BRB No. 03-0590

MICHAEL T. BREMBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: JUN 8, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Order Denying Motion to Reopen the Record and Decision and Order on Second Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Order Denying Motion to Reopen the Record and Decision and Order on Second Remand (97-LHC-2640) of Administrative Law Judge Fletcher E. Campbell, 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 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).

This case is before the Board for the third time. Claimant injured his left wrist on April 5, 1995, while grinding welds. Claimant was on and off restricted duty over the next several months, and he underwent surgery for a ganglion cyst on October 31, 1995. Employer paid claimant temporary total disability compensation from October 31, 1995,

until November 15, 1995. EX 18. Claimant returned to restricted duty on November 16, 1995. Commencing on May 29, 1996, claimant's work restrictions were reinstituted and discontinued on several occasions. The last set of restrictions was placed on November 1, 1996, with an expiration date of February 20, 1998. On December 6, 1996, employer laid off claimant from his light duty job at employer=s facility for economic reasons. Thereafter, claimant commenced full-time employment with Norfolk Naval Shipyard on February 24, 1997. Claimant filed a claim against employer under the Act for temporary total disability benefits from December 6, 1996, through February 24, 1997.

In his first Decision and Order, the administrative law judge found that claimant failed to present sufficient evidence to establish invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and thus found that claimant=s wrist injury is not work-related. Thus, the administrative law judge denied benefits, and thereafter denied claimant=s motion for reconsideration.

On appeal, the Board reversed the administrative law judge=s finding of no causation and held that claimant=s condition is work-related as a matter of law. Additionally, the Board vacated the administrative law judge=s denial of disability compensation and remanded the case for the administrative law judge to reconsider claimant=s entitlement to disability benefits in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Norfolk Shipbuilding & Drydock Co. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), since claimant was employed in a light duty job in employer=s facility at the time of his layoff. *Bremby v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0325 (Dec. 16, 1999)(unpub.). The Board denied employer's motion for reconsideration. *Bremby v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0325 (Mar. 31, 2000) (order on reconsideration) (unpub.).

On remand, the administrative law judge found that claimant did not establish a *prima facie* case of total disability; alternatively, the administrative law judge found that employer established the availability of suitable alternate employment during the period at issue, and he therefore once again denied the compensation benefits sought by claimant.

Claimant appealed this second decision to the Board, which subsequently held that the administrative law judge failed to follow the Board=s remand order and erroneously considered the issue of whether claimant established a *prima facie* case of total disability. The Board affirmed the administrative law judge's finding that employer established that suitable alternate employment was available between December 6, 1996, and February 24, 1997, but remanded the case for the administrative law judge to consider whether claimant rebutted employer's evidence of suitable alternate employment by establishing

that he diligently sought employment post-injury. *Bremby v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 02-0216 (Oct. 24, 2002)(unpub.).

In an Order Denying Motion to Reopen the Record and Decision and Order on Second Remand, the administrative law judge found that claimant did not establish due diligence in seeking employment, and he denied both claimant's motion to reopen the record to receive evidence on this issue and his proffer of evidence attached to claimant's post-hearing brief. Thus, the administrative law judge once again denied claimant's claim for benefits.

In the present appeal, claimant challenges the administrative law judge's finding that he did not establish that he diligently sought employment following his lay-off from employer. In the alternative, claimant alleges that he is entitled to an award of temporary partial disability compensation. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Claimant initially challenges the administrative law judge's determination that claimant did not establish that he diligently sought alternate employment. It is well established that a claimant may rebut an employer=s showing of suitable alternate employment, and thus retain entitlement for total disability benefits, if he shows that he diligently pursued alternate employment opportunities but was unable to secure a position. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT (4th Cir. 1988); *Roger=s Terminal & Shipping Corp. v. Director, OWCP*, 781 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). In addressing this issue in his second decision on remand, the administrative law judge noted that he had previously discredited both claimant's testimony that he attempted to return to his former light duty job with employer and his uncorroborated testimony that he looked for outside jobs. Because he found that claimant was not a credible witness, the administrative law judge declined to credit claimant's testimony that he had applied for "everything" listed in an unidentified document and that he had applied for 20-25 jobs. In rendering this determination, the administrative law judge reasoned that claimant did not present a list or otherwise identify the jobs for which he allegedly applied; he did not produce the documents from which he obtained job leads or present any corroboration of his allegation that he had contacted anyone looking for a job. Decision and Order on Second Remand at 3. The administrative law judge additionally determined that claimant is not a credible witness on the basis that in his deposition claimant testified that he kept a calendar of the jobs he performed on various ships, which he showed to employer's attorney, but at the formal hearing claimant denied the existence of the calendar despite having an opportunity to refresh his memory from the deposition transcript and hearing

the administrative law judge's admonition to tell the truth under oath. Decision and Order at 8; Tr. at 60-69; EX 26 at 1-2. Accordingly, as claimant's testimony constituted the only evidence of record on this issue, the administrative law judge concluded that claimant did not establish that he diligently yet unsuccessfully sought employment following his lay-off. *See* Decision and Order on Second Remand at 3.

After a review of the record, we affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. *See O'Keeffe*, 380 U.S. 359. It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In the instant case, the administrative law judge fully considered claimant's testimony and provided reasons supporting his decision not to rely upon it. On the basis of the record before us, the administrative law judge's decision in this regard is neither inherently incredible or patently unreasonable. Accordingly, we affirm the administrative law judge's determination that claimant failed to establish that he diligently sought employment post-injury. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT (5th Cir. 1995).

Claimant next challenges the administrative law judge decision to deny his motion to reopen the record for the taking of additional testimony and his refusal to accept into the record additional evidence regarding his job search. We reject claimant's argument. Claimant attached to his post-hearing brief on remand a list of employers whom he allegedly contacted about potential jobs. The administrative law judge refused to admit this evidence, which he presumed was an offer of proof on claimant's part that he would testify that he contacted these businesses on specific dates seeking work, because claimant gave no reason why he could not have submitted this evidence in 1998 or 2001. The administrative law judge also denied claimant's motion to reopen the record for additional evidence on this issue, stating that claimant made no offer of proof as to what additional evidence he would adduce and did not allege that he had any new evidence which could not have been presented at the hearing or in the five years which have since passed.[1] Decision and Order on Second Remand at 3-4.

[1] The administrative law judge noted that the record had already been reopened once for claimant's testimony on remand. *See* Tr. II (May 16, 2001).

An administrative law judge has considerable discretion in ruling on requests for the admission of evidence into the record. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); 20 C.F.R. §§702.338, 702.339. Thus, the Board may overturn such determinations only if they are arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, a party seeking to admit evidence must exercise due diligence in developing it prior to the hearing. *See Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989). In the instant case, the administrative law judge acted within his discretion in declining to reopen the record and provided rational reasons for excluding the new exhibit claimant offered. Decision and Order at 3-4. On appeal, claimant has not demonstrated that the administrative law judge's decision not to reopen the record is arbitrary, capricious, or an abuse of discretion. It is therefore affirmed. *See Williams v. Marine Terminals Corp.*, 14 BRBS 728 (1981).

In the alternative, claimant argues the administrative law judge erred in failing to consider his entitlement to an award of temporary partial disability compensation for the period between his December 6, 1996, layoff through February 5, 1997, when he began working for another employer. Claimant's contention has merit. While the instant claim involves a scheduled injury, the parties have consistently addressed the issue presented as one involving claimant's potential entitlement to *temporary* total disability compensation. A claim for total disability benefits, however, includes any lesser degree of disability.[2] *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201, 204 n.2 In the instant case, once employer established the availability of suitable alternate employment, the extent of claimant's disability was at most partial, rather than total. Although both parties, in their respective briefs, address the issue of when claimant's condition reached maximum medical improvement, this issue was never addressed by the administrative law judge. A determination as to the nature of claimant's disability, *i.e.*, whether it is temporary or permanent is necessary since, while the Act's schedule is the exclusive remedy available to claimant once his condition reaches permanency, *see Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), an award of temporary partial disability compensation based upon the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity is appropriate if claimant's

[2] Moreover, contrary to employer's allegation, claimant specifically, raised this issue before the administrative law judge in his brief on remand dated February 26, 2003. Brief of claimant to the administrative law judge on second remand at 10. In fact, in its brief to the Board on claimant's initial appeal, employer argued that based on its showing of suitable alternate employment, claimant "is not entitled to an award or, in the alternative, is limited to an award of temporary partial disability." Employer's Brief of April 28, 1999.

disability remained temporary during the relevant period of time.[3] *See* 33 U.S.C. §908(e); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1988). As the administrative law judge's finding that claimant was not totally disabled from December 6, 1996, through February 5, 1997, is affirmed, we remand this case for the administrative law judge to determine the nature of claimant's disability and his potential entitlement to benefits pursuant to Section 8(e) of the Act during this period of time.

Accordingly, the administrative law judge=s finding that claimant did not establish that he diligently sought employment is affirmed, his denial of benefits during the period December 6, 1996 through February 5, 1997, is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3] The parties stipulated that claimant's average weekly wage was $694.98. Moreover, the labor market survey establishing suitable alternate employment states that claimant has an earning capacity of $205.20 per week in these jobs. EX 22.