BRB No. 97-0888

BRIAN KOERNSCHILD	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
W.H. STREIT, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Laurence L. Smith (Neil A. Morris Associates, P.C.), Marlton, New Jersey, for claimant.

Stephen P. Pazan (Sweeney & Sheehan), Westmont, New Jersey, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (93-LHC-1648) of Administrative Law Judge Ainsworth H. Brown 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, a crane operator for employer, suffered a work-related injury on July 10, 1991, when he fell from a crane and landed on his back. After conservative treatment failed to relieve his symptoms, claimant underwent a laminectomy and diskectomy at the left L4-5 level on November 18, 1992. In July 1994, Dr. Kirshner, who performed claimant's back surgery, recommended that claimant undergo an intense physical therapy program for approximately 6 months in order to relieve claimant's continued complaints of back pain, but gave this program only a 50/50 chance of providing further relief to claimant. It is undisputed that claimant is unable to return to his former employment duties with employer.

Employer voluntarily paid claimant temporary total disability compensation based on an average weekly wage of $760, *see* 33 U.S.C. §908(b), during various periods of time from July 10, 1992, until February 14, 1994, at which time employer terminated payments. Employer did not, however, authorize claimant's physical therapy. Claimant filed a claim under the Act seeking permanent total disability benefits, 33 U.S.C. §908(a), and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. At the hearing, the parties stipulated, *inter alia*, that claimant reached maximum medical improvement no earlier than February 14, 1994.

In his Decision and Order, the administrative law judge, after initially determining that claimant's average weekly wage could not be calculated pursuant to Sections 10(a) or (b) of the Act, 33 U.S.C. §910(a), (b), concluded that the record did not establish why the rate at which voluntary payments were made by employer should not be applied. Thus, the administrative law judge determined that claimant's average weekly wage was $760. Next, relying on the July 7, 1994 report of Dr. Kirshner, the administrative law judge found that claimant reached maximum medical improvement in July 1994. Lastly, the administrative law judge rejected the report of employer's vocational consultant, Ms. Mocarski, as she did not take into account the physical limitations placed on claimant by Dr. Kirshner, and found that employer failed to meet its burden of establishing the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant permanent total disability benefits from the date employer terminated benefits in February 1994 and continuing, *see* 33 U.S.C. §908(a), as well as medical benefits.

On appeal, employer challenges the administrative law judge's findings regarding the date claimant reached maximum medical improvement, the extent of claimant's disability, and the calculation of claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision.

Nature of Disability: Maximum Medical Improvement

Employer initially argues that the administrative law judge erred in finding that claimant reached maximum medical improvement. Specifically, employer contends that since Dr. Kirshner, in July 1994, recommended physical therapy for a limited period of time in the hope that it would relieve claimant's symptoms, a finding of maximum medical improvement based upon that physician's opinion is inappropriate. Claimant responds, asserting that the administrative law judge rationally relied on Dr. Kirshner's opinion in finding that claimant reached maximum medical improvement in July 1994.

The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). Where a physician believes that further treatment should be undertaken, then the possibility of success exists, and maximum medical improvement does not occur until the treatment is complete. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

In the instant case, Dr. Kirshner, in his July 7, 1994 report, stated that the best chance that physical therapy would have relieved claimant's pain would have been a year earlier, that in all probability claimant would never be pain free, and that there was only a 50/50 chance that the prescribed physical therapy would provide a further benefit to claimant. *See* Cl. Ex. 9. Dr. Kirshner testified in August 1994 that claimant's condition was chronic and longstanding, and that his pain would probably worsen in the future. Emp. Ex. 13 at 52-53. Thus, while Dr. Kirshner may have recommended physical therapy to relieve some of claimant's pain, he did not believe it would diminish claimant's chronic back condition.[1] Moreover, claimant never underwent this physical therapy, as employer refused to authorize it. Thus, as the record contains substantial medical evidence to support the administrative law judge's determination that claimant reached maximum medical improvement in July 1994, we affirm that finding. *See Delay v. Jones Washington Stevedoring Co.*, BRBS , BRB No. 97-0691 (Jan. 21, 1998); *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). However, as the administrative law judge did not specify a date in the month of July that claimant's condition reached permanency, we modify the administrative law judge's decision to reflect that claimant reached maximum medical improvement on July 7, 1994, the date of Dr. Kirshner's report; claimant is thus entitled to an award of temporary total disability from February 14, 1994, the date employer terminated benefits, through July 7, 1994.

[1]The administrative law judge rationally gave greater weight to the opinion of Dr. Kirshner over that of Dr. Maslow as this opinion was given subsequent to Dr. Maslow's. We note that Dr. Maslow, on May 13, 1991, was also of the opinion that claimant reached maximum medical improvement. *See* Emp. Ex. 11.

Extent of Disability

Employer next challenges the administrative law judge finding that claimant is totally disabled. Specifically, employer argues that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment. In this regard, employer asserts that since the report of its vocational consultant, Ms. Mocarski, was not contradicted, the administrative law judge should have accepted this report as evidence of the availability of suitable alternate employment. Moreover, employer argues that the administrative law judge failed to consider whether the sedentary jobs identified by Ms. Mocarski would have been appropriate considering the physical limitations placed on claimant by Dr. Kirshner, as well as the jobs of parole officer and probation officer, positions for which claimant was attending school at the time of the hearing. We agree with employer that the administrative law judge's rejection of employer's labor market survey cannot be affirmed and, for the reasons that follow, we vacate his finding on this issue and remand the case for further consideration.

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by showing the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co.*, *Inc.*, 25 BRBS 294 (1992). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the instant case, the administrative law judge, after crediting the opinion of Dr. Kirshner over that of Dr. Maslow, rejected employer's labor market survey since it took into account the physical restrictions imposed on claimant by Dr. Maslow rather than Dr. Kirshner.[2] In his May 13, 1993 report, Dr. Maslow opined that claimant was not capable of performing a job with heavy tasks, but could perform jobs which involved no more than 50

[2]Employer's argument that the administrative law judge failed to consider the medical evidence other than the reports of Drs. Maslow and Kirshner, *see* Employer's Brief at 15, is rejected. Dr. Brill's report of May 12, 1992, which predates claimant's surgery and allegedly states that claimant can return to his former job, is alluded to in other reports but is not contained in the record. Emp. Exs. 12, 14. While Dr. Kirshner, on September 9, 1992, saw no cervical abnormalities, he did find severe lumbar abnormalities, for which he later performed surgery. *See* Cl. Exs. 9-10.

pounds of lifting on occasion, no more than 25 to 30 pounds of repetitive lifting, and no constant overhead reaching, pulling or lifting. *See* Emp. Ex. 11. Dr. Kirshner testified that he believed claimant could perform only sedentary work which involved lifting no more than 10 pounds, no repetitive lifting, and where he could sit, walk or stand up to only one hour at a time with breaks in between.[3] Emp. Ex. 13 at 52. In her labor market survey, Ms. Mocarski identified available jobs in 1993 within the physical restrictions imposed on claimant by Dr. Maslow, relying on the physical demands of each job as described by the Dictionary of Occupational Titles (DOT).[4] Emp. Ex. 14. She did not consider the reports of Dr. Mariani, claimant's initial treating physician, or Dr. Kirshner, who began treating claimant in September 1992. Emp. Ex. 15 at 42, 45. However, the fact that employer's labor market survey was prepared based only on Dr. Maslow's restrictions does not mandate that the identified positions do not also fall within Dr. Kirshner's restrictions. In her labor market survey, Ms. Mocarski listed one position, a surveillance officer, identified as sedentary by DOT, and three other positions identified as either sedentary or light duty positions. If credited by the administrative law judge, these positions could fall within the physical restrictions imposed on claimant by Dr. Kirshner and, therefore, may be sufficient to establish the availability of suitable alternate employment. *See, e.g., Diosdado*, 31 BRBS at 74; *see* Emp. Ex. 14. Accordingly, we vacate the administrative law judge's finding on this issue and we remand the case for reconsideration of the issue of suitable alternate employment.[5]

Average Weekly Wage

[3]In a Residual Functional Capacity Questionnaire, dated August 8, 1995, Dr. Kirshner reduced the time he believed claimant could sit, stand and walk at one time from one hour to one-half hour. Cl. Ex. 9.

[4]Contrary to claimant's assertion, the employer need not contact the prospective employer for its specific requirements in order to establish a valid vocational survey. The United States Court of Appeals for the Fourth Circuit, wherein this case lies, has held that an employer may meet its burden of establishing the availability of suitable alternate employment by demonstrating the availability of specific jobs in a local market which rely on standard occupational descriptions. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125 (CRT)(4th Cir. 1997).

[5]On remand, the administrative law judge need not consider the jobs of parole officer or probation officer. At the time of the hearing, claimant was going to school to pursue either of those careers, but had not completed the degrees necessary for the positions. Ms. Mocarski identified the jobs of probation officer and investigator, but failed to indicate the physical requirements of the jobs as described by the DOT, and never addressed the availability of these jobs. Claimant provided uncontradicted testimony that there are long waiting lists for the jobs of parole officer and probation officer. Tr. at 87-88. Accordingly, it is too speculative on this record to assume claimant could ultimately obtain employment in these positions. *See, e.g., Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

Lastly, employer argues that the administrative law judge did not perform a proper calculation of claimant's average weekly wage under Section 10(c) of the Act, 33 U.S.C. §910(c), and improperly adopted the wage rate at which employer voluntarily paid claimant temporary total disability compensation. Employer thus requests that the case be remanded and the record reopened for the submission of additional evidence with regard to the issue of claimant's average weekly wage. We reject employer's contention. In his decision, the administrative law judge initially determined that claimant's average weekly wage could not be calculated pursuant to Section 10(a) or (b), 33 U.S.C. §910(a), (b). Finding that the record was not "satisfactorily forthcoming" as to why the rate for voluntary temporary total disability benefits is not accurate, the administrative law judge awarded claimant permanent total disability benefits at a rate of $760.

Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[6] *See Newby v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson*, 14 BRBS at 855.

In the instant case, claimant testified that he earned between $19 and $20 per hour while working for employer. *See* Tr. at 63. The average weekly wage of $760 which employer voluntarily paid claimant temporary total disability benefits is representative of the lower hourly wage rate set forth by claimant, $19, multiplied by 40 hours per week. The administrative law judge's finding that claimant's average weekly wage was $760 is thus supported by claimant's testimony that he earned, at a minimum, $19 per hour while working for employer. Claimant's testimony with regard to his hourly rate is uncontradicted, and a claimant's average weekly wage may be computed by multiplying the hourly rate of pay by a time variable. *See Eckstein v. General Dynamics Corp.,* 11 BRBS 781 (1980). We therefore affirm the administrative law judge's determination that claimant's average weekly wage is $760, as employer has failed to demonstrate reversible error in this finding. *See, e.g., Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

[6]Neither employer nor claimant argues that Section 10(a) or (b) is applicable to the instant case.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is modified to reflect that claimant is entitled to an award of temporary total disability benefits from February 14, 1994 through July 7, 1994. The administrative law judge's determination that employer failed to establish the availability of suitable alternate employment is vacated, and the case is remanded for further consideration of that issue consistent with this opinion. In all other respects, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.[7]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[7]We reject employer's allegation that the administrative law judge was biased against it. Employer's mere assertions are insufficient to demonstrate bias on the part of the administrative law judge. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1995), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).