April 1996, and that he was capable of returning to his regular employment as a roustabout. Claimant continued treatment with Dr. Jackson, a neurosurgeon. In March 1997, Dr. Jackson reported findings of lower back spasm, positive straight leg raising and decreased sensation of the left leg and foot. Dr. Jackson discharged claimant in November 1997, opining that claimant is restricted to light-duty employment as claimant was subject to back pain upon heavy work.

The record also contains reports of treatment for a psychological disorder. On February 14, 1997, claimant refused hospitalization for depression and suicidal ideation. Claimant reported daily marijuana usage for pain relief. A similar diagnosis was obtained on April 14, 1997. Claimant, however, refused a formal psychological evaluation. Such an evaluation was performed on January 28, 1998, immediately prior to the February 2, 1998, formal hearing. At this time, Dr. Muir diagnosed severe depression and recommended counseling and substance abuse treatment. A second evaluation by Dr. Wakeman after the hearing diagnosed mild to moderate depression, an underlying personality disorder and an injury-related pain disorder.

In his Decision and Order, the administrative law judge credited the testimony of claimant and supervisory co-workers Ronnie Melancon and Cedric Bernard, as well as the medical evidence, to find that claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), linking his back injury to his employment. He found that employer failed to rebut the presumption. The administrative law judge also found that claimant sustained psychological injuries as a direct result of his back injury, specifically, depression and a pain disorder. Moreover, he found that the back injury aggravated a pre-existing personality disorder and claimant's substance abuse problem. The administrative law judge credited the opinion of Dr. Cenac that claimant's back injury reached maximum medical improvement as of April 1996. However, he credited the opinion of Dr. Jackson to find that claimant is limited to light-duty and cannot return to his usual employment with employer as a roustabout due to the work-related back injury. The administrative law judge also found that claimant is temporarily totally disabled by his untreated psychological conditions. The administrative law judge opined that claimant has the capacity to work, but he

found that employer's vocational consultant, Dawn Esposito, did not account for claimant's pain level or mental impairment when locating available jobs within claimant's work restrictions. Thus, he found that employer did not establish the availability of suitable alternate employment. The administrative law judge ordered employer to provide future medical expenses, specifically including intensive psychiatric/psychological intervention, a formal behavioral modification pain management program and a substance abuse assessment. Finally, the administrative law judge determined that claimant's average weekly wage was $437.25 pursuant to Section 10(b) of the Act, 33 U.S.C. §910(b). Accordingly, claimant was awarded continuing benefits for temporary total disability from August 12, 1995, and medical care, including mental health treatment.

In his Order Denying Motions for Reconsideration and for Leave to Supplement Record, the administrative law judge determined that employer's reconsideration motion was untimely filed, and he denied employer's motion to supplement the record with additional psychological and vocational evidence, agreeing with claimant that granting employer's motion would require that he allow claimant the opportunity to rebut employer's new evidence.[1]

On appeal, employer contends that the administrative law judge erred in finding that claimant is temporarily totally disabled and that it failed to establish the availability of suitable alternate employment. Employer also challenges the administrative law judge's average weekly wage determination. Claimant responds, urging affirmance.

[1]Employer appealed the denial of this motion to the Board. BRB No. 98-1410. The Board dismissed employer's appeal for lack of jurisdiction as the administrative law judge found the motion for reconsideration was untimely. *See* 20 C.F.R. §802.206. Employer appealed the Board's dismissal of its appeal of the administrative law judge's denial of reconsideration to the United States Court of Appeals for Fifth Circuit, where it is pending. No. 98-60554. This appeal was timely filed after the administrative law judge's initial decision.

Employer first contends that the administrative law judge's finding that claimant is temporarily totally disabled is not supported by the weight of the evidence. The administrative law judge found that claimant is not capable of returning to his usual employment solely as a result of his work-related back injury. In so doing, he credited the opinion of claimant's second treating physician, Dr. Jackson, and the supporting opinions of Drs. Walker and Guidry.[2] EXS 5, 7; CX 10. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). In the instant case, we hold that the administrative law judge's decision to credit the disability opinion of Dr. Jackson, as supported by the opinions of Drs. Walker and Guidry, is rational, and his findings are supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359. Accordingly, as these opinions establish that claimant cannot perform heavy work and it is uncontested that claimant's work for employer involved heavy-duty labor, claimant established a *prima facie* case of total disability.[3] *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Employer next argues that it established the availability of suitable alternate employment. Employer contends that the administrative law judge erred in discrediting its vocational consultant on the basis that she did not account for claimant's psychological injuries, as the issue of the existence of a psychological injury was not raised until the hearing and Ms. Esposito thus did not have an opportunity to incorporate the evidence of psychological injury in her reports. Moreover, employer contends there is no medical evidence that claimant's mental impairments preclude his working in light-duty employment. Once claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic

[2]Dr. Walker opined that a return to unrestricted work would likely re-injure claimant's back. CX 11 at 7. Dr. Guidry recommended a work hardening program. EX 7 at 2.

[3]Insofar as employer, in challenging the administrative law judge's finding that claimant's testimony with regard to his temporary total disability was credible, also contests his crediting of claimant's testimony that he sustained a work-related back injury on August 12, 1995, we note that the administrative law judge also credited the testimony of Mr. Melancon, Mr. Bernard, and medical evidence in this regard.

area where claimant resides, which claimant, by virtue of his age, education, work experience and physical or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge may rely on the testimony of vocational counselors that job openings exist to establish the availability of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The administrative law judge should determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (Ramsey, C.J., dissenting on other grounds), *motion for recon. denied,* 17 BRBS 160 (1985). A vocational counselor's testimony may be rationally discredited if the counselor fails to take into consideration all relevant restrictions found by the administrative law judge. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Ms. Esposito conducted labor market surveys on May 27, 1997, and January 20, 1998. In the former survey, she identified jobs claimant could perform without work restrictions. In the latter survey, she identified light-duty as well as full-duty positions. She testified at the February 2, 1998, formal hearing that she did not account for psychological injuries when conducting the surveys. Tr. at 225. Claimant received a psychological assessment from Dr. Muir on January 23, 1998, and from Dr. Wakeman on March 30, 1998. The administrative law judge found that because Ms. Esposito did not account for either claimant's pain level or mental impairment, employer could not establish suitable alternate employment with these surveys. While the administrative law judge found that claimant has the capacity to work and he did not "fully credit" claimant's complaints of pain, he found that claimant has experienced severe depression and some severe pain since the August 12, 1995, work injury. Based on his findings that claimant cannot return to his usual employment and that employer's evidence of suitable alternate employment is insufficient, the administrative law judge awarded claimant benefits for temporary total disability from August 12, 1995. Decision and Order at 17-18.

We hold that the administrative law judge rationally discredited employer's vocational evidence. Although the psychological assessments were performed after the labor market surveys, employer had the opportunity to respond to this evidence. Dr. Muir's report was admitted into evidence at the hearing, and the administrative law judge left the record open for an additional sixty days for an independent psychological evaluation and "whatever follow-up you want to do with regard to the psychologist." Tr. at 233. Thus, employer was provided the opportunity to schedule its own evaluation and to timely submit additional vocational evidence based on the

reports of Drs. Muir and Wakeman. It did not do so. Moreover, while neither of the reports specifically discuss the effect of claimant's psychological impairments on his employability, employer has the burden of establishing suitable jobs claimant could perform as injured. *See Turner*, 661 F.2d at 1040-1041, 14 BRBS at 163. Thus, the administrative law judge rationally found employer's vocational evidence was insufficient as it failed to account for the effect of claimant's psychological impairments on his work capabilities. As the administrative law judge committed no error in this regard, his conclusion that employer failed to establish the availability of suitable alternate employment must be affirmed.[4] *See Canty*, 26 BRBS at 151-152. Accordingly, we affirm the administrative law judge's award of continuing benefits for temporary total disability.

Finally, we address employer's contention that the administrative law judge erred by not computing claimant's average weekly wage pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). Employer contends that claimant's work for another employer as a deckhand within one year prior to the date of injury is substantially similar to claimant's work for employer as a deckhand, and that the combined wages for both jobs during the year prior to the August 12, 1995, injury should be used to calculate claimant's average weekly wage under Section 10(a). The administrative law judge found Section 10(b) applicable. He incorporated claimant's $8.25 per hour wage rate at the date of injury and evidence of the hours worked by similar employees to derive an average weekly wage of $437.25. EX 11, 22 at 3.

We reject employer's contention. Claimant worked for employer as a deckhand on an offshore oil rig. He worked seven days per week and was then off-work for seven days. Section 10(a) is therefore inapplicable as its plain language, and that of Section 10(b), limit their applicability to employees working either five or six days per week.[5] When neither Section 10(a) or (b) can fairly or reasonably be

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[4]We note employer's argument that the administrative law judge erred by failing to address claimant's refusal to meet with Ms. Esposito for a vocational assessment. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Under the facts of this case, however, any error is harmless, as the administrative law judge rationally discredited the surveys based on the failure to include claimant's psychological condition. Employer was thus not prejudiced by claimant's failure to meet with Ms. Esposito, as claimant's refusal was not a factor contributing to its not meeting its burden of establishing suitable alternate employment.

[5] Sections 10(a), (b), provide in pertinent part:

(a) If the injured employee shall have worked in the employment in which he was working at the time of injury, ... his average annual earnings shall consist of

applied to calculate claimant's annual earning capacity at the time of injury, Section 10(c) provides a general method for determining average weekly wage. The administrative law judge has great discretion in determining annual earning capacity under Section 10(c). *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part,* 600 F.2d 1288 (9th Cir. 1979). In this case, any error by the administrative law judge in purporting to calculate claimant's average weekly

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three hundred times the average daily wage or salary *for a six-day worker* and two hundred and sixty times the average daily wage or salary *for a five-day worker* ....

(b) [H]is average daily earnings if a *six-day worker*, shall consist of three hundred times the average daily wage or salary and, if a *five-day worker*, two hundred and sixty times the average daily wage or salary, which an employee of the same class...shall have earned in such employment during the days when so employed.

33 U.S.C. §910(a), (b) (*emphasis added*).

wage pursuant to Section 10(b) is harmless.[6] As Section 10(c) permits the use of data pertaining to similar employees, the administrative law judge acted within his authority under Section 10(c) in crediting claimant's hourly rate of pay at the date of injury and calculating the number of days claimant would have been employed during the year prior to the work injury based on the work available to employees of the same class. 33 U.S.C. §910(c); *see Harrison v. Todd Pacific Shipyard Corp.*, 21 BRBS 339 (1988). Accordingly, we affirm the administrative law judge's average weekly wage determination.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6]Section 10(b) requires calculating claimant's average daily wage based on the earnings of a similar employee, and multiplying this wage by 260 or 300 depending on whether claimant is a five or six day per week employee. 33 U.S.C. §910(b); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). The administrative law judge did not apply this formula in calculating claimant's average weekly wage.