BRB No. 99-334

THOMAS BUNTING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAYTHEON ENGINEERS AND CONSTRUCTORS, INCORPORATED	)	DATE ISSUED: Dec. 15, 1999
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

G. Chadd Mason (Mason Law Firm, P.L.C.), Fayetteville, Arkansas, for claimant.

Kurt A. Gronau, Brian G. S. Choy, Glenn N. Taga (Gronau, Choy & Taga), Honolulu, Hawaii, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2353) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 worked for employer on the Johnston Atoll in the Pacific Ocean. He

performed various jobs, including those in the chemical support facility, the laundry and at the loading dock. On January 28, 1994, claimant injured his back during the course of his work. After evaluations and treatment both in Hawaii and on the mainland near his hometown in Arkansas, claimant returned to the Johnston Atoll in June and July 1994 to attempt light duty work. He was unable to perform this work and returned to his home in Arkansas. He has been unable to locate alternate employment, with the exception of one job which lasted three months.

The administrative law judge determined that claimant has two work-related conditions. He found that claimant's physical injury to his back resulted in a permanent condition which reached maximum medical improvement on January 22, 1996. He also found that claimant's psychological condition, a depressive disorder, is a temporary sequella of the work injury. Further, the administrative law judge concluded that claimant is unable to return to his former work due to his physical condition and that employer failed to establish the availability of suitable alternate employment; therefore, claimant is permanently totally disabled. Decision and Order at 33, 36, 38-39. Thus, he awarded claimant temporary total disability benefits from the date of injury until June 8, 1994, and from July 20, 1994, through January 22, 1996. Thereafter, with the exception of the period from October 16, 1997, through January 8, 1998, when claimant worked in temporary employment and was entitled to permanent partial disability benefits, the administrative law judge awarded claimant permanent total disability benefits. *Id.* at 39, 42. Additionally, he held employer liable for Section 10(f), 33 U.S.C. §910(f), adjustments, medical expenses, interest, and an attorney's fee. He also rejected employer's contention that claimant violated Section 31 of the Act, 33 U.S.C. §931, and committed fraud by misrepresenting the nature and extent of his disability. *Id.* at 41-42. Employer appeals the administrative law judge's decision. Claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in awarding permanent total disability benefits, as it argues there is evidence of suitable alternate employment.[1] Specifically, employer argues that the record contains evidence of a light duty position at its facility which claimant can perform, claimant's self-employment, and vocational evidence of security guard and private investigatory work claimant can perform, as well as evidence of a position claimant held as a construction supervisor. We reject employer's contention that this evidence establishes suitable alternate employment for the following reasons. First, the light duty position at employer's facility was offered to and attempted by claimant in June and July of 1994. Not only was that light duty position available to him *prior* to the date his condition reached maximum medical improvement, but the administrative law judge found

[1]Employer does not dispute the finding that claimant cannot return to his usual employment.

that claimant was unable to perform the job. Consequently, as the administrative law judge concluded, this position does not constitute suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Similarly, neither the vocational evidence nor the self-employment evidence supports employer's assertion. Although the record demonstrates that claimant took and passed a private investigator's exam, the vocation rehabilitation counselor, Mr. Wright, testified that claimant has not been successful in locating work in that field. Moreover, although Mr. Wright stated that claimant would be well-suited to supervising security guards because of his previous experience in law enforcement, and that typically he could earn over $16,000 per year as a security guard or security guard supervisor, Mr. Wright spoke of no particular job opening and he noted that there has been nothing available in this field within claimant's locale in recent months. Tr. at 155-156, 158-159. The administrative law judge considered this evidence insufficient to establish suitable alternate employment, as it is not specific and does not contain the precise nature and terms of employment. Decision and Order at 38. The administrative law judge also appears to have rejected the evidence of self-employment at claimant's emu farm, as claimant testified that he and his brother have owned this farm for years and they have yet to realize income from this venture, and claimant testified that his brother performs most of the work. Decision and Order at 6, 38; Tr. at 80-82. Thus, the administrative law judge properly found that this evidence also fails to establish the availability of suitable alternate employment. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89(CRT) (2d Cir. 1997) (list of physical tasks a claimant can perform is not sufficient to demonstrate suitable alternate employment); *Bumble Bee Seafoods*, 629 F.2d at 1327, 12 BRBS at 660 (specific jobs must be identified to constitute suitable alternate employment); *Sledge v. Sealand Terminal*, 14 BRBS 334 (1981), *following remand*, 16 BRBS 178 (1984) (self-employment may constitute suitable alternate employment if earnings yielded are realistically representative of a wage-earning capacity).

Employer also argues that claimant's work as a construction supervisor constitutes evidence of the availability of suitable alternate employment. Claimant testified that he held this job for approximately three months. His friend hired him but told him that the position was temporary. Nevertheless, claimant accepted the work. He was able to perform it, and he only stopped when the work discontinued. Tr. at 86-88. We affirm the administrative law judge's conclusion that this employment does not qualify as suitable alternate employment, as employer failed to show that this work was "realistically and regularly available" on the open market.[2] *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

[2]The administrative law judge properly awarded permanent partial disability benefits for this period.

Finally, we reject employer's assertion that claimant committed fraud. Section 31 of the Act provides that it is a felony to knowingly or willfully make a false statement or representation in order to obtain benefits. Employer argues that claimant's assertions as to the nature and extent of his physical and psychological conditions, as they relate to his work injury, have been misrepresented. It cites the statement of Dr. Runnels who opines that claimant may be malingering. Cl. Ex. 9. However, questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and it is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, the Board may not reweigh the evidence but may only inquire into the existence of evidence to support the findings. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 90-1870 (D.C. Cir. 1981). In this case, the administrative law judge discredited Dr. Runnels' opinion because it was inconsistent with other evidence of record. Decision and Order at 29-30, 35; *see* Cl. Exs. 2, 11, 13. The evidence credited by the administrative law judge fully supports his conclusion that claimant has a physical condition and a psychological condition, both of which are related to his work injury. The mere existence of evidence in the record which may lead to a contrary conclusion does not establish the commission of a fraud. Therefore, we affirm the administrative law judge's determination that employer's assertion of fraud is baseless. 33 U.S.C. §931(a); *see generally Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge