BRB No. 92-0625

MITHAL T. R. CHHUGANI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE - GOLDEN GATE EXCHANGE REGION	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA/ESIS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter Murray, Administrative Law Judge, United States Department of Labor.

Terence O. Mayo (Mayo & Rogers), San Francisco, California, for claimant.

Frank B. Hugg and Jeanne M. Bates (Law Offices of Frank B. Hugg), San Francisco, California, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeal Judges.

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-732) of Administrative Law Judge Vivian Schreter Murray denying benefits 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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, who worked as an accounting technician for employer, sustained an injury to his neck and right shoulder from using a video display terminal (VDT) in the course of his employment. In her Decision and Order, the administrative law judge found that claimant was capable of performing his usual work as an accounting technician as of October 1, 1989, and that employer established the availability of suitable alternate employment given that claimant's usual work was no longer available. The administrative law judge awarded claimant temporary total disability benefits from April 3, 1989 through June 15, 1989 and from June 23, 1989 through September 30, 1989 at the stipulated weekly rate of $224.91, but denied claimant's claim for continuing temporary total disability benefits. 33 U.S.C. §908(b).

On appeal, claimant challenges the administrative law judge's credibility determinations and her findings regarding the extent of claimant's disability. Employer responds that the decision of the administrative law judge is supported by substantial evidence and should be affirmed.

Initially, we reject claimant's contention that the administrative law judge erred in crediting the opinions of Drs. Ancel and Wong that claimant can perform his usual employment over that of Dr. Strassberg that claimant remains totally disabled and has not yet reached maximum medical improvement. In this regard, claimant specifically contends that Dr. Wong provided no rationale for reversing his August 20, 1989, opinion that claimant could not return to his usual employment as an accounting technician. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). In the instant case, the administrative law judge set forth claimant's medical history in detail and, in crediting the opinion of Dr. Wong that claimant can perform his usual work despite some physical restrictions, stated that he was the only physician who, prior to testifying, viewed the surveillance films of claimant performing numerous tasks involving his neck and shoulder which claimant contended he could not perform, including a sequence that shows claimant with his "frozen" shoulder fully extended over his head, as he opens his car trunk.[1] The administrative law judge also relied on the opinion of Dr. Ancel that claimant could return to his usual employment as an accounting technician, without restriction, as of September 30, 1989.[2] In rejecting the opinion of Dr. Strassberg, the administrative law judge reiterated that, unlike Dr. Wong, Dr. Strassberg had not reviewed the surveillance films, that Dr. Strassberg relied on erroneous information from claimant, that Dr. Strassberg's stated conclusions were inconsistent with his physical findings, and that he failed to provide a rationale for his opinion that claimant's sedentary work activity in all likelihood, contributed to the degenerative change that occurred in the patient's

[1]In crediting Dr. Wong's opinion, the administrative law judge noted that prior to Dr. Wong's review of records and surveillance films, he had opined on August 20, 1990, that claimant's "frozen" right shoulder prevented his return to his original job as an accounting technician.

[2]The administrative law judge stated with respect to Dr. Ancel that she was claimant's treating physician for some years until 1989, that she was a Board-certified internist, and that she had obtained all necessary diagnostic studies and provided the appropriate physiotherapy.

cervical spine.[3]

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw her own inferences from it. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). She is not bound to accept the opinion or theory of any particular witness, and her credibility determinations may be disturbed only if they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). As the administrative law judge weighed the conflicting opinions of Drs. Wong, Ancel and Strassberg and within her discretion accorded determinative weight to the opinions of Drs. Ancel and Wong, we affirm the administrative law judge's finding that claimant is capable of performing his usual work as it is supported by substantial evidence. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1998), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir.1990).

Next, we reject as without merit claimant's contention that the administrative law judge erred in crediting the testimony of Mr. Autrey, the accounting supervisor, that 50 to 60 percent of an accounting technician's day was spent at the VDT, *i.e.*, in claimant's case between two hours and thirty-six minutes and three hours and fifteen minutes per day at the computer, over the conflicting testimony of claimant that he spent seven hours per day at the terminal.[4] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Similarly, contrary to claimant's contentions, the administrative law judge, within her discretion, refused to credit claimant's testimony and that of his wife[5] concerning the limitations on his activities which were imposed by his injury finding neither of their testimony to be credible. As claimant has failed to raise any reversible error made by the

[3]In refusing to credit Dr. Strassberg, the administrative law judge, *inter alia*, found that Dr. Strassberg relied on claimant's statement that he spent most of his day entering data or watching a VDT, a statement which the administrative law judge discredited and that although Dr. Strassberg clearly diagnosed a frozen shoulder or adhesive capsulitis due to disuse, he repeatedly reported that there was no atrophy of claimant's right upper extremity or any of the supportive muscles of the shoulder.

[4]The administrative law judge found that both claimant and the accounting supervisor described numerous specific duties which the accounting technician performed in addition to using a VDT terminal. The administrative law judge noted further that, contrary to claimant's testimony that he worked for seven hours at a VDT terminal without a break, claimant's entire work day consisted of six and one-half hours excluding an hour for lunch and two fifteen minute breaks and included numerous other specific duties which claimant was required to perform throughout the day away from the VDT.

[5]In finding that claimant's wife was not a credible witness, the administrative law judge stated that she certainly knew that her husband drove her back and forth from Alameda to San Francisco frequently, a trip of over one and one-half hours, despite his attestation that he was unable to drive long distances.

administrative law judge in weighing the conflicting evidence and making credibility determinations, we affirm this determination. *See Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); *see also Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979).

Moreover, we reject claimant's contention that the administrative law judge erred in finding that employer established the availability of suitable alternate employment.[6] In order to demonstrate suitable alternate employment, employer must establish the existence of realistically available job opportunities within the geographic area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). The credible testimony of a vocational rehabilitation specialist is sufficient to meet the burden of showing suitable alternate employment. *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In the instant case, the administrative law judge rationally credited the opinion of the vocational expert, Ms. Mars, that various jobs in the labor market survey that she provided for claimant, including accounting technician, bookkeeper, and billing clerk were currently and realistically available to him. Tr. at 215. Moreover, the administrative law judge found that the jobs enumerated in the labor market survey allowed for the medical restrictions placed on claimant by all physicians, including those of Dr. Strassberg in his physical capacities evaluation of September 12, 1990. *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Contrary to claimant's contention, the administrative law judge may credit a vocational expert's opinion even if the expert did not examine the employee, as long as the expert was aware of the employee's age, education, industrial history, and physical limitations when exploring the local opportunities. *See Southern*, 17 BRBS at 67. In any event, we note that the prior counselor, Ms. Davis, whose file was available to Ms. Mars, worked directly with claimant. Ms. Mars also independently obtained and reviewed the relevant medical reports, reviewed claimant's deposition and consulted with Dr. Wong. We therefore affirm the administrative law judge's finding that suitable alternate employment is available to claimant based on the opinion of Ms. Mars. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

Inasmuch as the administrative law judge, however, did not make a finding concerning claimant's post-injury wage-earning capacity in the alternate employment pursuant to Section 8(h), 33 U.S.C. §908(h), and the administrative law judge found that claimant reached maximum medical improvement on October 1, 1989, we must remand the case for the administrative law judge to determine claimant's wage-earning capacity, and in so determining, consider whether claimant is permanently partially disabled. On remand, if the administrative law judge awards benefits, she must determine the date upon which employer established the availability of suitable alternate employment, and thus the commencement date of claimant's permanent partial disability benefits. Claimant will be entitled to permanent total disability benefits from the date of maximum medical

[6]Although the administrative law judge found that claimant is able to perform his usual work, she found that his job was no longer available because the office closed. The administrative law judge went on to consider the issue of suitable alternate employment, and employer has not contested this finding. *See McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45 (CRT)(D.C. Cir. 1988).

improvement to the date suitable alternate employment is shown to have been available. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S. Ct. 798 (1991). In addition, if claimant is entitled to permanent disability benefits, the administrative law judge should reconsider employer's entitlement to relief pursuant to Section 8(f), 33 U.S.C. §908(f).

Accordingly, the administrative law judge's Decision and Order is affirmed with regard to the findings that claimant can do his usual work and that suitable alternate employment is available. The case is remanded to the administrative law judge for further consideration of claimant's post-injury wage-earning capacity consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge