BRB No. 98-1432

LAWRENCE CLAYTON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRINITY MARINE	)	DATE ISSUED: July 28, 1999
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motions for Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence J. Clayton, Jr., Port Arthur, Texas, *pro se*.

Michael D. Murphy (Eastham, Watson, Dale & Forney, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order and Order Denying Motions for Reconsideration (95-LHC-2280) of Administrative Law Judge Lee J. Romero, 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §§802.211(e), 802.220. Employer responds, urging affirmance.

While working as a shipfitter for employer on January 12, 1994, claimant sustained injuries as a result of a 20 foot fall. At the hospital, Dr. Ragula diagnosed a fracture of claimant's 7th, 8th, and 9th ribs on his right side and an abrasion of claimant's left forearm, he prescribed medicine, and indicated that claimant could return to modified light duty work the next day, and work in that capacity for ten days. At his follow-up visit on January 22, 1994, claimant complained of right-sided chest pain and Dr. Ragula extended claimant's light-duty work restriction for an additional ten days. Claimant returned to work in a light-duty position with employer and remained in that position until August 13, 1994, when as a result of employer's decision to shut down its facility, he lost his job. Claimant has not returned to any type of work since then.

Meanwhile, continued right-sided chest pain prompted claimant to visit his family physician, Dr. Lee, on January 19, 1994. Dr. Lee initially provided treatment for claimant's resolving rib fracture, released him for transitional work on February 9, 1994, and then on July 28, 1994, projected a "full [work] release in approximately four to six weeks," with continued compliance with his work restrictions and treatment regime. Claimant's Exhibit 2. In August 1994, Dr. Lee began conservative treatment of claimant's complaints of back pain, which Dr. Lee associated to the work-related accident.[1] Claimant also was examined by Drs. Haig, Caram, and Wilde, each of whom concluded that claimant reached maximum medical improvement with regard to his work-related rib injury.[2] Employer conceded claimant's entitlement to temporary partial disability for certain weeks in which claimant earned less than his average weekly wage at his light-duty job.

[1]Dr. Lee specifically opined that claimant's chronic intermittent right rib pain, chronic right hip pain, chronic lumbar pain with intermittent left leg pain and chronic posterior cervical pain were related to his work accident.

[2]A fourth examining physician, Dr. Stovall, did not offer any opinions regarding claimant's physical condition or whether claimant reached maximum medical improvement.

In his Decision and Order, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption with regard to both his rib and alleged back injuries and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's rib and back injuries are work-related. The administrative law judge then found that claimant could not return to his pre-injury position as a shipfitter due to his rib injury, but that employer established the availability of suitable alternate employment by means of the light-duty position claimant held within its facility. The administrative law judge, however, determined that claimant is entitled to temporary total disability benefits from the date of his lay-off with employer until the date he reached maximum medical improvement without any residual disability. Consequently, the administrative law judge concluded that claimant is entitled to temporary total disability from August 13, 1994, to February 26, 1995, and temporary partial disability for the weeks of January 16, 1994 through February 27, 1994, March 13, 1994 through May 29, 1994, and August 7, 1994 through August 14, 1994. 33 U.S.C. §908(b), (e). Lastly, the administrative law judge awarded claimant all reasonable and authorized medical benefits. The administrative law judge denied claimant's motions for reconsideration by Order dated July 10, 1998.[3]

Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined solely by medical evidence. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order 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. Where, as in the instant case, claimant is unable to perform his usual employment, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is realistically able to secure and perform. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). Employer can meet its burden by offering claimant a

[3]As the administrative law judge noted in his Order, claimant filed three separate requests for reconsideration in which he questioned the administrative law judge's conclusions, argued that since he was unrepresented he did not receive the requisite due process in this case, and that his compensation rate should be modified.

suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996).

In determining the nature and extent of claimant's work-related disability, the administrative law judge reviewed the relevant evidence of record, noting that Drs. Caram and Wilde each opined that claimant reached maximum medical improvement for his rib injury on February 27, 1995, that Dr. Haig opined that claimant reached maximum medical improvement by December 12, 1994, and that although Dr. Lee did not specifically express an opinion regarding maximum medical improvement, his notes nonetheless establish that claimant reached a state of stability at least by March 28, 1995. The administrative law judge therefore concluded, consistent with the weight of the reasoned medical evidence of record, that claimant reached maximum medical improvement with regard to his work-related rib injury on February 27, 1995. Moreover, based on the opinions of Dr. Caram, who, despite agreeing with the 2 percent permanent impairment rating established by an independent work ready program, concluded that claimant could return to his normal duties, and Drs. Haig and Wilde, who each opined that claimant did not have any residual permanent disability from his work-related injuries, the administrative law judge concluded that claimant suffered no disability after reaching maximum medical improvement. In so finding, the administrative law judge explicitly noted that Drs. Caram, Haig and Wilde are more highly credentialed than Dr. Lee. Furthermore, the administrative law judge did not credit claimant's testimony that his back symptoms were either exacerbated by continuing to work for employer, or were not prominent until his rib pain subsided, as there is no objective evidence to support his subjective complaints of back and neck pain and his testimony was not factually precise and was characterized by equivocation and inconsistencies. The administrative law judge is entitled to evaluate the credibility of all witnesses, and may draw his own inferences and conclusions from the evidence. *See, e.g., Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In the instant case the credibility determinations made by the administrative law judge in resolving the issue of claimant's entitlement to benefits are rational and within his authority as factfinder. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). We therefore affirm the administrative law judge's determination that claimant reached maximum medical improvement with no residual disability on February 27, 1995, and the consequent award of temporary total disability benefits from the date of his lay-off from employer on August 13, 1994, until February 27, 1995, as it is rational, supported by substantial evidence, and in accordance with law. Furthermore, we affirm the administrative law judge's award of temporary partial disability benefits in addition to those benefits previously conceded by employer as that award is unchallenged on appeal.

Claimant's average weekly wage is determined at the time of injury by utilizing one of three methods set forth in Section 10 of the Act, 33 U.S.C. §910. *See* 33 U.S.C. §910(a)-(c). Section 10(a) applies when claimant has worked in the same or comparable employment for substantially the whole of the year immediately preceding the injury and provides a specific formula for calculating annual earnings. Where claimant's employment is regular and continuous, but he has not been employed in that employment for substantially the whole of the year, the wages of similarly situated employees who have worked substantially the whole of the year may be used to calculate average weekly wage pursuant to Section 10(b). Section 10(c) provides a general method for determining annual earning capacity where Section 10(a) or (b) cannot fairly or reasonably be applied to calculate claimant's average weekly wage at the time of injury. *Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1991).

In considering this issue, the administrative law judge first found that as claimant worked substantially the entire year prior to his injury on January 12, 1994, with employer, claimant's average annual wage is to be calculated under Section 10(a). Reviewing claimant's payroll records with employer over that period of time, the administrative law judge rationally determined that claimant worked a total of 240.2 days,[4] during which time he earned $20,622.43, giving claimant an average daily wage of $85.86. The administrative law judge then determined that claimant worked a five-day week and, accordingly, multiplied his average daily wage by 260, as set out in Section 10(a), which yields an average annual wage of $22,323.60. Pursuant to Section 10(d), the administrative law judge divided claimant's average annual wage of $22,323.60 by 52 to conclude that claimant's average weekly wage is $429.30. As the administrative law judge's calculation of claimant's average weekly wage is consistent with the statute and supported by substantial evidence, it is affirmed. *See generally SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57 (CRT)(5th Cir. 1996).

Lastly, we reject claimant's allegation that the administrative law judge was

[4]In calculating this figure, the administrative law judge divided claimant's total hours by an average eight-hour day. There is no evidence in the record to suggest that claimant regularly worked more than an eight-hour day. *Cf. Wooley v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 98-501 (June 22, 1999).

biased in his resolution of this case, as adverse rulings, alone, are insufficient to show judicial bias. *See Olsen v. Triple A Machine Shops, Inc.,* 25 BRBS 40, 45-46 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge