BRB No. 97-732

JOHN H. COX	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY TIMES PUBLISHING COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
TRAVELER'S INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Edith Barnett, Administrative Law Judge, United States Department of Labor.

Edward E. Wright, Bethesda, Maryland, for claimant.

D. Stephenson Schwinn (Jordan, Coyne, Savits and Lopata), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (81-DWC-0194) of Administrative Law Judge Edith Barnett 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 District of Columbia Workmen's Compensation Act, 36 D.C. Code §501 *et seq.* (1973) (the Act). We must affirm the findings of fact and the 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).

This case is before the Board for the fourth time. To reiterate the facts briefly, on July 30, 1980, claimant, a telephone salesman for employer with a history of high blood pressure dating back to 1966, experienced a hypertensive episode after his supervisor informed him that he was being suspended for two days because of his failure to adhere to a new sales presentation text, and that a future offense of this type would result in his termination. After claimant was released from the hospital, his physician, Dr. Dejter, began to treat his hypertension with the medication Inderal, which had the side-effect of making him very sleepy. Dr. Dejter kept claimant off work because of his concern about these side effects and his fear that job-related stress could precipitate another potentially life-threatening hypertensive episode. Claimant has not worked since his July 30, 1980, hypertensive episode and retired for health reasons on May 29, 1981; thereafter he sought compensation under the Act. In his original Decision and Order issued in 1982, Judge Victor J. Chao discredited Dr. Dejter's opinion that claimant was still unable to return to his former work or to obtain other stressful work. Relying on the medical opinion of Dr. Walsh, the administrative law judge found that any work-related disability claimant experienced ended by September 30, 1980. Accordingly, he awarded claimant temporary total disability benefits only for the period from July 31, 1980, until September 30, 1980. Claimant's subsequent motion for reconsideration was denied summarily. Claimant appealed, challenging the administrative law judge's disability findings and his award of interest.

By Decision and Order dated January 30, 1987, the Board affirmed the administrative law judge's finding that claimant was temporarily totally disabled, but remanded the case for him to reconsider whether claimant remained totally disabled based on the opinions of Drs. Dejter and Walsh, finding his rationale for having rejected Dr. Dejter's opinion invalid. In addition, the Board directed the administrative law judge to modify his award of interest to incorporate the interest rate applicable in the District of Columbia as of September 3, 1982, pursuant to unamended 28 U.S.C. §1961. *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987). The administrative law judge issued a Decision and Order on Remand on September 25, 1987, reaffirming his earlier decision. By decision dated December 28, 1989, the Board held that the relevant medical evidence established that claimant is disabled and remanded the case for the administrative law judge to determine whether employer established the availability of suitable alternate employment, to address whether employer was entitled to Section 8(f) relief, 33 U.S.C. §908(f), and to modify his award of interest consistent with its prior instructions. *Cox v. Army Times Publishing Co.*, BRB No. 87-3090 (Dec. 28, 1989)(unpublished).

While the case was before Judge Chao on remand, employer filed a motion to reopen the record, which claimant opposed. By Order dated November 19, 1990, Judge Chao granted employer's motion, and claimant was directed to file additional medical documentation regarding the treatment he underwent for hypertension from November 1981 to the present. Employer was also directed to obtain an independent medical examination and an evaluation by a certified vocational rehabilitation expert. Claimant filed an appeal of Judge Chao's November 19, 1990, Order, which the Board dismissed as interlocutory by Order dated April 28, 1993. *Cox v. Army Times Publishing Co.*, BRB No. 91-0529 (April 28, 1993)(order) (unpublished), *aff'd on recon.,* BRB No. 91-0529 (May 12,

1994)(unpublished). Claimant's appeal of the Board's May 12, 1994, Order was summarily dismissed by the United States Court of Appeals for the District of Columbia Circuit as interlocutory, and the case was remanded to the Office of Administrative Law Judges. *Cox v. Department of Labor,* No. 94-1498 (D.C. Cir. Dec. 27, 1994)(unpublished). Because of Judge Chao's retirement, the case was transferred to Administrative Law Judge Edith Barnett, who reinstated Judge Chao's Order reopening the record on November 22, 1995. Although claimant refused to comply with the November 22, 1995, Order by producing additional evidence, employer submitted into evidence the depositions of Dr. Seides, a cardiologist, and Mr. Stern, a vocational expert.

In her Decision and Order, Judge Barnett stated that in light of claimant's deliberate refusal to comply with her November 22, 1995, Order, it was proper for her to draw the adverse inference that additional evidence would not support a finding of continuing disability. She then concluded that based on the adverse inference and the fact that claimant's own witness, Dr. Dejter, provided testimony in 1981 that claimant's blood pressure readings were declining and were within a few points of readings that would not preclude him from returning to work, claimant was capable of performing his former work with employer by no later than December 1, 1981. She alternatively determined, however, that even if claimant were unable to return to his former work, he was no longer disabled as of October 1,1980, because employer had established that claimant was capable of performing suitable alternate work which paid his prior wage rate, based upon the vocational report of Mr. Stern and the deposition testimony of Dr. Seides introduced by employer on remand. Thus, Judge Barnett reinstated Judge Chao's original award.

While recognizing that when the Board remanded the case in 1989, it instructed the administrative law judge to determine whether employer established the availability of suitable alternate employment, claimant argues on appeal that the administrative law judge's consideration of this issue on remand was nonetheless improper because employer had abandoned the suitable alternate employment issue by failing to introduce relevant evidence at the time of the initial 1981 proceedings. Claimant further asserts that the administrative law judge abused her discretion in reopening the record as this action was not necessary to carry out the Board's 1989 remand instructions, and that by reopening the record and determining that claimant was no longer disabled on remand Judge Barnett violated the "law of the case" doctrine. Claimant also contends that Judge Barnett erred in finding that employer established the availability of suitable alternative employment based on employer's late submitted evidence, in irrationally and unjustly drawing an adverse inference against him, in allowing employer to introduce evidence regarding a change in his condition after 1981 on remand when this evidence could, and should, have been introduced pursuant to a modification proceeding, and in entering her award of interest on remand. Claimant urges the Board to reverse and vacate Judge Barnett's decision below and to hold as a matter of law that claimant is entitled to continuing total disability compensation dating back to his July 31, 1980, injury. Alternatively, claimant argues that the Board should enter an award of total disability compensation from July 31, 1980, until a date no earlier than Judge Chao's November 19, 1990, Order Granting Request to Reopen. Employer responds, requesting affirmance of the decision below. Claimant replies,

reasserting his prior arguments.

Judge Barnett's reinstatement of Judge Chao's original award of benefits is affirmed. Initially, we reject claimant's argument that the issue of suitable alternative employment was not properly before the administrative law judge on remand. Contrary to claimant's assertions, employer did not abandon this issue by failing to introduce relevant evidence at the time of the initial proceedings and in not raising this issue again until the case came before the Board for the second time on appeal. As the Board noted in its May 12, 1994, Order on Reconsideration, following a preliminary hearing in 1981 in which the parties disputed whether claimant was physically capable of undergoing a vocational rehabilitation evaluation, Judge Chao informed the parties that he would defer the decision as to whether employer could call a vocational expert to examine claimant and testify about his findings until the medical question, *i.e.*, claimant's ability to undergo a vocational evaluation, had been resolved. *Id.*, slip. op. at 3, n.1. In light of the administrative law judge's evidentiary rulings on the medical issues, it was not necessary for employer to present its evidence, or for the administrative law judge to reach the suitable alternate employment issue at any time prior to the Board's 1989 Decision and Order. We therefore reject this argument, consistent with the rationale in our prior decision.

Claimant's contention that the administrative law judge erred in reopening the record on remand is also without merit. It is well-established that an administrative law judge has considerable discretion regarding the development of evidence and has the duty to inquire fully into the matters at issue at a hearing, conducting proceedings in a manner to best ascertain the rights of the parties. 20 C.F.R. §§702.338, 702.339. Moreover, the administrative law judge has the authority to reopen the record on remand, *Bakke v. Duncanson-Harrelson Co.*, 13 BRBS 276 (1980), and her orders regarding the admissibility of evidence are only reviewable for an abuse of discretion. *Wayland v. Moore Dry Dock* 21 BRBS 177, 180-181 (1988). In its 1989 Decision and Order, the Board remanded the case for findings regarding the issue of suitable alternate employment and employer's entitlement to Section 8(f) relief. Both of these issues require evaluation of the evidence and findings of fact by the administrative law judge. Inasmuch as all of the medical evidence in the existing record pre-dated Judge Chao's 1982 Decision and Order and the record was devoid of any vocational evidence because of his deferred ruling on this issue, we hold that Judge Barnett's reopening of the record on remand in this case

was clearly within her discretionary authority.[1] Consequently, we reject claimant's numerous arguments to the contrary.[2]

[1]Claimant's related argument that employer should have introduced any new evidence regarding claimant's condition after the 1981 hearings pursuant to a motion for modification under Section 22 of the Act, 33 U.S.C. §922, is also rejected. As no final decision regarding the extent of claimant's disability had yet been entered, the administrative law judge could properly reopen the record. In addition, as the administrative law judge has considerable discretion to admit evidence under Section 22, and may do so on his own motion, this section provides additional support for the administrative law judge's ability to admit new evidence here. As the same evidence is admissible under Section 22, claimant's arguments that his ability to secure counsel, his counsel's right to a fee, and his timely right to compensation were prejudiced by employer's failure to seek modification are without merit.

[2]Claimant argues on appeal that Judge Barnett's reopening of the case on remand violates the "law of the case" doctrine because in its 1989 Decision and Order the Board previously upheld Judge Chao's denial of claimant's motion to reopen the record while the case was before him on remand in 1987. As the underlying factual situation changed subsequent to Judge Chao's denial of claimant's motion to reopen, in that the suitable alternate employment became an issue following the Board's 1989 remand, the "law of the case" doctrine is not applicable. *See Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *see generally Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting).

Claimant's assertion that Judge Barnett erred in denying him additional total disability compensation on remand is also rejected. It is well established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment as a result of his work injury. Once claimant meets this burden, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1991).

In the present case, Judge Barnett found that claimant was capable of performing his usual work for employer by no later than December 1, 1981, based in part on Dr. Dejter's 1981 testimony regarding claimant's improving blood pressure readings and in part on the adverse inference she drew against claimant for his refusal to comply with her evidentiary order. Although claimant argues on appeal that the adverse inference drawn by the administrative law judge was unjustified and improper for various reasons, and challenges her determination that claimant was capable of performing his usual work for employer as of December 1, 1981, as irrational and not supported by substantial evidence, we need not address claimant's arguments in this regard. Inasmuch as Judge Barnett alternatively found that even if claimant could not perform his usual work employer had met its burden of establishing the availability of suitable alternate employment as of October 1, 1980, paying claimant's former wages, and this finding is rational and supported by substantial evidence, any error she may have made with regard to claimant's *prima facie* case is harmless.[3]

In finding that employer met its burden on remand of establishing the availability of suitable alternate employment after October 1, 1980, Judge Barnett relied on the newly admitted vocational opinion of Mr. Stern and the medical opinion of Dr. Seides. In denying the claim for additional total disability, she noted that after evaluating claimant in 1981 and considering his prior work experience and hypertensive condition, Mr. Stern performed a labor market survey on August 24, 1981, and identified a number of telephone sales positions paying claimant's former wages which he believed would be suitable for, and available to, claimant. Moreover, she determined that although the Board observed that the record evidence at the time of its 1989 Decision and Order did not establish that the side effects of the various medications for claimant's hypertension had been, or could be controlled, this deficiency had been cured through the introduction of Dr. Seides's deposition testimony on remand. Noting that Dr. Seides provided credible undisputed testimony that even back in 1980, there were a wide variety of medications available which

[3]We note, however, that it is well established that when a party has relevant evidence within its control which it fails to produce, the administrative law judge has the discretion to hold that failure gives rise to an inference that the evidence is unfavorable to it. *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982).

allowed a person to pursue any occupation, and that the side effect of drowsiness could be alleviated by taking the medication in divided doses with the highest dose being given in the evening, Judge Barnett concluded that Dr. Seides's testimony established that claimant was capable of performing the telephone sales jobs identified by Mr. Stern. Accordingly, she determined that claimant had no loss in wage-earning capacity as of October 1, 1980, and reinstated Judge Chao's prior award of temporary total disability compensation from July 31, 1980 through October 1, 1980.

Claimant argues that Judge Barnett's finding that employer met its burden of establishing the availability of suitable alternate employment on remand cannot be affirmed because in so concluding, she ignored the testimony in the 1981 proceedings of claimant's treating physician, Dr. Dejter, that claimant was unable to perform any type of telephone sales work due to his hypertension and that his hypertension and the side-effects of his medication were not adequately controlled. Contrary to claimant's assertions, however, it is apparent from Judge Barnett's Decision that in finding that employer established the availability of suitable alternate employment she fully considered Dr. Dejter's testimony in the initial proceedings, but found it outweighed by the unrefuted 1996 deposition testimony of Dr. Seides which employer introduced on remand. The vocational opinion of Mr. Stern[4] in conjunction with Dr. Seides's deposition testimony provide substantial evidence to support Judge Barnett's finding that employer met its burden of establishing the availability of suitable alternate employment. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995);*Lacey v. Raley's Emergency Road Serv.*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991). As claimant has failed to establish any reversible error by the administrative law judge in evaluating the conflicting medical evidence and assessing credibility, we affirm this determination, and consequently her reinstatement of Judge Chao's original two month award of temporary total disability compensation on remand. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Claimant correctly argues on appeal, however, that as Judge Barnett's Decision and Order states that the applicable interest rate is that which was in effect at the time of her January 10, 1987, Decision and Order, her award of interest does not comply with the Board's prior remand instructions stating that the interest award was to be calculated pursuant to pre-amendment 28 U.S.C. §1961 based on the District of Columbia interest rate in effect on September 3, 1982. Accordingly, we vacate this finding and modify her

[4]Claimant's argument that Mr. Stern's vocational report should have been discredited by the administrative law judge as unverifiable hearsay is also rejected. The formal rules of evidence are not applicable to administrative hearings before an administrative law judge, and hearsay evidence is generally admissible if considered reliable. *See Richardson v. Perales*, 402 U.S. 389 (1971); *Vonthronsohnhaus v. Ingalls Shipbuilding Inc.*, 24 BRBS 154, 157 (1990); 33 U.S.C. §923(a); 20 C.F.R. §702.339.

Decision and Order to reflect that this rate applies.[5]

[5] Although claimant also makes various statements regarding the specific interest rate in effect in the District of Columbia as of September 3, 1982, we decline to address claimant's assertions as they are not adequately briefed. *Plappert v. Marine Corps Exchange*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997). The district director should make any necessary calculations.

Accordingly, the Decision and Order of the administrative law judge to modified to reflect that the applicable interest rate is that in effect in the District of Columbia on September 3, 1982, but is in all other respects affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge