BRB Nos. 97-0729
and 97-0729A

ALAN PICHON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Kevin B. Liebkemann, Metairie, Louisiana, for claimant.

Wayne G. Zeringue, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for the self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Awarding Benefits (94-LHC-2820) of Administrative Law Judge James W. Kerr, Jr., 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 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 sought temporary total disability compensation and medical benefits under the Act commencing May 3, 1994, in connection with an April 28, 1993, back injury he sustained while working for employer as a welder. Claimant alleged that because of the physical effects of his injury, he became depressed and has required ongoing psychiatric treatment and has incurred psychiatric disability. Employer voluntarily paid claimant temporary total disability compensation from May 2, 1993, until May 3, 1994.

The administrative law judge awarded claimant temporary total disability benefits from April 29, 1993, until January 5, 1995, for the combined effect of his back and psychological injuries. Thereafter, he awarded claimant temporary partial disability compensation, not to exceed five years, based on the difference between claimant's stipulated average weekly wage of $470 per week, and claimant's post-injury wage-earning capacity of $271.73, based on vocational evidence. He also awarded medical benefits.

On appeal, claimant argues that the administrative law judge erred in limiting him to temporary partial disability benefits as of January 5, 1995, asserting the combination of his physical and psychological injuries precludes him from performing the jobs identified in Ms. Favaloro's labor market surveys. Claimant further avers that the administrative law judge erred in finding that employer established the availability of suitable alternate employment based on Ms. Favaloro's vocational testimony because her labor market surveys are flawed. Alternatively, claimant argues that the administrative law judge erred in determining his wage-earning capacity between January 6, 1995, and June 26, 1996, and in limiting his temporary partial disability award to five years. On cross-appeal, employer argues that the administrative law judge's award of disability compensation should be reversed because claimant did not sustain a work-related psychiatric injury, any psychiatric condition he has is not disabling, and employer offered claimant a suitable job at his former wages in its welding department. In the alternative, employer urges affirmance, as it established suitable alternate employment based on Ms. Favaloro's testimony, and claimant was not diligent in pursuing a job. Claimant replies, reiterating his original arguments.

Initially, we reject employer's argument on cross-appeal that claimant's psychiatric condition is not causally related to his April 28, 1993, work-related back injury because claimant did not complain of depression until over a year after the accident. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

In the present case, although the administrative law judge set forth the applicable standards regarding application of the Section 20(a) presumption, he never made a specific determination as to whether the presumption was invoked or rebutted. Nonetheless, we conclude any error he may have made in this regard is harmless because, after weighing the relevant evidence pro and con, the administrative law judge rationally found that claimant's depression was work-related based on his crediting of the opinions of Drs.

Richoux and MacGregor.[1] *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). Inasmuch as the medical opinions of Drs. Richoux and MacGregor provide substantial evidence to support the administrative law judge's determination that claimant's psychological condition is work-related and employer has failed to establish any reversible error, we affirm this determination. *See Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175, 179 (1996).

[1] Moreover, the administrative law judge characterized Dr. Roniger's opinion that claimant did not suffer from any psychiatric condition as questionable given that many of the symptoms which he had noted appeared to be of a psychiatric nature. Decision and Order at 15.

We also affirm the administrative law judge's finding that claimant is entitled to temporary total disability compensation until January 5, 1995, and temporary partial disability benefits thereafter for the combined effect of his physical and psychological injuries. Initially, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability by establishing that he is unable to perform his usual welding duties. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Based on Dr. Watermeier's orthopedic opinion that claimant was limited to light to sedentary work, Dr. Richoux's opinion that claimant was psychiatrically disabled from performing any work,[2] and Dr. MacGregor's psychiatric opinion that due to concentration problems and irritability, claimant should not work around heavy machinery, in dangerous positions, or extensively with his co-workers,[3] the administrative law judge rationally found that claimant was unable to perform his former welding duties. In addition, he found claimant's testimony regarding the requirements of his former job duties credible. Inasmuch as the administrative law judge's finding that claimant established a *prima facie* case of total disability is rational and supported by substantial evidence, we affirm this determination. *Merrill*, 25 BRBS at 145.

The burden therefore shifted to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Merrill*, 25 BRBS at 145. In the present case, employer attempted to meet this burden both by offering claimant a medium duty welding job at its facility, and through Ms. Favaloro's vocational testimony. After finding that the alternate job offered by employer was not suitable, the administrative law judge determined that employer had nonetheless established the availability of suitable alternate employment based on various jobs identified in Ms. Favaloro's January 5, 1995 and June 26, 1996, labor market surveys.

Initially, we find no merit in employer's argument that claimant sustained no

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[2]Employer argues on cross-appeal that Dr. Richoux's opinion should have been disregarded in its entirety because of alleged inconsistencies and irregularities. We need not address these specific contentions, as any error the administrative law judge may have made concerning Dr. Richoux's opinion is harmless because the administrative law judge also credited other doctors' opinions in finding that claimant was unable to perform his usual work duties. Moreover, he did not credit Dr. Richoux's opinion that claimant was totally disabled in determining the extent of claimant's psychiatric disability.

[3]In its brief on cross-appeal, employer argues that Dr. MacGregor's restrictions regarding claimant's inability to operate heavy machinery and to get along with others do not hold up to scrutiny because claimant still drives his car on a regular basis and also operates his boat when he goes fishing, and is able to get along with his friends and neighbors. The administrative law judge, however, was aware of this information and acted within his discretionary authority in nonetheless crediting Dr. MacGregor's testimony.

compensable disability because it offered claimant a suitable welding job at his former wages at its facility. Mr. Duhon, the manager of employer's workers' compensation department, testified that employer had offered claimant a modified job in its welding department in April 1994 based on the results of a February 1994 functional capacity evaluation which showed claimant capable of medium duty work. The administrative law judge, however, rationally found that the welding job employer offered did not constitute suitable alternate employment because it did not conform to the light to sedentary work restrictions imposed by Dr. Watermeier or Dr. MacGregor's restrictions regarding working around heavy machinery which he credited. Decision and Order at 17. The administrative law judge's finding that this job was not sufficient to demonstrate suitable alternate employment is thus affirmed.

Claimant argues that the administrative law judge should have found that he was totally disabled based on the medical opinion of Dr. Watermeier, as he was the only physician to account for the combined effect of claimant's orthopedic and psychiatric injuries. This argument is rejected. The administrative law judge is free to accept or reject all or any part of any medical opinion as he sees fit. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Inasmuch as Dr. Watermeier was an orthopedist, the administrative law judge's decision to credit his opinion regarding claimant's physical capabilities, but afford greater weight to Dr. MacGregor's opinion regarding claimant's psychiatric disability was a rational credibility determination within his discretionary authority. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Moreover, we note that Dr. Watermeier deposed that when he reported, on August 2, 1994, that claimant should not perform any gainful employment, he also stated that he would want to reexamine him to determine his physical status, and would defer to a psychiatrist as to mental status. RX-4 at 79-86, 91-92.

We also reject claimant's argument that the administrative law judge erred in finding that employer met its burden of establishing the availability of suitable alternate employment based on Ms. Favaloro's vocational testimony. In a report dated January 5, 1995, Ms. Favaloro identified various positions which she felt fell within the restrictions imposed by Dr. Watermeier. Favaloro Depo. at 58. On June 26, 1996, after receiving the additional psychiatric reports of Drs. Richoux, Rivener and MacGregor, Ms. Favaloro conducted a supplemental labor market survey, and identified additional positions available in the sedentary to light duty classification. *Id.* at 113; RX-19 at 1. After considering Ms. Favaloro's testimony, the administrative law judge initially rejected the security guard and repair technician jobs she identified in her January 5, 1995, labor market survey as outside of claimant's physical and/or psychological restrictions. He determined, however, that the cashier job she identified at the time was suitable, and paid $4.50 per hour. In addition, he found that employer had established the availability of suitable alternate employment based on the positions of copy clerk, service advisor, parking lot cashier, weigh station operator and unarmed security/timekeeper which Ms. Favaloro identified in her June 26, 1996, survey.

Claimant argues on appeal that Ms. Favaloro's testimony does not provide

substantial evidence to support the administrative law judge's finding of suitable alternate employment because she failed to account for the majority of claimant's psychiatric impairments when conducting her labor market surveys, and failed to accurately and completely report the requirements of the allegedly available jobs. In addition, he argues that it was irrational for the administrative law judge to have found that claimant was capable of performing the cashier job identified in the January 1995 labor market survey, given his crediting of Dr. MacGregor's testimony regarding claimant's inability to interact with people and his concentration difficulties. Claimant further asserts that the copy clerk, service advisor, parking lot cashier, weigh station operator, and unarmed security/time-keeper jobs upon which the administrative law judge relied from Ms. Favaloro's June 1996 survey are similarly unsuitable.

Claimant's contention that employer has not succeeded in establishing the availability of suitable alternate employment is rejected. Claimant's assertion that the jobs relied upon by the administrative law judge are not suitable from a psychological perspective lacks merit, inasmuch as the record reflects that Ms. Favaloro considered claimant's age, education, and physical restrictions, as well as Dr. MacGregor's assessment of claimant's psychiatric limitations in conducting her market surveys. In addition, Ms. Favaloro provided testimony that she did not view claimant's psychiatric limitations as important in the type of repetitive entry level jobs identified in her surveys. Favaloro Depo. at 81. Moreover, we note that in considering whether the alternate jobs identified were suitable from a psychiatric perspective, the administrative law judge did not simply adopt Ms. Favaloro's findings. Rather, he considered the specific requirements of the jobs himself and then compared them with claimant's physical and psychiatric limitations to determine their suitability. Inasmuch as the administrative law judge's finding that employer established the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm that determination. *See generally Mendoza v. Marine Personnel Co., Inc.* 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Claimant's due diligence argument similarly fails. A claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement to temporary total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment. *See also Roger's Terminal and Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). In the present case, although claimant argues that his failure to conduct a job search was attributable to his reliance on Dr. Watermeier's opinion that he was totally disabled based on his combined physical and psychiatric impairments, as discussed *supra,* the administrative law judge rationally rejected Dr. Watermeier's opinion in this regard. Moreover, based on the fact that claimant admitted that he did not personally go to any of the employers Ms. Favaloro identified, but only called them by telephone, and the fact that claimant informed one prospective employer that he was on total disability, the administrative law judge rationally determined that claimant did not demonstrate due diligence. Inasmuch as the administrative law judge's finding is rational and supported by substantial evidence, it is affirmed. *See generally Fox v. West State, Inc.,* 31 BRBS 118 (1997).

While we find no merit in claimant's arguments regarding the administrative law judge's finding of suitable alternate employment, we agree that the administrative law judge erred in determining his post-injury wage-earning capacity for the period of temporary partial disability compensation awarded between January 6, 1995 and June 26, 1996. An award of temporary partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(e). In the present case, the administrative law judge found that employer established suitable alternate employment as of January 6, 1995, the date of Ms. Favaloro's first labor market survey, and averaged the $4.50 per hour salary paid in the cashier job which he found suitable from Ms. Favaloro's January 1995 survey with the salaries paid in the jobs which she identified in June 1996 to arrive at a post-injury wage-earning capacity figure of $6.79 per hour, or $271.73 per week. Accordingly, he awarded claimant temporary partial disability benefits commencing January 6, 1995 based on the difference between his stipulated average weekly wage of $470 per week and a post-injury wage-earning capacity of $271.73. Inasmuch, however, as the only suitable job shown to be available between January 6, 1995, and the time of Ms. Favaloro's June 1996 labor market survey was the cashier job she identified in 1995, we agree with claimant that the administrative law judge erred in including the salaries for the jobs identified in 1996 in determining claimant's post-injury wage-earning capacity during this period. *See Director, OWCP v. Bethlehem Steel Corp.,* 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991); *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991). Accordingly, we vacate the administrative law judge's determination that claimant had a post-injury wage-earning capacity of $271.73 between January 6, 1995 and June 26, 1996, and modify his Decision and Order to reflect that claimant's post-injury wage-earning capacity during this period was $4.50 per hour, or $180 per week.

Finally, we affirm the administrative law judge's limitation of the award of temporary partial disability benefits to a period not to exceed five years. Under Section 8(e), temporary partial disability shall not be paid for a period exceeding five years. 33 U.S.C. §908(e). The five year period is thus mandated by the Act.

Accordingly, the administrative law judge's award of temporary partial disability benefits between January 6, 1995 and June 26, 1996, is modified to reflect that claimant's wage-earning capacity was $180 per week. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge