BRB Nos. 03-0516
and 03-0516A

JIMMY BOND	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HAM MARINE, INCORPORATED	)	DATE ISSUED:April 30, 2004
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Michael J. McElhaney, Jr. and Gina Bardwell Tompkins (Colingo, Williams, Heidelberg, Steinberger & McElhaney, P.A.), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits of Administrative Law Judge Clement J. Kennington 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).

On February 15, 1999, claimant fell at work and sustained injuries to his left eye, leg and hip. On February 17, 1999, Dr. Cope performed an open reduction internal fixation on claimant's leg, and installed hardware to fix a basilar neck fracture near the left hip. Cl. Ex. 16 at 32. After recuperating, claimant returned to work for employer in a light duty capacity on May 25, 1999. On January 9, 2000, claimant was terminated as part of a reduction in force. On August 30, 2000, Dr. Longnecker performed surgery to remove the metal hardware from claimant's hip as it was causing claimant problems. The parties stipulated that claimant first reached maximum medical improvement on December 21, 1999, and again on October 14, 2002, following the removal of the hardware installed during claimant's initial surgery. ALJ Ex. 1. The parties also stipulated to a 45 percent impairment rating to claimant's left leg. *Id.* Employer paid claimant compensation for various periods of temporary total and temporary partial disability.

In his Decision and Order, the administrative law judge found that claimant established a *prima facie* case of total disability and that employer established the availability of suitable alternate employment. He then determined that claimant did not establish that he diligently sought employment post-injury. The administrative law judge ultimately awarded claimant temporary total disability compensation from February 16, 1999, until May 24, 1999; temporary partial disability compensation from May 25, 1999, until December 21, 1999; 115.2 weeks of compensation for a forty percent permanent partial impairment to claimant's left leg pursuant to Section 8(c)(2); permanent total disability compensation from January 10, 2000, until August 30, 2002, to run concurrently with claimant's award under the schedule; temporary total disability compensation from August 31, 2002, to October 14, 2002; and 14.4 weeks of compensation for a five percent permanent partial impairment of claimant's left leg. The administrative law judge denied employer relief from continuing compensation liability under Section 8(f), 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's determination of the date on which it established the availability of suitable alternate employment. Employer also appeals the administrative law judge's average weekly wage finding. Claimant responds, urging affirmance on these issues. In his cross-appeal, claimant contends that he is entitled to a permanent total disability award. In the alternative, claimant argues that he is entitled to awards for injuries to his hip and low back in addition to his award for the impairment sustained to his left leg. Employer responds, stating that the administrative law judge's findings in this regard are supported by

substantial evidence and should be affirmed. Claimant has filed a reply brief, reiterating his arguments on appeal.

Extent of Claimant's Work-Related Disability

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment as of October 14, 2002; specifically, claimant avers that the administrative law judge erred in relying upon vocational evidence which did not take into sufficient consideration claimant's overall health, low IQ, and ongoing complaints of pain. Employer, in its appeal, alleges that the administrative law judge erred in failing to find that it established the availability of suitable alternate employment as of February 15, 1999. We reject both parties' assertions of error regarding this issue. Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In the instant case, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon the positions identified by employer's vocational counselor. Specifically, the administrative law judge found that the positions identified with Gulf Coast Security Services and Swetman Security established the availability of suitable alternate employment that claimant was capable of performing considering claimant's age, background, experience and physical limitations. *See* Decision and Order at 22. Based upon a review of claimant's medical records as well as his psychometric and psychological evaluation, employer's expert prepared a labor market survey in January 2003 in which he identified various employment opportunities that he opined were suitable for claimant.[1] *See* Emp.

[1] The administrative law judge and the parties refer to the vocational evidence of Mr. Tingle, along with that of Mr. Pennington. *See* Decision and Order at 10-11, 22; Emp. Br. at 27. Our review of the record does not reflect any evidence attributable to Mr. Tingle. The vocational report and labor market survey to which the parties refer, Emp. Ex. 17 at 3, bears Mr. Pennington's signature only. Emp. Ex. 17 at 4. Mr. Pennington also testified at the formal hearing. *See* Tr. at 40-46.

Ex. 17. Contrary to claimant's assertions on appeal, Mr. Pennington specifically testified that he considered claimant's IQ and reviewed claimant's multiple medical records, including references to claimant's hypertension, prior to conducting his labor market survey, and that he discussed claimant's medical condition with him when he interviewed claimant.[2] The employment opportunities identified by Mr. Pennington were thereafter approved by Dr. Longnecker, who opined that claimant could perform the listed jobs on a trial basis subject to his work limitations. *See* Emp. Ex. 30.

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment in October 2002. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, as Mr. Pennington's testimony, his accompanying labor market surveys, and the approval of the identified positions by Dr. Longnecker establish that post-injury employment opportunities are available within claimant's physical restrictions, the administrative law judge's finding that claimant is capable of performing two of the identified jobs is supported by substantial evidence and consistent with law. *See Mendoza v. Marine Personnel Co.*, Inc., 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment.

In its appeal, employer challenges the administrative law judge's failure to find that it established the availability of suitable alternate employment prior to October 14, 2002, the date claimant reached MMI for the second time, contending that, as its vocational expert testified that the jobs identified in his labor market survey were available "periodically" between February 15, 1999, and October 14, 2002, the administrative law judge should have utilized the earlier date in determining when those positions were available to claimant. We disagree. In addressing this issue, the administrative law judge found, and employer agrees, that no specific date of job availability was identified by employer prior to October 14, 2002. *See* Decision and Order at 22; Emp. Br. at 28. Contrary to the position espoused by employer on appeal, the administrative law judge's finding is not inconsistent with the decision of the United States Court of Appeal for the Fifth Circuit in *P & M Crane Co. v. Hayes*, 930 F.2d 424,

[2] Although Mr. Pennington acknowledged that he did not review medical records documenting a cardiac condition, claimant on appeal has cited to no record evidence discussing such a condition. *See* Cl. Br. in support of cross-petition at 14. Mr. Pennington's report indicates that he reviewed the medical reports of Drs. Cope and Longnecker, as well as their depositions, and the reports of several other physicians. *See* Emp. Ex. 17.

21 BRBS 109(CRT) (5th Cir. 1991). In *P & M Crane*, the court rejected the argument that a single job opportunity was manifestly insufficient to establish suitable alternate employment, holding that an employee may have a reasonable likelihood of obtaining such a job under appropriate circumstances. The court remanded the case for the administrative law judge to determine whether the employer demonstrated that proposed specific and general jobs demonstrated that jobs were realistically available to claimant.

In the instant case, the administrative law judge did not err in refusing to find that suitable jobs were "realistically available" to claimant prior to October 14, 2002. Employer's expert stated that the employers listed in the survey had "either current or periodic openings" available between the date of injury of February 15, 1999, and October 14, 2002, Emp. Ex. 17 at 3, a period that included several times when claimant was physically unable to perform any work. On these facts, we cannot say that the administrative law judge erred in interpreting the report as not establishing that jobs were available during periods when claimant was able to work. We thus affirm the administrative law judge's conclusion that employer showed the availability of suitable alternate employment on October 14, 2002.[3] *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Claimant next argues, in the alternative, that he is totally disabled since employer did not establish a post-injury wage-earning capacity for him. Claimant's allegation of error is without merit. As claimant's permanent partial disability is due to an injury to his leg, a member listed in the schedule at Section 8(c)(1)–(20) of the Act, 33 U.S.C. §908(c)(1)–(20), his award of disability benefits is based on the degree of medical impairment and not loss of earning capacity. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000). Accordingly, employer need not establish claimant's post-injury wage-earning in the present case. Thus, we affirm the administrative law judge's decision to award claimant permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for an impairment to claimant's left leg.

Lastly, claimant argues that the administrative law judge erred in failing to award benefits for a hip/low back injury; alternatively, if an award under the schedule is affirmed, claimant contends that the administrative law judge erred in awarding

[3] As claimant correctly states in his brief, he is entitled to cost-of-living adjustments under Section 14(f), 33 U.S.C. §914(f), on his award of permanent total disability benefits. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990(*en banc*); *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996).

permanent partial disability compensation for a 45 percent, rather than a 65 percent, impairment to his left leg. We reject these contentions. In his Decision and Order, the administrative law judge considered and rejected claimant's assertion of a hip injury, finding instead that claimant's injury is a basilar neck fracture in claimant's left lower extremity, and concluding that the evidence shows that claimant's hip was not the member that was affected, but that it was the basilar neck located just below the hip. Decision and Order at 13; Clt. Ex. 19 at 23; Emp. Ex. 18 at 8. Dr. Longnecker opined that claimant's fracture did not cause a problem with his hip and that the hip was normal. *Id.* The administrative law judge also found insufficient evidence of a disabling low back condition. Decision and Order at 13 n. 3. As substantial evidence supports the administrative law judge's finding that claimant's permanent restriction to sedentary work is due to the fracture of his leg, he is limited to an award under the schedule. *Cf. Bass v. Broadway Maintenance*, 28 BRBS 11 (1994) (if a schedule injury results in impairment to non-scheduled member, claimant also may receive an award under Section 8(c)(21) if disability results from the impairment to the non-scheduled body part).

Moreover, before the administrative law judge, the parties stipulated that claimant had sustained a 45 percent impairment to his left leg. *See* ALJ Ex. 1. The administrative law judge accepted the parties' stipulation, and awarded claimant permanent partial disability compensation based upon a 40 percent impairment rating to claimant's left leg, based on Dr. Cope's assessment of claimant's condition following the initial surgery, and additional permanent partial disability compensation for a five percent impairment to that member based on Dr. Longnecker's opinion, following the removal of the hardware from claimant's hip. *See* 33 U.S.C. §908(c)(2); Decision and Order at 15; Clt. Ex. 16 at 5; Clt. Ex. 13 at 1. We hold that the administrative law judge committed no error in relying upon the parties' stipulation and the opinions of Drs. Cope and Longnecker in determining that claimant sustained a 45 percent impairment to his left leg. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge rationally weighed the evidence, and as the opinions of Drs. Cope and Longnecker constitute substantial evidence to support the administrative law judge=s finding, we affirm the administrative law judge's determination that claimant suffers from a 45 percent permanent partial disability to his left leg. *See O=Keeffe*, 380 U.S. 359.

Average Weekly Wage

Lastly, employer challenges the administrative law judge=s calculation of claimant=s average weekly wage at the time of his injury. Specifically, while acknowledging that the administrative law judge properly utilized Section 10(c) of the Act, 33 U.S.C. '910(c), to calculate claimant's average weekly wage at the time of his injury, employer contends that the administrative law judge erred in using only the wages claimant earned while working for employer rather than an average of claimant's

earnings with various employers during the seven years prior to the injury. Calculated in this manner, employer contends that claimant's average weekly wage should be $368.99. We disagree.

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 James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *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). It is well-established that the administrative law judge has broad discretion in determining a claimant=s annual earning capacity under Section 10(c). *See Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 34 BRBS 44(CRT), *modified on other grounds on reh=g*, 237 F.3d 409, 35 BRBS 26(CRT) (5th Cir. 2000). Accordingly, 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 Fox v. West State Inc.*, 31 BRBS 118 (1997). In the instant case, the administrative law judge calculated claimant=s average weekly wage based upon claimant=s total earnings while working for employer from January 18, 1999, through February 14, 1999.[4] We hold that the result reached by the administrative law judge is reasonable, is supported by substantial evidence, and best reflects claimant's earning capacity with employer at the time of his injury. *See Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT). We, therefore, affirm the administrative law judge's determination of claimant's average weekly wage at the time of his injury. *See Fox*, 31 BRBS at 125.

[4] The administrative law judge calculated claimant's average weekly wage as follows: from January 18, 1999, to February 14, 1999, a period of 28 days, claimant earned $3,266.25, while working a total of 198.5 hours, or an average of 49.625 hours per week. Based on the number of hours, claimant is most like a six-day per week employee; thus his average daily wage is $136.09 (4 weeks x 6 days per week = 24, divided into $3,266.25); this average daily wage x 300, results in an annual earning capacity of $40,827. Under Section 10(d) of the Act, 33 U.S.C. §910(d), $40.827 claimant's annual earning capacity divided by 52 weeks = $785.13. Decision and Order at 18.

Accordingly, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge