BRB No. 03-0860

QUENTIN TAHARA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED:Sept. 28, 2004
	)	
and	)	
	)	
JOHN MULLEN AND COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Ann Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLC), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (97-LHC-0232) of Administrative Law Judge Ann Beytin Torkington 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 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).

This case is before the Board for the third time. Claimant worked as a winch/crane operator, substitute supervisor, and alternate clerk for McCabe, Hamilton & Renny Company (McCabe), whose business involves providing labor loans to shipping companies in and around Honolulu, Hawaii. Claimant was on a labor loan from McCabe to Matson Terminals, Incorporated (employer), on March 30, 1994, when he was attacked and severely beaten by a co-worker, Bruce Perry. As a result of that incident, claimant sustained four broken ribs and a crushed skull, which permanently severed the optic nerve and caused blindness in his left eye. The attack arose because, several weeks prior to the incident, claimant, during the course of his employment for employer as a substitute supervisor, reported Mr. Perry for leaving the job site shortly after Mr. Perry reported to work.

Employer paid claimant temporary total disability benefits, 33 U.S.C.§908(b), from March 30, through June 5, 1994, and permanent partial disability benefits under the schedule for a 100 percent loss of one eye, 33 U.S.C. §908(c)(5). Claimant returned to his usual employment as a winch/crane operator for employer on June 6, 1994. Due to claimant's vision loss, employer refused to continue employing claimant as a crane operator. McCabe then located employment for claimant with Honolulu Terminals as a wharf clerk. In May 1995 claimant was placed in protective police custody and shortly thereafter he was moved from Hawaii to the United States mainland, entering a witness protection program pending the state trial of Mr. Perry for felony assault.

Claimant was in the state protection program from May 4, 1995, to December 31, 1996, during which time he received payments from the state of $1,200 to $1,400 per month. Thereafter, claimant entered an unpaid federal witness protection program from January 1 to November 16, 1997, while the federal government pursued racketeering charges involving Mr. Perry. On his own volition, claimant terminated his participation in the federal witness protection program and returned to Hawaii. Claimant subsequently learned that Mr. Perry was no longer working on the waterfront. He attempted to return to work for McCabe, which refused to rehire him. Claimant successfully pursued arbitration to, *inter alia*, return to work. Pursuant to an arbitrator's decision, claimant returned to longshore work as a laborer in December 1998.

Claimant filed a claim under the Act against both employer and McCabe in which he sought compensation for the period he was in the federal and state witness protection programs. On August 24, 1995, the district director issued an "Order Memo" recognizing employer as claimant's statutory employer and releasing McCabe from any responsibility under the Act. Following its payment of benefits to claimant in June 1999, employer submitted a motion for summary decision to the Office of Administrative Law Judges, wherein it sought to conclusively resolve the responsible employer issue. In response, claimant filed his own motion for summary decision seeking to have McCabe named as the responsible employer.

In his initial decision, Administrative Law Judge Holmes bifurcated the case at the parties' urging, proceeding only on the responsible employer issue. The administrative law judge determined that employer was claimant's borrowing employer at the time of the accident and therefore liable for benefits under the Act. Accordingly, he granted employer's motion for summary decision and denied claimant's motion for summary decision. The Board affirmed the administrative law judge's finding that employer was claimant's borrowing employer and thus liable for claimant's benefits. *Tahara v. Matson Terminals, Inc.*, BRB No. 00-0383 (Oct. 13, 2000). The Board remanded the case to the administrative law judge "for further proceedings necessary to a final decision on claimant's claim in this case," *id.* at 7, having previously noted that the parties raised as an issue for resolution claimant's entitlement to temporary total disability benefits while he was in the witness protection programs.[1] *Id.* at 3.

In his Order of Remand, Judge Holmes stated that the Board's opinion delineated no unresolved issues, and he remanded the case to the district director. Claimant moved for reconsideration, contending that the issue of his entitlement to temporary total disability benefits while he was in the state and federal witness protection programs was unresolved. The administrative law judge summarily denied claimant's motion. Claimant appealed to the Board, and the Board agreed with claimant that the administrative law judge erred by not addressing claimant's entitlement to disability benefits. *Tahara v. Matson Terminals, Inc.*, BRB No. 01-0578 (April 10, 2002). The Board vacated the administrative law judge's Order of Remand to the district director, and the case was remanded to the administrative law judge for resolution of claimant's entitlement to disability benefits.

On remand, the case was assigned to Administrative Law Judge Torkington, as Judge Holmes was no longer available. In her decision, the administrative law judge found claimant entitled to compensation for temporary total disability from March 30 to June 5, 1994, and from May 4, to September 14, 1995. Pursuant to the parties' stipulation that claimant's work injuries reached maximum medical improvement on September 15, 1995, the administrative law judge awarded claimant compensation for permanent total disability, 33 U.S.C. §908(a), from September 15, 1995, to November 16, 1997, when claimant terminated his participation in the federal witness protection program. Thereafter, claimant was awarded compensation for permanent partial disability due to his 100 percent vision loss of the left eye. Finally, the administrative law judge found that claimant's stipend of $1,200 to $1,400 per month during his participation in the state witness protection program does not establish a post-injury

[1]Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit. Matson's motion to dismiss the appeal was granted on February 16, 2001. *Tahara v. Matson Terminals, Inc.*, No. 00-71372 (9th Cir. Feb. 16, 2001).

wage-earning capacity during this period, and that employer therefore is not entitled to credit these payments against its compensation liability.

On appeal, employer challenges the administrative law judge's award of compensation to claimant while he was in the witness protection programs. Alternatively, employer challenges the administrative law judge's award of compensation for permanent total disability. Employer finally appeals the finding that the stipend claimant received while he was in the state program did not constitute a post-injury wage-earning capacity. Claimant responds, urging affirmance.

Employer argues that claimant is not entitled to any compensation while he participated in the witness protection programs because he was physically able to work as a wharf clerk when he stopped working on May 4, 1995, based on police information that his life was in danger and the recommendation that he enter the state witness protection program. In her decision, the administrative law judge found that claimant established that he was unable to perform his usual employment due to his work injury. Citing *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988), the administrative law judge found that claimant's physical ability to return to work is not dispositive of his entitlement to benefits.[2] The administrative law judge credited the fact that the state pursued criminal charges against Mr. Perry based on claimant's work injuries, and that the danger to claimant from his participation in the criminal prosecution necessitated his participation in the witness protection program. Alternatively, the administrative law judge found that claimant's usual employment was unavailable to him because the workplace was unsafe under the Occupational Health and Safety Act (the OSHA), which provides that the workplace must be free from recognized hazards that are likely to cause death or serious physical harm. 29 U.S.C. §654(a). The administrative law judge also relied on case law holding that a finding of total disability may be based on evidence that a return to work would aggravate claimant's injuries. In this case, the administrative law judge found claimant's regular employment was unavailable because his participation in the witness protection program was necessary to prevent claimant from being re-injured by Mr. Perry or his cronies.

[2] In *McBride*, the administrative law judge found the claimant physically capable of returning to his usual job; however, the employer did not allow claimant to resume working. Instead, employer offered claimant retraining and placement in less strenuous work in another city. On appeal, the United States Court of Appeals for District of Columbia Circuit held the administrative law judge erred by finding that claimant could perform his original job based solely on the medical evidence, rather than on economic factors as well. The court held that since claimant's work injury was the precipitating factor that rendered his former job unavailable, claimant fulfilled his burden of showing that he was unable to return to his usual work due to his injury. *McBride*, 844 F.2d at 799-800, 21 BRBS at 48-50(CRT).

We affirm, on other grounds, the administrative law judge's compensation award during the period claimant was in the state and federal witness protection programs. Substantial evidence supports the administrative law judge's finding claimant was unable to perform his usual employment when he returned to work after an absence due to his injuries. *See Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). While claimant initially returned to his usual employment as a winch/crane operator, he was subsequently transferred by McCabe to the wharf clerk job. Tr. at 62, 108. Claimant testified that OSHA regulations require equipment operators to have at least 90 percent vision, and that it was suggested to him by Bob Bee, the vice-president for operations at McCabe, that he should no longer operate heavy equipment due to his 50 percent vision loss. Tr. at 61, 104; *see also* EX II at 19-21. Robert Guard, president and general manager for McCabe, testified that employer informed McCabe that claimant could no longer work for them as a crane operator, and that concern for workplace safety prompted McCabe to transfer claimant to a position as a wharf clerk. CX 31 at 263-265, 286. Thus, the issue before the administrative law judge was not whether claimant was able to continue performing his pre-injury work, but whether employer established the availability of suitable alternate employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). Specifically, the issue was whether the longshore job claimant successfully performed as a wharf clerk after the crane/winch operator position became unavailable due to the vision loss from claimant's work injury constituted suitable alternate employment. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Diosdado v. Newpark Shipbuiding & Repair, Inc.*, 31 BRBS 70 (1997).

The administrative law judge rationally found that claimant had been in physical danger, which necessitated his stopping work as a wharf clerk and entering the state witness protection program on May 4, 1995. Claimant testified that two weeks prior to the state trial of Mr. Perry, he was advised by the police that he should enter their witness protection program. Claimant initially refused the request. The police returned the next day, urging claimant's participation as they had information that claimant may be murdered by someone in Mr. Perry's gang, and that claimant was most vulnerable when going to and from work. Tr. at 62-64. Claimant agreed to enter the witness protection program. The following day, the police met with Mr. Guard, and obtained his agreement to a leave of absence while claimant was in police custody. Tr. at 65; CX 31 at 254-256.

We reject employer's contention that claimant's physical ability to work as a wharf clerk after May 4, 1995, is sufficient to establish claimant's continued ability to perform suitable alternate employment, as "disability" under the Act is an economic as well as a medical concept, and cannot be measured by claimant's physical condition

alone. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975). Rather, employer must establish the availability of specific jobs claimant can perform given his physical restrictions and other relevant factors. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. Moreover, there must be a reasonable likelihood, given claimant's age, education and background, that he would be hired if he diligently sought the job. *Hairston*, 849 F.2d 1196, 21 BRBS at 123(CRT).

In this case, employer did not establish that claimant was able to perform suitable alternate employment while claimant was enrolled in a witness protection program. Claimant's testimony is uncontradicted that he was not allowed to work by the state and federal authorities during this time, Tr. at 66, 69, 98-99, and it is uncontested that his enrollment in the programs was related to the circumstances surrounding his work injury. Under these circumstances, claimant is entitled to compensation for total disability as employer cannot meet its renewed burden of proof after claimant was forced to leave suitable alternate employment through no fault of his own. *See Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999). Notwithstanding that, in this case, employer itself did not withdraw the suitable employment as a wharf clerk, the facts herein are analogous to those cases where a claimant is entitled to total disability compensation while participating in a Department of Labor-sponsored vocational rehabilitation program that precludes him from working. *See, e.g. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Castro v. General Constr. Co.*, 37 BRBS 65 (2003). Moreover, holding that claimant is entitled to total disability benefits due to his inability to work while he was in the witness protection programs is consistent with the decision of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, in *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT). In *Hairston*, the court held that suitable alternate employment was not established by a position at a bank that the claimant physically could perform, as the job was not realistically available because claimant had a criminal record. *Hairston*, 849 F.2d at 1196, 21 BRBS at 124(CRT). In this case, no jobs were realistically available to claimant while he was in the witness protection programs. Accordingly, for these reasons, we affirm the administrative law judge's conclusion that claimant is entitled to compensation

for total disability while he was in the witness protection programs from May 4, 1995, through November 16, 1997.[3]

We also reject employer's contention that claimant is not entitled to compensation for permanent total disability because claimant sought compensation only for temporary total disability. The parties stipulated that claimant's work injuries reached maximum medical improvement on September 15, 1995. Decision and Order at 5. Accordingly, claimant implicitly raised his entitlement to permanent total disability, as disability changes from temporary to permanent on the date of maximum medical improvement. *See Stevens*, 909 F.2d at 1258-59, 23 BRBS at 93(CRT). Moreover, the burden of proof in a claim for temporary total disability is the same as that in a permanent total disability case, and employer herein defended a total disability claim. *See Diosdado*, 31 BRBS at 72; *Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 11-12 (1993). Therefore, we affirm the administrative law judge's award of permanent total disability benefits.

[3] Thus, we need not address the administrative law judge's specific rationale for her award of compensation for the period when claimant was enrolled in a witness protection program. We note, however, that OSHA was not enacted to provide a private workers' compensation remedy. *Pedreza v. Shell Oil*, 942 F.2d 48 (5th Cir. 1991). The risk of re-injury cases relied upon by the administrative law judge appear to be limited to cases wherein a return to work could potentially aggravate the work injury, whereas, in this case, there is no evidence claimant's work injury would have been aggravated by continued employment as a wharf clerk.

Finally, employer argues that the state stipend claimant received while in the witness protection program should have been treated as "wages" under Section 2(13), 33 U.S.C. §902(13).[4] Employer contends this stipend establishes that claimant had a wage-earning capacity during this period and he is therefore limited to receiving his award under the schedule after his work injury reached maximum medical improvement on September 15, 1995. We disagree. The administrative law judge rejected employer's contention that claimant's state stipend of $1,200 to $1,400 per month is a wage under Section 2(13). The administrative law judge correctly reasoned that the stipend was paid by the state and not an employer and that the stipend was not received pursuant to a contract for hire; these conditions are required for sums to constitute wages under the plain language of Section 2(13). *Blakney v. Delaware Operation Co.*, 25 BRBS 273 (1992). The administrative law judge found that the stipend is analogous to unemployment compensation, which, also, is not a wage under Section 2(13). *Id.*; *see Strand v. Hansen Seaway Service, Ltd.*, 614 F.2d 572, 11 BRBS 732 (7th Cir. 1980). Moreover, there is no evidence that the state stipend was subject to tax withholding. *See McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir.1998); *see also Eagle Marine Services v. Director, OWCP [Wolfskill]*, 115 F.3d 735, 31 BRBS 49(CRT) (9th Cir. 1997); *Wright v. Universal Maritime Service Corp.*, 31 BRBS 195 (1997), *aff'd and remanded*, 155 F.2d 311, 33 BRBS 15(CRT) (4th Cir. 1988) (post-injury receipt of vacation/holiday pay does not constitute a wage-earning capacity). We therefore affirm the administrative law judge's finding that the state stipend claimant received during his participation in the state witness protection program does not establish that he had a post-injury wage-earning capacity.

[4] Section 2(13) states:

> The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of title 26 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

Accordingly, the administrative law judge's Decision and Order on Remand 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