BRB No. 09-0193

| | | |
|---|---|---|
| J.M. | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| BROWN & ROOT/SEII | ) | DATE ISSUED: 07/20/2009 |
| | ) | |
| and | ) | |
| | ) | |
| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Michael W. Thomas and Shana L. Prechtl (Laughlin, Falbo, Levy & Moresi LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-LDA-00030) of Administrative Law Judge Jennifer Gee 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related injury to his back on July 17, 2005, while working for employer as a carpenter in Chagcharaun, Afghanistan. Following this injury, claimant returned to the United States where he commenced treatment with Dr. Baca, a chiropractor. Dr. Baca diagnosed claimant with, *inter alia*, a lumbosacral sprain, myofascial pain syndrome, and lumbar intervertebral disc degeneration. A lumbar MRI subsequently revealed minimal disc bulging at L2–3, L3–4, and L4–5, and a compression fracture at T11. In September 2006, claimant began performing light handyman work on a periodic basis. On or about May 1, 2007, claimant commenced part-time work as a superintendent of remodeling for a local general contractor. Employer voluntarily paid claimant temporary total disability benefits during the period of August 4, 2005, to May 8, 2006.

In her Decision and Order, the administrative law judge found that claimant's back condition reached maximum medical improvement on November 2, 2005, that claimant is unable to return to his pre-injury employment with employer, and that employer established the availability of suitable alternate employment as a security guard. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from August 1, 2005, through November 2, 2005, permanent total disability benefits from November 3, 2005, through December 14, 2005, and permanent partial disability benefits, based upon two-thirds of the difference between claimant's average weekly wage and his post-injury wage-earning capacity, from December 15, 2005, and continuing. 33 U.C.C. §908(a), (b), (c)(21), (h).

On appeal, employer challenges the administrative law judge's decision to award claimant ongoing permanent partial disability benefits. Claimant has not filed a brief in response to employer's appeal.

Where, as in this case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *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). In order to meet this burden, employer must establish that suitable alternate work was "realistically and regularly" available to claimant in his community. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Employer initially challenges the administrative law judge's finding that the maintenance technician positions which it identified did not establish the availability of suitable alternate employment.[1] Employer asserts that the administrative law judge erred in relying upon the opinion of claimant's chiropractor, Dr. Baca, over the opinion of its witness, Dr. Moczynski, when determining claimant's work-related physical limitations. In this case, Dr. Baca, Dr. Muczynoki, and Dr. Schurgin, who is Board-certified in pain management, essentially agreed as to the diagnosis of claimant's back condition. *See* CX 2, 3, 4, EX 20, 21. Dr. Baca and Dr. Moczynski disagreed, however, as to claimant's residual impairment.[2] In determining claimant's physical restrictions, the administrative law judge relied upon Dr. Baca's opinion, claimant's testimony, and claimant's stipulation that he was capable of performing the light exertional activities of a security guard. Decision and Order at 16–20. Dr. Baca recommended that claimant perform only sedentary work in order to avoid a more severe injury or a re-injury to his back. Dr. Baca further placed the following restrictions upon claimant's activities: sitting, walking and standing for two hours at a time, limitations on pushing, pulling and lifting to 10 pounds and two hours per day, and limitations on repetitive movements of claimant's wrists and elbow. Dr. Moczynski, who examined claimant on two occasions, opined that claimant remained symptomatic with regard to prolonged standing and sitting, that claimant should avoid activities that would require repetitive bending, and that claimant should not lift more than fifty pounds. Claimant, in his May 2007 deposition, testified that he continued to experience back and shoulder pain, but that he could function if he is not required to perform repetitive bending or lifting of heavy objects. EX 32 at 32–39.

In crediting Dr. Baca's testimony, the administrative law judge found that the physical limitations he placed on claimant were based on Dr. Baca's examination and testing of claimant as well as claimant's reports of pain. Decision and Order at 18. In declining to rely upon the opinion of Dr. Moczynski, the administrative law judge found that Dr. Moczynski offered no explanation for the physical restrictions he placed on claimant. Decision and Order at 18. Stating she had given very careful consideration to the opinions of Drs. Baca and Moczynski, as well as to claimant's testimony, the administrative law judge found Dr. Baca's opinion regarding claimant's limitations more persuasive than that of Dr. Moczynski since Dr. Baca offered a more detailed explanation for his opinion and based his assessment on both his physical examination of claimant and the results of the tests performed on claimant. *Id.* at 20. However, based upon claimant's

[1] The administrative law judge's finding that the multiple security guard positions identified by employer establish the availability of suitable alternate employment as of December 15, 2005, is affirmed, as it is unchallenged on appeal. *See* Decision and Order at 29.

[2] Dr. Schurgin did not offer an opinion on this subject.

concession that he is physically capable of working as a security guard, a position which the administrative law judge determined constituted light-duty work, the administrative law judge found that claimant is capable of working at a light-duty exertional level with restrictions on lifting up to 20 pounds occasionally and 10 pounds frequently, walking or standing up to 5 hours at a time, position changes as necessary, and no repetitive bending, lifting or stooping. *Id.*

In challenging the administrative law judge's decision to credit Dr. Baca's opinion, employer contends that since Dr. Baca is a chiropractor and he did not manually manipulate claimant's spine in order to correct a subluxation, Dr. Baca is not a "physician" under the Act, 20 C.F.R. §702.404, and cannot therefore render a credible expert medical opinion.[3] *See* Emp. Br. at 16–20. Thus, employer asserts that Dr. Baca's opinion regarding claimant's present medical condition and limitations has no probative value and cannot be entitled to any weight.

We reject employer's argument that Dr. Baca's opinion cannot be credited because he did not treat claimant for a subluxation of the spine and we affirm the administrative law judge's determination of claimant's physical limitations as it is based on a rational weighing of the evidence of record. The administrative law judge properly addressed the fact that Dr. Baca is a chiropractor and found that while he would not be entitled to reimbursement for his treatment under Section 702.404, that did not affect the weight to be given his opinions. The administrative law judge reasoned that the regulation does not prohibit claimant's treatment by a chiropractor for conditions other than a subluxation but limits reimbursable services to that condition. She thus concluded that the weight to be given the chiropractor's opinion should be based on factors relevant to the opinion of any medical provider. Decision and Order at 17.

---

[3] Section 702.404 of the Act's regulations, 20 C.F.R. §702.404, states:

> The term physician includes . . . chiropractors. . . . The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings.

We affirm the administrative law judge's conclusion. It is well established that it is for the administrative law judge to evaluate, weigh, and draw inferences from the evidence of record.[4] *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Moreover, the administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of his symptoms and physical effects of his injury in assessing the extent of claimant's disability.[5] *Pimpinella v. Universal Maritime Service Corp.*, 27 BRBS 154 (1993). The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner, *Donovan*, 300 F.2d 741; *Hughes*, 289 F.2d 403, and the Board must respect her findings if they are rational. *Casey v. Georgetown Univ. Medical Ctr.*, 31 BRBS 147 (1997).

In this regard, the administrative law judge rationally rejected employer's reliance on *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001). In *Deweert*, the Ninth Circuit affirmed the administrative law judge's rejection of a chiropractor's opinion because it "derived no support" from the records and opinions of claimant's treating physicians and was based on a misunderstanding of linesman jobs. Although the court noted that the chiropractor is not a medical doctor, the court did not rely on this to reject the opinion. Rather, substantial evidence supported the conclusion that the claimant in *Deweert* could perform the work in question. This opinion thus supports the well-established principle that it is with the administrative law judge's discretion to determine the weight to be accorded to the medical evidence of record, so long as an adequate rationale is provided. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). In this case, the administrative law judge acted within her discretion in crediting Dr. Baca's opinion, as she discussed at length his examinations and testing of claimant's back, as well as his reliance on claimant's credible complaints of pain. The administrative law judge rationally found Dr. Baca's opinion to be more detailed and

[4] As the administrative law judge concluded, Section 702.404, which is contained within Subpart D – Medical Care and Supervision of the regulations and is labeled "Physician defined," does not address the weight to be given a chiropractor's opinion.

[5] Similarly, an administrative law judge may credit a claimant's complaints of subjective symptoms and pain. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Volpe v. Northeast Marine terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

thus more persuasive than the opinion of Dr. Moczynski regarding the issue of claimant's present physical limitations and we affirm this finding as it is supported by substantial evidence.[6] *O'Keeffe*, 380 U.S. 359; *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

Next, in challenging the administrative law judge's determination that claimant is incapable of performing the nine maintenance technician positions it identified as suitable alternate employment,[7] employer contends that the opinion of its vocational expert, Dr. Haag,[8] establishes the suitability of these positions. The administrative law judge discussed the nine maintenance technician positions identified by Dr. Haag in conjunction with Dr. Moczynski's restriction and concluded, in view of Mr. Stock's research into the positions, that the duties required exceed claimant's credited physical restrictions, as set by Dr. Baca and claimant's testimony, and thus that the jobs are unsuitable for claimant Decision and Order at 20–29. Contrary to employer's contentions on appeal, the administrative law judge fully considered Dr. Haag's deposition testimony, *id.*, and employer has failed to demonstrate error in the administrative law judge's rational weighing of the vocational evidence. Accordingly, as the administrative law judge explicitly considered each of the maintenance technician positions identified by employer, and her findings that the duties of the positions exceed claimant's physical restrictions are rational and supported by substantial evidence, the administrative law judge's conclusion that these positions do not establish the availability of suitable alternate employment is affirmed. *See Wilson*, 30 BRBS 199.

We agree with employer, however, that the administrative law judge erred in failing to consider a January 23, 2006, labor market survey prepared by Ms. Thompson. *See* EX 23. The administrative law judge did not discuss this evidence, and if credited,

---

[6] On appeal, employer cites a ruling issued by the Employees Compensation Appeals Board, *Re Rebecca J. Bauers*, 83-934 (July 8, 1983), which it alleges establishes that a chiropractor's opinion, in the absence of a spinal subluxation is of no probative value in cases arising under the Federal Employees Compensation Act (FECA). We reject employer's assertion that this ruling should be applied in this longshore case. There are significant differences between FECA and the Longshore Act.

[7] Employer identified maintenance technician positions with Camelback Resort, Tiempo Property Management, Resort Suites, Maravilla Care Center, Scottsdale Village Square, Forum at Desert Harbor, Scottsdale Villa Mirage, Kival Campus of Care, and the Radison-Phoenix Chandler. EXs 31, 38.

[8] Dr. Haag is a vocational consultant who received his Ph.D. in psychology. EX 31.

it could establish a post-injury wage-earning capacity greater than that found by the administrative law judge as of January 23, 2006. In addition, employer asserts that claimant's post-injury wage-earning capacity subsequent to April 30, 2007, should be calculated based upon the actual post-injury wages earned by claimant. As the administrative law judge did not address this argument, the case must be remanded for further findings regarding claimant's post-injury wage-earning capacity.

An award for permanent partial disability is based on two-thirds of the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c),(21) (h). Section 8(h) of the Act provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h); *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *see also Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001).

Before the administrative law judge, both claimant and employer argued that claimant's actual post-injury wages established his post-injury wage-earning capacity.[9] The administrative law judge did not address the parties' contentions regarding claimant's actual post-injury earnings. Rather, after finding that the availability of suitable alternate employment had been established as of December 15, 2005, the administrative law judge stated that

> In view of the Claimant's stipulations that he was able to perform the work required for the security guard positions identified by Dr. Haag . . . and the fact that his wage earning capacity from those jobs would have been $337.20, there is no need to discuss the Claimant's calculations as to his wage earning capacity.

Decision and Order at 30. While an administrative law judge is not required to rely upon a claimant's actual earnings if other suitable positions are representative of his wage-earning capacity, *see Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990), the administrative law judge must address the contentions of the parties raised

[9] Claimant testified that he earned approximately $1,000 per month between September 2006 and the date of the formal hearing, and that on or about May 1, 2007, he commenced employment paying $15 per hour with a local general contractor. Tr. at 39–60; EX 32 at 47; Cl. Post-hearing Br. at 9.

before her. Emp. Post-hearing Br. at 16–18; Cl. Post-hearing Br. at 8–9. In this case, both parties asserted that claimant's actual post-injury earnings established his post-injury wage-earning capacity. We therefore vacate the administrative law judge's calculation of claimant's post-injury wage-earning capacity and remand the case for the administrative law judge to address the contentions of the parties regarding claimant's actual post-injury earnings and the January 2006 labor market survey.

Accordingly, the administrative law judge's calculation of claimant's post-injury wage-earning capacity is vacated, and the case remanded for reconsideration of claimant's post-injury wage-earning capacity. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge