BRB No. 92-1967

CHRISTIAN REYES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
M. P. HOWLETT, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Michael N. Cotignola (Kalmus & Martuscello), New York, New York, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2897) of Administrative Law Judge Lawrence E. Gray 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*. 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).

On May 9, 1989, claimant sustained various soft-tissue injuries while working for employer cleaning scrap cargo, when the three-story high hopper on which he was standing was jarred by a crane-held bucket of salt that dropped precipitously into the hopper. Claimant has not returned to work since except for a 15 minute stint on September 25, 1989.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Employer voluntarily paid claimant temporary total disability benefits from May 10, 1989, until October 20, 1989, based upon an average weekly wage of $719.03. At that time, employer

suspended its voluntary payment of compensation based on the opinion of Dr. Koval, an independent medical examiner. Claimant sought continuing total disability compensation thereafter and, in addition, contended that he was entitled to compensation based upon an average weekly wage of $1,034.94 instead of the $719.03 figure utilized by employer in making its voluntary payments.

Affording the medical opinion of Dr. Koval dispositive weight, the administrative law judge found that claimant was able to return to his usual longshore work as of October 20, 1989. The administrative law judge further determined that inasmuch as claimant had already been paid temporary total compensation through that date and had not demonstrated by a preponderance of the evidence that the $719.03 average weekly wage on which employer's voluntary payments were based was incorrect, no additional compensation was owed and denied the claim accordingly.

On appeal, claimant challenges the administrative law judge's denial of additional compensation. Claimant contends that in denying the claim the administrative law judge failed to employ the proper standard in evaluating his disability, failed to give due consideration to his medical evidence and testimony, and failed to consider whether the Section 20(a), 33 U.S.C. §920(a), presumption was applicable to this case. Furthermore, claimant contends that inasmuch as he had worked 189 days or approximately 38 weeks in the year prior to his injury, the administrative law judge erred in failing to employ the $1,034.94 average weekly wage urged by the claimant calculated pursuant to Section 10(a) of the Act, 33 U.S.C. §910(a). Employer responds, urging affirmance.

Initially, we reject claimant's assertion that the administrative law judge applied an erroneous standard in making his disability determination. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment. *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 74 (1994). In making this determination, questions of witness credibility are for the administrative law judge as the trier-of-fact. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

In denying additional compensation, the administrative law judge concluded that claimant did not meet his initial burden based primarily on the medical opinion of Dr. Koval, a Board-certified orthopedic surgeon and impartial medical examiner. Dr. Koval examined claimant on October 2, 1989, and April 2, 1990. At the October 2, 1989, examination, Dr. Koval observed that although claimant kept his left arm at his side with the elbow slightly flexed while he was taking his medical history, claimant was able to raise his left arm above shoulder and head level to remove his shirt. Dr. Koval also observed that while claimant exhibited marked voluntary rigidity of the cervical spine, he had a full range of motion without any difficulty when he was distracted. In his report relating to the October 2, 1989, examination, Dr. Koval indicated that it was not possible to explain claimant's complaints which were way out of proportion to his physical findings. Dr. Koval further opined that claimant should have an arthrogram of his left shoulder, and that if this proved negative, he should be sent back to work without restrictions. Employer's Exhibit 2. Inasmuch as the arthrogram, which was performed on October 20, 1989, showed no fracture or dislocation, *see*

Claimant's Exhibit 2, the administrative law judge concluded, based on Dr. Koval's October 2, 1989, report, that claimant could return to work as of that date.

The administrative law judge weighed Dr. Koval's opinion against that of claimant's treating physician, Dr. Post, who believed that claimant was totally disabled from longshore work, and found Dr. Koval's opinion more persuasive. Contrary to claimant's assertions, the administrative law judge was not required to afford determinative weight to Dr. Post's opinion because of his status as claimant's treating physician. It is well established that the administrative law judge is not bound to accept the opinion or theory of any medical expert. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In crediting Dr. Koval's opinion, the administrative law judge noted that he had been hired as an impartial expert. The administrative law judge further noted that the discrepancies in claimant's physical capabilities Dr. Koval observed when claimant was distracted were consistent with his own negative assessment of claimant's credibility.

There is also no merit to claimant's assertion that the administrative law judge erred in failing to credit his testimony. Although credible complaints of pain alone may be sufficient to establish a *prima facie* case of total disability, the administrative law judge acted reasonably in concluding that the evasive nature of claimant's testimony and the results of Dr. Koval's examination cast severe doubt on claimant's credibility. *See Thompson*, 26 BRBS at 57.

Claimant's assertion that the administrative law judge erred in failing to consider the applicability of the Section 20(a) presumption similarly must fail. In the present case, the parties stipulated that claimant's injury was work-related, and the Section 20(a) presumption does not aid claimant in establishing the nature and extent of his disability. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988); *Holten v. Independent Stevedoring Co.*, 14 BRBS 441, 443 (1982).[1]

[1]Although claimant asserts that the administrative law judge erred in failing to resolve factual doubt in his favor, the United States Supreme Court recently determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251 (1994).

We agree with claimant, however, that in denying the claim the administrative law judge failed to weigh relevant evidence in the record which could support his claim. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Specifically, the administrative law judge failed to address Dr. Lizzio's July 2, 1990 report, in which he stated that claimant suffered from, among other things, post-traumatic cervico-lumbo-sacral spine syndrome with associated para-spinal myalgia and sciatic neuralgia. In this report, Dr. Lizzio requested that the period of disability be reinstated, and felt that claimant would remain disabled for at least an additional three months. Claimant's Exhibit 4. The administrative law judge also failed to consider the medical reports of Dr. Patel which indicate that claimant was totally disabled from his usual work in February 1990 and in May 1990. Claimant's Exhibit 5. Finally, while the administrative law judge did note that Dr. Lee found that claimant could return to work on November 29, 1989, the administrative law judge failed to recognize that in a subsequent report dated January 23, 1990, Dr. Lee indicated that claimant was still symptomatic and in need of further testing before he could be considered for any type of work. Because the administrative law judge failed to properly weigh and evaluate all of the relevant evidence as is required under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), we vacate his denial of benefits. On remand, the administrative law judge should reconsider the compensability of the claim based on the evidence as a whole. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-384 (1990). If, on remand, the administrative law judge concludes that claimant is unable to perform his usual work, he should award claimant total disability compensation as employer has offered no evidence of suitable alternate employment. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

We also agree with claimant that the administrative law judge erred in abdicating his responsibility to calculate a reasonable average weekly wage based on the evidence of record. Claimant's average weekly wage is determined at the time of injury by utilizing one of the three methods set forth in Section 10 of the Act, 33 U.S.C. §910. Section 10(a) applies when claimant has worked in the same employment for substantially the whole year immediately preceding injury. *See Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 140 (1990). Section 10(b) also applies to permanent and continuous jobs where claimant has not been employed for substantially the whole year and submits evidence of the earnings of a fellow employee. Section 10(c) provides a general method for determining average weekly wage where Section 10(a) or (b) cannot fairly or reasonably be applied and requires calculation of claimant's annual earning capacity at the time of injury. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979).

In the case at hand, employer argued before the administrative law judge that claimant's average weekly wage calculated pursuant to Section 10(c) was $719.03.[2] Claimant argued that inasmuch as he had worked for 189 days, or approximately 38 weeks in the year preceding his injury without any allowance for the time he lost due to a prior injury, his average weekly wage should be calculated pursuant to Section 10(a) and that the applicable figure was $1,034.94.[3]

In the present case, the administrative law judge properly determined that although claimant had been employed for substantially the whole year prior to his injury, Section 10(a) could not be applied to determine the applicable average weekly wage because the record does not contain any evidence from which the average daily wage could be extrapolated. *See Browder*, 24 BRBS at 219. As the record also does not contain any evidence regarding the wages of a similarly situated individual, Section 10(b) also could not be applied. *See Taylor v. Smith & Kelly Co.*, 14 BRBS 489 (1991). Accordingly, since Section 10(a) and (b) could not be applied on the facts presented, Section 10(c) should have been applied to determine a reasonable average weekly wage. *See generally Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sub nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). The administrative law judge, however, neglected to do so, indicating that it was claimant's burden to establish the applicable average weekly wage by a preponderance of the evidence, and that there was "no basis for ordering that the average weekly wage be anything other than the $719.03 that employer has used as the basis for paying compensation."

A determination of claimant's average weekly wage must be based on adequate evidence in the record. *See Duncan*, 24 BRBS at 140. Employer's $719.03 average weekly wage figure, which the administrative law judge adopted, however, is not supported by the record; it is based on the erroneous assumption that claimant worked 49 4/7 weeks from April 1, 1988 to March 31, 1989. Claimant testified, however, that he was out of work for a left shoulder injury in 1988 for 3 1/2 to 4 months. Tr. 174-176. Moreover, claimant's wage records, which are in evidence, reflect that he had no earnings from May 5, 1988, to August 10, 1988. Employer's Exhibit 7. Employer also conceded in its proposed findings of fact below that claimant worked a total of 189 days in the year preceding the accident. The administrative law judge erred in simply adopting the $719.03 average weekly wage figure urged by the employer, without consideration of the evidence of record. We therefore vacate his average weekly wage determination and remand this case for findings under Section 10(c) based on the evidence of record. *See generally Browder*, 24 BRBS at 219.[4]

---

[2]This figure was based on claimant's earning records from the New York Shipping Association from April 1, 1988 to March 31, 1989. Employer determined that claimant's income during this period was $35,643.45, which it then divided by 49 and 4/7 weeks.

[3]It is not clear from the record how claimant arrived at this figure. It appears that he may have added the income reflected on his 1988 and 1989 tax returns ($37,768.00 + $20,668.40 or $56,436.40) and then divided this figure by the 56.4 weeks which he actually worked during this two year period.

[4]Although the administrative law judge found that claimant's proposed average weekly wage

could not be employed under Section 10(a), 33 U.S.C. §910(a), the average weekly wage proposed by claimant could be applied under Section 10(c). Unlike Section 10(a), Section 10(c) does not require that the administrative law judge utilize claimant's actual earnings from the year prior to the injury or evidence from which an average daily wage can be determined, but rather seeks a rational determination of claimant's annual earning capacity.

Accordingly, the administrative law judge's determination that claimant was not disabled after October 20, 1989, is vacated, and the case is remanded for reconsideration of claimant's disability claim in light of all relevant evidence of record. The administrative law judge's average weekly wage determination is also vacated, and the case is remanded for reconsideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge