BRB No. 98-1217

DONALD KRAMER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAY SHIPBUILDING CORPORATION	)	DATE ISSUED: May 27, 1999
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

J. Patrick Condon (Borgelt, Powell, Peterson & Frauen, S.C.), Milwaukee, Wisconsin, for employer/carrier.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2229 and 95-LHC-2230) of Administrative Law Judge Robert G. Mahony 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 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).

Claimant sustained work-related injuries to his left knee on September 5,

1978, to his back on February 22, 1979, and to his right knee on April 2, 1985. Employer voluntarily paid claimant for various periods of temporary total disability benefits for the 1978 knee and 1979 back injuries. Employer also paid claimant scheduled permanent partial disability benefits for a five percent impairment to the left knee and for a seven and one-half percent impairment to the right knee. 33 U.S.C. §908(c)(2). After claimant left employer in 1988, he worked as a shipfitter for another employer from 1989-1991, as a laborer at a nursery in 1989, 1992-1994, and 1996, as a spot welder in 1993-1996, as a janitor for a meat cutting business in 1995, as a cheese maker at a cheese factory in 1995, and as a dishwasher at three hotels in 1996. Claimant sought permanent total disability benefits beginning October 17, 1996, the date of his last employment with the Landmark Hotel as a dishwasher, or alternatively, permanent partial disability benefits for his loss in wage-earning capacity as a result of the 1979 back injury. The administrative law judge found that claimant has no disability from his 1979 back injury and no loss in wage-earning capacity from his two knee injuries.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in finding that he did not establish his *prima facie* case of total disability with regard to his 1979 back injury. It is claimant's burden to establish that he is unable to perform his usual employment due to his work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In determining that claimant did not establish his inability to perform his usual work due to his back injury, the administrative law judge credited the opinions of Drs. Wagener, Gruesen, Gmeiner, and Pilon, over the opinion of Dr. Person.[1] Decision and Order at 22-24. The administrative law judge gave less

[1]Both Drs. Wagener and Gruesen treated claimant in 1979 for his back injury and released him from their care after concluding that claimant had made a full recovery or had been completely relieved of his pain and that there were no residuals and none were anticipated, respectively. CX 1 at B3, K1; EX D. Dr.

weight to Dr. Person's opinion as claimant engaged in

Gmeiner evaluated claimant in 1996 and concluded that claimant did not need any work restrictions relative to his back. EX S at 14-15. Dr. Pilon reviewed claimant's records in 1996 and concluded that claimant's 1979 back injury was a temporary aggravation of pre-existing spondylolysis, and due to this pre-existing back condition, no absolute restrictions were required but that it was wise to avoid over 50 pound lifting and frequent bending and twisting. EX U at 5.

work activities far exceeding Dr. Person's restrictions for 17 years after this injury.[2] *See* Decision and Order at 24; EX H-O; *see also* EX T at 5-7. Moreover, claimant did not inform Dr. Person of his previous non-work-related back injuries. CX 1 at L. As the administrative law judge acted within his discretion in crediting the opinions of Drs. Wagener, Gruesen, Gmeiner, and Pilon, over that of Dr. Person, and as the

[2]Dr. Person restricted claimant from lifting over 10-15 pounds, repetitive flexion, extension, lateral bending, or rotating motions of his lumbar spine, crouching, cramping or unusual positions, climbing ladders or working in the air, and opined that claimant should be able to change positions depending on his symptoms. CX 1 at L1. The administrative law judge noted that claimant's work between 1989 and 1991 as a shipfitter required lifting between 25 and 100 pounds, and assuming a variety of positions and postures. Decision and Order at 24; Tr. at 55-56. The administrative law judge also noted that claimant's 1995 work in a cheese factory required him to lift between 35 and 40 pounds, eight hours a day, seven days a week. Decision and Order at 24; Tr. at 54-55. Claimant testified that he left shipyard work because he was laid off. Tr. at 90-91. Claimant left the cheese factory either because he did not show up for work or was allergic to the acid in the cheese. Tr. at 62-63.

former opinions support the administrative law judge's finding that claimant did not establish his *prima facie* case of total disability with respect to his back injury, we hereby affirm this finding.[3] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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); Decision and Order at 22-24; CX 1 at B3, K1, L1; EXS D, S at 14-15, U at 5.

[3]Claimant's contention that the administrative law judge erred in relying on medical opinions dating from the late 1970s to find that claimant was not disabled from 1996 is an incorrect assessment of the administrative law judge's weighing of the evidence. The administrative law judge did discuss, weigh and rely on the earlier reports of Drs. Wagener and Gruesen dating from 1979, but also discussed, weighed and relied on the 1996 opinions of Drs. Gmeiner and Pilon to conclude that claimant is not now disabled due to his 1979 back injury. *See* Decision and Order at 23-24.

Claimant also contends that the administrative law judge erred in finding that he did not establish his *prima facie* case of total disability with regard to his knee injuries. In order to determine whether claimant has established his inability to perform his usual work, the administrative law judge must compare claimant's medical restrictions to the physical requirements of his usual employment. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). With respect to claimant's knee injuries, the administrative law judge determined that claimant sustained no loss in wage-earning capacity by crediting, as more persuasive, the opinion of Mr. Zanskas, employer's vocational expert, that claimant sustained no loss in wage-earning capacity, over that of Mr. Reynolds, claimant's vocational expert, who stated that claimant sustained a 100 percent loss in wage-earning capacity. Decision and Order at 24-26; CX 7, 12; EXS T, V. In doing so, however, the administrative law judge improperly analyzed the issue before him. The administrative law judge erred in relying only on the vocational evidence regarding claimant's loss in wage-earning capacity, as this issue is not dispositive of claimant's claim for total disability benefits due to his knee injuries.[4] *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 277 n.17, 14 BRBS 363, 366 n.17 (1980). Thus, we vacate the administrative law judge's denial of total disability benefits for claimant's knee injuries, and we remand this case to the administrative law judge for further consideration. Although the administrative law judge noted the restrictions placed on claimant by Drs. Gmeiner, Pilon, McGuire, Anderson, and Person before concluding that claimant sustained no loss in wage-earning capacity, he did not compare the restrictions with the physical requirements of claimant's usual work to determine if claimant is capable of performing it. CX 1; EX 5; EX U; On remand, the administrative law judge must do so. *See Harrison*, 21 BRBS at 339. If claimant establishes his inability to perform his usual work due to his knee injuries, claimant is entitled to total disability benefits unless employer establishes the availability of suitable alternate employment. *See generally DM & IR Ry. Co. v. Director, OWCP,* 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998).

Accordingly, the administrative law judge's Decision and Order denying additional benefits for claimant's knee injuries is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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[4]Claimant has already received scheduled permanent partial disability benefits for his knee injuries, and this award is claimant's sole remedy for a permanent partial disability. *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 14 BRBS 363 (1980). Loss in earning capacity is not a factor in awarding permanent partial disability under the schedule. Where claimant claims total disability, however, the same analysis applies regardless of the body part injured.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge