BRB Nos. 99-0607
and 99-0607A

DAVID K. WILSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ATLAS WIRELINE SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
CNA INSURANCE COMPANIES	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

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

David K. Wilson, Ellisville, Mississippi, *pro se*.

Thomas J. Smith and Kevin A. Marks (Galloway, Johnson, Tompkins & Burr), New Orleans, Louisiana, for employer/carrier.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals

Judges.

PER CURIAM:

Claimant, representing himself, appeals, and employer cross-appeals, the Decision and Order and Order Granting in Part and Denying in Part Motion for Reconsideration (98-LHC-255) 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 laws judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

Claimant injured his lower back on December 27, 1988, during the course of his employment for employer as a field engineer. On February 6, 1989, claimant had a lumbar hemilaminectomy and diskectomy, which was performed by Dr. Lowry. Claimant obtained work as an auto parts service writer on January 22, 1990; however, he quit this job due to back pain on June 16, 1990 and has not worked since. On June 10, 1996, Dr. Lowry installed a TENS unit, which he removed a week later as it was ineffective for pain relief. On October 10, 1996, claimant received a morphine pump, which has provided some relief; however, claimant also requires Darvocet on occasion. Dr. Lowry subsequently recommended psychological counseling for depression and suicidal and homicidal ideation. Claimant was seen by Lynda Thoms, a psychological counselor, in December 1997, who diagnosed depression and post-traumatic stress. He was also evaluated by Drs. Kamp and Maggio, both of whom opined that claimant is unable to work due to his psychological condition.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant sustained a work-related orthopaedic injury. He credited the opinions of Ms. Thoms, Dr. Kamp and Dr. Maggio to find that claimant established a *prima facie* case of a work-related psychological injury and thus invoked the presumption in Section 20(a) of the Act, 33 U.S.C. §920(a); he further found that employer failed to produce sufficient evidence to rebut the Section 20(a) presumption. He credited the opinion of Dr. Lowry that claimant's back condition reached maximum medical improvement on May 19, 1997, and the opinions of Ms. Thoms, Dr. Kamp and Dr. Maggio to find that claimant's depression has not reached maximum medical improvement. Furthermore, he credited the work restrictions placed by Drs. Lowry and Helveston, both of whom limited claimant to

lifting no more than 25 pounds. Dr. Helveston also opined that any job should allow for alternate sitting and standing, while Dr. Lowry further opined that claimant could, at best, perform sedentary work for a couple of hours at a time and, ideally, claimant would have frequent rest breaks when he could lie down. The administrative law judge found that employer failed to establish the availability of suitable alternate employment. He credited the vocational opinions of Dr. Stokes and Mr. Carlisle that claimant is unemployable at present due to his physical and psychological limitations. Claimant was awarded compensation for temporary total disability, 33 U.S.C. §908(b), from the date of injury, December 27, 1988, to January 22, 1990, and from June 16, 1990, to the present and continuing. Claimant was awarded compensation for temporary partial disability, 33 U.S.C. §908(e), from January 22, 1990, to June 16, 1990. On reconsideration, the administrative law judge rejected claimant's contention that his conditions are permanent.

The administrative law judge determined claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c). He credited claimant's testimony that he worked seven days on and seven days off. He thus calculated a bi-average weekly wage of $1,193.08 and a bi-weekly compensation rate of $795.43. The administrative law judge modified this finding on reconsideration, however, crediting claimant's 1988 W-2 form to find claimant earned $49,139.29 in 1988, which, when divided by 52, yields an average weekly wage of $944.39. Pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a), employer was ordered to pay for reasonable and necessary, past and present medical treatment for claimant's back and psychological conditions. The administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f). Employer relied on a medical report from a 1979 automobile accident which noted that claimant may have suffered a possible disc condition and left leg radiculopathy. The administrative law judge found that this report failed to establish a pre-existing permanent partial disability or that any pre-existing disability contributed to claimant's total disability due to his work-related back injury and depression. Finally, employer was held liable for a penalty pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), from August 1 through October 14, 1997.

On appeal, claimant, representing himself, challenges the administrative law judge's findings as to the date of maximum medical improvement for his back and psychological injuries, the award of compensation for temporary partial disability while he worked as a service writer, and the administrative law judge's average weekly wage determination. Claimant further contends that he is entitled to medical benefits for hypertension, and to interest on medical bills he paid, and he raises the alleged applicability of Sections 14(f), 18(a), 30(a), and 31(c), 33 U.S.C. §§914(f), 918(a), 930(a), 931(c). Employer responds, urging rejection of claimant's

contentions. BRB No. 99-0607. In its cross-appeal, employer contends that it established the availability of suitable alternate employment within the restrictions imposed by claimant's back injury, and that it established entitlement to Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's finding on these issues. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. BRB No. 99-0607A.

Claimant initially contends that the administrative law judge erred by finding that his back injury reached maximum medical improvement on May 19, 1997, arguing that the administrative law judge should have credited evidence that his back condition stabilized on December 19, 1989. Moreover, claimant contends that the administrative law judge erred in finding that he remains temporarily disabled by his psychological condition.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period, *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), or if he has any residual impairment after reaching maximum medical improvement, the date of which is determined by medical evidence. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

Regarding claimant's back injury, claimant's treating physician, Dr. Lowry, stated on December 19, 1989, that claimant's back had reached maximum medical improvement post-surgery; however, he subsequently opined that claimant's back stabilized on May 19, 1997. EX 26 at 29-31. In this regard, claimant's continuing back complaints resulted in Dr. Lowry's installing, in 1996, a TENS unit and, after claimant failed to obtain any relief, a morphine pump, from which claimant reported significant improvement of his pain symptomatology. EX 26 at 14-18; Tr. at 57-61. Dr. Lowry further testified that claimant's back condition thereafter stabilized. EX 26 at 17-18. Based on the evidence of record, we affirm the administrative law judge's crediting of Dr. Lowry's testimony that claimant's back condition reached maximum medical improvement on May 19, 1997, after claimant's pain significantly improved. *See generally Cooper v. Offshore Int'l Pipelines, Inc.,* 33 BRBS 46, 51-53 (1999). Regarding claimant's psychological condition, Ms. Thoms's opinion is uncontradicted that claimant requires continuing treatment and that his condition has

not reached maximum medical improvement. EX 28 at 57-58. Accordingly, the administrative law judge's finding that claimant is temporarily totally disabled due to his psychological injury is supported by substantial evidence and is affirmed. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994).

Claimant next contends that the administrative law judge erred in determining that his average weekly wage at the date of injury is $944.39. Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous, and he is a five or six day per week worker. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied. The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part,* 600 F.2d 1288 (9th Cir. 1979).

In the present case, the administrative law judge properly utilized Section 10(c) to calculate claimant's average weekly wage as claimant was not a five or six day per week employee; rather he worked seven days on and seven days off. Section 10(a) or (b) therefore cannot be applied. *See Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 89 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999). Moreover, the administrative law judge rationally relied on claimant's 1988 W-2 form to calculate claimant's average weekly wage in the year preceding his December 27, 1988, work injury. His finding on reconsideration of an average weekly wage of $944.39 therefore is affirmed.[1] *See generally Fox v. West State,*

[1]Claimant's remaining arguments, concerning the alleged applicability of penalties and fines pursuant to Sections 30(a) and 31(c), the temporary partial disability award in 1990, and the compensability of his hypertension will not be addressed as they are raised for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). We note claimant's allegation that he is entitled to a penalty pursuant to Section 14(f), 33 U.S.C. §914(f), for employer's late payment of compensation. This contention must first be raised before the district director. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 157 (1989). Moreover, while there is no supporting evidence of record that claimant was

Inc., 31 BRBS 118 (1997).

In its cross-appeal, employer argues that the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment within claimant's work restrictions from his back injury. Specifically, employer cites to videotape surveillance evidence, the work restrictions of Drs. Lowry and Helveston that claimant could perform sedentary work, and the vocational testimony of Dr. Stokes to contend that claimant's back condition allows him to work at the positions it identified as evidence of suitable alternate employment.

Where, as here, it is uncontested that claimant is unable to return to his usual employment as a field engineer, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden under the standard set forth in *Turner*. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212 (CRT) (5th Cir. 1999).

In the instant case, the administrative law judge found the surveillance evidence of claimant building a garage type structure unpersuasive because the videotape did not reveal whether claimant was working in pain and there is no evidence of what claimant did after working; moreover, he noted that most of the times claimant was filmed he remained at home. Decision and Order at 33. In discussing the work restrictions of Drs. Lowry and Helveston, the administrative law judge specifically credited Dr. Lowry's testimony that claimant would require frequent rest breaks and would need to lie down during the day. Decision and Order at 31-33, 36; *see* EX 26 at 35-36. Finally, the administrative law judge credited the vocational opinions of Mr. Carlisle and Dr. Stokes that prospective employers were unlikely to hire claimant under this restriction. Decision and Order at 36; *see* EX 30 at 53-59.

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not paid interest by employer for covered medical bills that he paid himself, we note claimant's entitlement to interest on any bills he actually paid. *See Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75, 79-80 (1997).

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; 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); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, we hold that the administrative law judge's decision to find employer's video surveillance evidence unpersuasive and to credit instead the work restrictions of Drs. Lowry and Helveston, as well as the opinions of Drs. Stokes and Carlisle consistent with these restrictions, is rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, the administrative law judge's finding that claimant is not realistically employable at this time due to his back injury is supported by substantial evidence, and is affirmed.[2] Moreover, as employer does not challenge the administrative law judge's finding that claimant is temporarily totally disabled by his psychological disability, we affirm his conclusion that employer failed to establish the availability of suitable alternate employment. *Lostanau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.,* 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied,* 459 U.S. 1104 (1983).

Finally, employer contends that the administrative law judge erred by denying its request for Section 8(f) relief. Specifically, employer argues the administrative law judge erred by finding that employer failed to establish that claimant had a pre-existing permanent partial disability. Section 8(f) shifts liability for compensation for permanent disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury. *Ceres Marine Terminal v. Director, OWCP,* 118 F.3d 387, 31 BRBS 9 (CRT)(5th Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP,* 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In the instant case, the administrative law judge found that employer failed to establish either the pre-existing permanent partial disability element or that any such disability contributed to claimant's total disability from his back and psychological injuries. As employer does not challenge the administrative law judge's finding that

[2]Thus, we need not address employer's contention that the administrative law judge erred in finding that the jobs it identified lack specificity as to their requirements.

it failed to establish that claimant's total disability is not due solely to the work injury, we need not address employer's contention that it established a pre-existing partial disability.[3] Moreover, we note that Section 8(f) relief is inapplicable, as here, where the claimant's total disability remains temporary. *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.,* 17 BRBS 183 (1985). Therefore, the administrative law judge's denial of Section 8(f) relief is affirmed.

[3]Following its argument that claimant has a pre-existing permanent partial disability, employer summarily states that, *ipso facto*, claimant's work accident is not the sole cause of his total disability. This statement is insufficient to invoke the Board's review as it does not assign error to the administrative law judge's finding.

Accordingly, the administrative law judge's Decision and Order and Order Granting in Part and Denying in Part Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge