BRB No. 06-0401

VERNON PATTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROWN & ROOT SERVICES	)	DATE ISSUED: 11/28/2006
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

William H. Haller (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Richard L. Garelick (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-LDA-00032) of Administrative Law Judge Richard D. Mills 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 Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer as a truck driver in Iraq on May 26, 2004. He injured his back and left knee on August 30, 2004, in a truck accident during the course of his employment for employer. Claimant returned home to Texas on September 13, 2004, where he sought treatment from Dr. Howard, a general practitioner, for lower back pain, tinnitus, and minimal left knee pain. Claimant was referred to Dr. Piskun, a neurosurgeon, in November 2004. Dr. Piskun testified that an MRI showed a disc herniation at L5-S1, and he diagnosed lower back pain secondary to degenerative disc disease and spondylosthesis. Dr. Piskun advised that claimant undergo a spinal fusion, which employer refused to authorize. He referred claimant to Dr. Ice, a pain specialist, who treated claimant for lower back pain. Employer voluntarily paid compensation for temporary total disability at a rate of $800 per week. Claimant sought continuing compensation under the Act for temporary total disability based on a higher average weekly wage, and medical benefits.

In his decision, the administrative law judge found that claimant's back condition is related to the truck accident at work. The administrative law judge found that claimant is unable to return to work as a truck driver due to his injury, and that employer did not submit evidence of suitable alternate employment. The administrative law judge calculated claimant's average weekly wage as $1,798.83 based solely on the wages he earned in Iraq. The administrative law judge found claimant entitled to the medical treatment recommended by Dr. Piskun. Claimant was awarded continuing compensation for temporary total disability commencing September 11, 2004, at the statutory maximum compensation rate of $1,030.78. *See* 33 U.S.C. §906.

On appeal, employer challenges the administrative law judge's finding that claimant is unable to return to his usual employment as a truck driver and his calculation of claimant's average weekly wage. Claimant responds, urging affirmance.

Employer argues that the report and deposition testimony of Dr. McCaskill establish that claimant was able to return to work as a truck driver as of the date of his evaluation of claimant on July 12, 2005, and that the administrative law judge erred by failing to address and credit this evidence. Claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1980). In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In this case, the administrative law judge credited the opinion of Dr. Piskun and claimant's testimony to find that claimant is not capable of performing his usual employment. Decision and Order at 12. Dr. Piskun treated claimant's back injury. The administrative law judge credited his testimony that claimant is unable to work as a truck

driver due to severe pain induced by prolonged sitting. CX 9 at 11. The administrative law judge also credited claimant's testimony that his regimen of narcotic pain medication precludes him from driving a truck and that he unsuccessfully tried to drive his truck in December 2004, and his opinion that he is physically unable to drive a truck.[1] Tr. at 84-86.

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge rationally credited the testimony of claimant's treating physician, Dr. Piskun, as supported by claimant's testimony, to conclude that claimant is unable to return to his usual employment as a truck driver. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999).

We reject employer's contention that the case must be remanded for the administrative law judge to address the contrary opinion of Dr. McCaskill. In his decision, the administrative law judge fully summarized the report and testimony of Dr. McCaskill. Decision and Order at 8. In addressing the cause of claimant's back injury, the administrative law judge found that Dr. Piskun's deposition testimony is entitled to greater weight than Dr. McCaskill's opinion that claimant's ability to perform physical tests during his examination was inconsistent with a severe back injury. Decision and Order at 11; EX 14 at 8-9. Dr. Piskun stated that persons with degenerative disc disease frequently are able to physically perform in a limited, single examination setting. CX 9 at 13-15. The administrative law judge credited Dr. Piskun's opinion over Dr. McCaskill's because Dr. Piskun treated claimant over the course of several months as opposed to Dr. McCaskill's single examination. As the administrative law judge rationally gave less weight to Dr. McCaskill's opinion regarding claimant's physical capabilities in an earlier part of his decision, it was not necessary for the administrative law judge to again discuss the doctor's opinion in the section addressing claimant's ability to return to work. The administrative law judge's finding that claimant cannot return to his usual work is supported by substantial evidence and is affirmed. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). In the absence of any evidence of suitable alternate employment, we affirm the administrative law judge's finding that claimant is totally disabled and his award of temporary total disability compensation. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

[1] Claimant testified that he takes morphine for back pain. Tr. at 78.

Employer also contends that the administrative law judge erred by calculating claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), based solely on his earnings in Iraq.[2] Employer argues that the combination of claimant's stateside earnings in 2003 and 2004 as a truck driver and his overseas earnings in Iraq is most reflective of his wage-earning capacity at the time of injury.

The administrative law judge found that claimant's potential earning capacity at the time of his injury is best reflected by his actual earnings with employer. Decision and Order at 14. The administrative law judge determined it would be unfair to combine these earnings with claimant's stateside earnings to determine his average weekly wage, as claimant chose to forego working at home to undertake a new venture in Iraq, with increased hours and within a danger zone, inasmuch as he was unable to earn a sufficient income as a self-employed truck driver in the United States. The administrative law judge also credited claimant's testimony that he intended to work in Iraq for several years, which the administrative law judge found signified a new long-term potential wage-earning capacity. Accordingly, the administrative law judge concluded that claimant's annual wage-earning capacity should be calculated based on his actual earnings with employer in Iraq. The administrative law judge found that, under Section 10(c), claimant's earnings in Iraq over 15.5 weeks of $27,881.80 yielded an average weekly wage of $1,798.83.

In *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), the Board affirmed the administrative law judge's average weekly wage determination based solely on the claimant's earnings in Iraq, as the administrative law judge acted within his discretion by considering the extrinsic circumstances of claimant's employment. *Proffitt*, 40 BRBS at 44; *see generally Duncanson-Harrelson Co. v. Director, OWCP [Freer]*, 686 F.2d 1336 (9th Cir. 1982), *vacated and remanded*, 462 U.S. 1101 (1983) (in addressing average weekly wage, "the nature of the decedent's work and the details of his employment [are]

[2] Employer does not challenge the administrative law judge's finding that Sections 10(a) and (b), 33 U.S.C. §§910(a), (b), are inapplicable to determine claimant's average weekly wage. Employer's Petition for Review at 9-10. Section 10(c) states:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

factual findings"). In this case, the administrative law judge's crediting of claimant's inability to earn sufficient wages as a truck driver in the United States and his undertaking increased hours of employment overseas within a zone of danger form a rational basis for the administrative law judge use of the wages claimant earned only in Iraq. Moreover, the administrative law judge's reliance on these wages properly reflects the increase in pay claimant received when he commenced working for employer, *see Proffitt*, 40 BRBS at 45; *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986), and it fully compensates claimant for the earnings he lost due to his injury inasmuch as the administrative law judge rationally credited claimant's testimony that he intended to work in Iraq for several years. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Proffitt*, 40 BRBS at 45; *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981). In sum, the administrative law judge's calculation of claimant's average weekly wage accounts for the language of Section 10(c) that he have "regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury." 33 U.S.C. §910(c). His finding that the wages claimant earned in Iraq are the best measure of claimant's annual earning capacity is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's average weekly wage calculation.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge