BRB No. 96-0639

DICH TRAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Dich Tran, San Diego, California, *pro se.*

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order Awarding Benefits (95-LHC-218) of Administrative Law Judge Edward C. Burch 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 who is not represented by counsel, the Board will review the administrative law judge's Decision and Order under its statutory standard of review. 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

On July 28, 1993, claimant sustained injuries while working for employer as an electrician trainee when a reel of cable came loose and knocked him to the ground. The parties stipulated that claimant sustained an injury on July 28, 1993, that claimant's average weekly wage at the time of the injury was $437.32, and that claimant was appropriately compensated for temporary total disability from July 29, 1993 until February 22, 1994. Claimant sought additional temporary total disability benefits under the Act through December 14, 1994, and permanent total disability benefits thereafter.

The administrative law judge awarded claimant temporary total disability compensation benefits from July 29, 1993 until February 28, 1994, the date he determined that claimant reached maximum medical improvement, and permanent partial disability compensation thereafter. The administrative law judge found that although claimant was not capable of returning to his usual employment, employer had established the availability of suitable alternate employment through the testimony of its vocational counselor, Ms. Babits-Gill, and claimant had not shown reasonable diligence in attempting to secure alternate work. The administrative law judge also awarded medical benefits.

Claimant, appearing without the benefit of counsel, appeals the decision of the administrative law judge. Employer has not responded to claimant's appeal.

After review of the Decision and Order in light of the record evidence, we initially affirm the administrative law judge's determination that claimant's condition reached maximum medical improvement on February 28, 1994. An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994)(Smith, J., concurring and dissenting on other grounds); *see also Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). In the present case, although claimant argued below that his condition did not reach permanency until December 20, 1994, in accordance with the opinion of Dr. Lineback, the administrative law judge reasonably determined that maximum medical improvement had been reached as of February 28, 1994, based on the medial opinion of Dr. Averill. Employer's Exhibit 19. Inasmuch as Dr. Averill's medical opinion provides substantial evidence to support the permanency finding made by the administrative law judge and his decision to credit this testimony is neither inherently incredible nor patently unreasonable, we affirm his determination that claimant's condition reached maximum medical improvement on February 28, 1994. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

We also affirm the administrative law judge's denial of permanent total disability compensation. The administrative law judge determined that as claimant had established a *prima facie* case of total disability by establishing that he was unable to perform his usual employment due to his work-related injury, the burden shifted to employer to demonstrate the availability of realistic specific job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Royce v. Elrich Construction Co.*, 17 BRBS 157 (1985); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). He then determined that employer met its burden of establishing the availability of suitable alternate employment through the testimony of its vocational counselor, Ms. Babits-Gill, and that claimant had not met his resultant burden of establishing that he diligently tried but was unable to secure alternate work, so as to nevertheless entitle him to total disability compensation. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *See Hooe v. Todd*

Shipyards Corp., 21 BRBS 258 (1988).

After reviewing claimant's medical limitations as set forth by Drs. Lineback and Levy, and conducting a labor market survey in November 1994, Ms. Babits-Gill identified a number of specific job opportunities which she believed were suitable and realistically available to claimant as a painter/painter's helper and combination welder which paid wages of up to $400 in 1993. Transcript at 38, 39-46; Employer's Exhibit 24. Because claimant's testimony that he had not attempted to obtain any work since leaving employer's employ, Transcript at 12, provides substantial evidence to support the administrative law judge's finding that claimant failed to exercise due diligence in securing alternate work, and Ms. Babits-Gill's testimony provides substantial evidence to support both the administrative law judge's suitable alternate employment determination and his determination that claimant has a post-injury wage-earning capacity of $400 per week,[1] we affirm his finding that claimant is entitled to permanent partial disability compensation of $24.88 per week.[2] 33 U.S.C. §908(c)(21),(h); *See generally Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

While we affirm the administrative law judge's denial of permanent total disability compensation, his determination that the commencement date for the award of permanent partial disability compensation was February 28, 1994, the date of maximum medical improvement cannot be affirmed. A showing of suitable alternate employment may not be automatically applied retroactively to the date of maximum medical improvement. Rather, an employee's disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 94 (CRT) (1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). In this case, Ms. Babits-Gill's labor market survey was performed in November 1994, and claimant reached maximum medical improvement in February 1994. Inasmuch as the administrative law judge in the present case did not make a specific determination as to when suitable alternate employment was first shown to be available, or consider whether the alternate jobs were available at an earlier date, we vacate his finding with regard to the commencement date for the award of permanent partial disability compensation and remand for him to make this determination.

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[1]In calculating the award of permanent partial disability compensation, the administrative law judge erred in comparing claimant's stipulated average weekly wage with the wages paid in the jobs identified as suitable in 1994. Decision and Order at 8. Sections 8(c)(21),(h) of the Act, 33 U.S.C. §908(c)(21),(h), require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Any error the administrative law judge may have made in this regard, however, is harmless on the facts presented inasmuch as Ms. Babits-Gill testified that claimant could earn from $340 to $480 per week as a combination welder in 1993 dollars. Transcript at 45.

[2]This figure is based on two-thirds of the difference between claimant's stipulated average weekly wage of $437.32 and his residual wage-earning capacity of $400 per week.

Accordingly, the administrative law judge's finding regarding the commencement date for the award of permanent partial disability compensation is vacated, and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge