BRB No. 98-1240

FRANCIS NIELSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: June 18, 1999
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	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Upon Request for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Alan C. Rassner (Rassner, Rassner & Olman), New York, New York, for claimant.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Supplemental Decision and Order Upon Request for Reconsideration (97-LHC-1236) of Administrative Law Judge Robert D. Kaplan 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 was injured on May 23, 1991, while working as a dock builder for employer, when he sustained an open compound fracture of the right tibia and fibula. Cl. Ex. 42. He was hospitalized for six weeks and underwent surgery in which a Hoffman external fixator device was applied and skin and bone grafts were performed. Emp. Ex. 35. Claimant developed pain in the right leg after the device was removed from his leg. He consulted a series of doctors, undergoing various procedures over several years in an attempt to alleviate his leg pain, and attended psychological counseling. Employer paid claimant temporary total disability benefits from May 24, 1991, to July 11, 1994, and from July 30, 1996, to December 9, 1996. Claimant additionally sought continuing permanent total disability from July 11, 1994.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on July 8, 1994, when Dr. Ariosta discharged claimant from his care, stating he could not do anything else for him. The parties agreed that claimant cannot return to his usual employment. The administrative law judge found, however, that employer established the availability of suitable alternate employment on September 9, 1996. Consequently, he awarded claimant temporary total disability benefits from May 24, 1991, through July 7, 1994, permanent total disability benefits from July 8, 1994, through September 8, 1996, and permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C.§908(c)(2), for a 33 1/3 percent loss of use of the leg, beginning on September 9, 1996, and continuing for 96 weeks, based on an average weekly wage $857.31, with a resultant compensation rate of $571.54. The administrative law judge denied claimant's request for reconsideration.

On appeal, claimant argues that he has been permanently totally disabled from July 8, 1994 until the present, based on his inability to work due to pain. In the alternative, claimant contends that he is entitled to permanent partial disability benefits pursuant to Section 8(c)(2) based on a 92 percent loss of use of the leg. Claimant also challenges the administrative law judge's calculation of his average weekly wage under Section 10(c), rather than Section 10(a), of the Act. Employer responds, urging affirmance.

Where, as in the instant case, it is undisputed that claimant is unable to perform his usual pre-injury work, the burden shifts to employer to establish the availability of suitable alternate employment. *Pietrunti v. Director, OWCP,* 119 F.3d 1035, 31 BRBS 84 (2d Cir. 1997; *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant's subjective complaints of pain do not preclude an administrative law judge from finding that employer has established the availability of suitable alternate employment where substantial

evidence establishes that claimant is nonetheless able to perform the job. *See generally Adam v. Nicholson Terminal & Dry Dock Corp.*, 14 BRBS 735 (1981); *Peterson v. Washington Metropolitan Area Transit Authority,* 13 BRBS 891 (1981). The administrative law judge's determination in this case that employer established the availability of suitable alternate employment is supported by substantial evidence.

The administrative law judge, acting within his discretion as fact finder, rationally rejected claimant's contention that his disabling pain results in his inability to perform any of the jobs on which employer relied to establish suitable alternate employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963). The administrative law judge found that 16 positions listed in two 1997 reports prepared by employer's vocational expert, Mr. Steckler, were suitable for claimant. Emp. Ex. 23. Claimant challenges the administrative law judge's finding of suitable alternate employment based on these jobs, arguing that the reports rely upon the opinions of Drs. Rosenblum and Greifinger, who, claimant alleges, did not consider claimant's pain in rendering their opinions that claimant could perform sedentary work. Claimant's assertion is without merit. Claimant relies upon the physical capacities evaluations which are only standard forms completed by the doctors. Emp. Exs. 13, 16. While claimant is correct that these forms do not address pain, other reports prepared by Dr. Rosenblum, as well as Dr. Greifinger's deposition, reflect that both doctors considered claimant's complaints of pain in reaching their conclusions. Emp. Exs. 11, 12, 36(b).

It was within the administrative law judge's discretion to credit these doctors' opinions that claimant could perform sedentary work over the opinion of Dr. Chang, claimant's treating physician, who stated claimant could not work due to pain and the effect of medication he was taking, as the administrative law judge essentially found Dr. Chang's opinion was not well-documented or reasoned and was contradicted by other medical opinions of record. The administrative law judge reasoned that Dr. Chang based his opinion that claimant suffers from debilitating pain on a diagnosis of reflex sympathetic dystrophy (RSD), while Drs. Rosenblum and Greifinger attributed it to peripheral nerve damage,[1] and while the cause of the

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[1]Claimant contends that his condition is neurological in nature and that therefore Dr. Greifinger's opinion as an orthopedist should not carry much weight concerning claimant's ability to work. Without addressing the validity of this argument, we note that the administrative law judge also relied on the opinion of Dr. Rosenblum, a neurologist. In addition, he found Dr. Chang's opinion was also contradicted by Dr. Weisbrot, a physician board certified in psychiatry and neurology,

pain was ultimately unimportant, Dr. Chang's opinion as to the intensity of the pain was based on the faulty RSD diagnosis. The administrative law judge also found that Dr. Chang himself wrote that the bone scan contraindicated RSD and noted other examples of inconsistencies in Dr. Chang's opinion. With regard to claimant's allegations regarding the effects of medication, the administrative law judge cited Dr. Bakshi's report that claimant has no side effects from medication and is alert, thus rejecting Dr. Chang's opinion that medication is interfering with claimant's ability to work. The administrative law judge further found the reports of Drs. Macaluso, Fabian and Ariosta, upon which claimant relied, did not support a finding of continuing total disability.[2] Cl. Exs. 29, 35. Moreover, the administrative law judge committed no error in addressing a surveillance videotape, finding it demonstrated that although claimant used a cane and walked with a measured pace, he did not appear to be experiencing severe pain when walking and standing. Decision and Order at 9.

The administrative law judge may consider a variety of medical opinions and observations in assessing the extent of claimant's disability. *See Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Moreover, it is well established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988), and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Further, in light of the administrative law judge's determination that the opinions of Drs. Chang and Ariosta were not entitled to determinative weight, it is irrelevant that the

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who also diagnosed peripheral nerve damage and found claimant able to perform sedentary work.

[2]The administrative law judge found that Dr. Malacuso's form report lacked a rationale for the opinion that claimant was totally disabled due to RSD, Dr. Fabian did not address whether claimant was disabled, and Dr. Ariosta discharged claimant in July 1994 and thus did not give an opinion as to whether claimant was permanently totally disabled in 1996.

vocational expert did not review these reports prior to creating his labor market survey. Accordingly, as the credited medical evidence supports the conclusion that claimant is able to perform sedentary work, the administrative law judge's decision that employer established the availability of suitable alternate employment by showing that such jobs were available is affirmed. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995); *see generally Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Claimant argues, in the alternative, that should the Board affirm the administrative law judge's finding regarding suitable alternate employment and he is thus entitled only to permanent partial disability benefits, such benefits should commence in December 1996, when he alleges that the first realistic finding of alternate employment was made.[3] We reject claimant's argument. The administrative law judge found that the first date on which Mr. Steckler adequately identified available suitable jobs was September 9, 1996 and this finding is supported by the evidence. Emp. Ex. 23. As claimant's contention lacks any support in the record, the administrative law judge's finding is affirmed.

Claimant also contends that his impairment rating should be based on the 80 percent loss of use of the leg found by Dr. Rosenblum, plus the additional 12 percent found by Dr. Greifinger, for a total of 92 percent. There is, initially, no basis for adding the impairment ratings provided by these two doctors under the schedule at Section 8(c)(1)-(19), 33 U.S.C. §908(c)(1)-(c)(19); compensation is paid for the loss or loss of use of particular body parts based on a medical evaluation of the degree of loss. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). The administrative law judge awarded claimant 33 1/3 percent under Section 8(c)(2), equivalent to 96 weeks, after weighing the various impairment ratings of record and taking into account claimant's patent difficulty in ambulating as evidenced on the surveillance videotape. As the administrative law judge's finding of the extent of claimant's impairment is supported by substantial evidence, we affirm the decision that claimant is entitled to a scheduled award for a 33 1/3 percent loss of use of his leg. *See Pimpinella*, 27 BRBS at 154.

We next address the administrative law judge's average weekly wage determination. Claimant contends that the administrative law judge erred in calculating his average weekly wage by simply dividing his actual earnings in the year prior to injury by 52, consistent with Section 10(d) of the Act, 33 U.S.C.

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[3]Claimant apparently chose this date because employer paid him temporary total disability benefits until December 1996.

§910(d), arguing that since he worked 44 weeks in the 52-week period preceding the injury, which the parties stipulated was substantially the whole of the year, Section 10(a) of the Act, 33 U.S.C. §910(a), should apply. Utilizing Section 10(a), (b) and (c), an administrative law judge must arrive at a figure for claimant's average annual earnings, which is then divided by 52 under Section 10(d) to arrive at an average weekly wage. Section 10(a) is to be applied when an employee worked "substantially the whole of the year" immediately preceding his injury. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). Section 10(a) requires evidence of the number of days claimant actually worked in that year in order to calculate claimant's average daily earnings, which are then multiplied by 260 in the case of a 5 day worker to result in claimant's average annual earnings.

The administrative law judge found that during the 52-week period immediately preceding the injury, *i.e.,* from May 23, 1990, to May 22, 1991, claimant worked 44 weeks, as stipulated by the parties, and that he earned $44,580.63. Rejecting claimant's contention that his average weekly wage should be calculated under Section 10(a), the administrative law judge found that Section 10(a) presupposes that work would be available for claimant each day, while here claimant testified that he did not work during times when there were layoffs between jobs. Thus, the administrative law judge found his employment was not continuous, as the reason he did not work during certain periods was that work was not available.

The Board has previously affirmed a finding that Section 10(a) cannot be applied where claimant's employment was intermittent. *See Gilliam*, 21 BRBS at 91; *Lozupone v. Lozupone and Sons*, 12 BRBS 148, 155-156 (1979). Moreover, claimant's proposed Section 10(a) calculation requires determining the number of days claimant worked by extrapolating this figure based on the stipulated weeks of work multiplied by the 5 days per week claimant testified he worked. Section 10(a), however, requires evidence of the actual number of days claimant worked. *See Taylor v. Smith & Kelly,* 14 BRBS 489 (1981). On these facts, we affirm the administrative law judge's conclusion that Section 10(a) cannot be applied. In a case where neither Section 10(a) nor Section 10(b) applies,[4] average annual earnings should be calculated under Section 10(c), and then divided by 52 consistent with Section 10(d). Under these provisions, an administrative law judge may use claimant's actual annual earnings divided by 52 to calculate his average weekly wage. *Gilliam,* 21 BRBS at 92-93. We therefore affirm the administrative law judge's average weekly wage calculation in this case.

[4]No one contends that Section 10(b) is applicable.

Accordingly, the Decision and Order and Supplemental Decision and Order Upon Request for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge