BRB No. 89-3220

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| STEPHEN DiSILVESTRI | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| DAY & ZIMMERMAN | ) | DATE ISSUED: _____ |
| | ) | |
| and | ) | |
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| COMMERCIAL UNION INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

George E. Swegman (Ashcraft & Gerel), Washington, D.C., for claimant.

Audrey F. Gorman (Gorman and Gorman), Bethesda, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order -- Award of Benefits (88-DCW-0063) of Administrative Law Judge Charles P. Rippey 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.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 May 16, 1978, claimant injured his back while working as a sheet metal mechanic for employer; he has been unable to perform this work since that date. With employer's assistance, claimant underwent extensive vocational rehabilitation, obtaining an Associate Arts degree in business management from Prince Georges County Community College. Despite persistent placement efforts by employer, claimant was unable to obtain employment until late in 1985, when he began to work as an office manager for Techtron Associates, Inc., which operated under the name of The Security Store. For three months prior to February 2, 1986, claimant worked for The Security Store (Security) under the terms of a Training Agreement between Security and the rehabilitation agency. This agreement prohibited Security from requiring claimant to exert himself physically. During this period, employer paid claimant's salary and continued to pay him disability benefits. Security began paying claimant's wages on February 2, 1986. Claimant continued to work there until July 12, 1987, when he injured his shoulder. He has not worked since that injury.

Employer voluntarily paid claimant temporary total disability compensation from May 16, 1978 through February 2, 1986. In his LS-18 Pre-Hearing Statement, claimant indicated that he was seeking temporary partial disability benefits for the period when he worked for Security from February 3, 1986 to July 11, 1987, and temporary total disability benefits thereafter. At the hearing, however, claimant, over employer's objection, sought to modify the claim to one for permanent partial disability benefits during the period of time he worked at Security and permanent total disability benefits thereafter.

The administrative law judge awarded claimant permanent partial disability compensation from February 3, 1986 through July 12, 1987, and permanent total disability compensation thereafter. The administrative law judge also awarded claimant medical expenses, including those relating to the July 1987 shoulder injury which he found to be a natural consequence of the May 1978 work injury. In addition, the administrative law judge determined that claimant was entitled to Section 10(f), 33 U.S.C. §910(f), adjustments on the permanent total disability award, as well as a Section 14(e), 33 U.S.C. §914(e), assessment.[1]

On appeal, employer contends that the administrative law judge erred in permitting claimant to amend his claim at the hearing without allowing it the opportunity to present supplementary evidence and adequately prepare to defend a permanent disability claim. Employer also contends that the administrative law judge erred in finding that claimant was permanently totally disabled given that he had undergone extensive vocational rehabilitation and had been placed in a light duty job at which he worked for over a year and a half. In the alternative, employer argues that if the administrative law judge's award of disability compensation is upheld, claimant is only entitled to

[1]In a Supplemental Decision and Order Approving Attorney Fees, the administrative law judge awarded claimant an attorney's fee of $10,395 and $1,353.95 in costs. Employer filed a Notice of Appeal of the attorney's fee award which was assigned the same docket number given to employer's appeal of the case in chief, BRB No. 89-3220. As employer failed to submit a timely petition for review with regard to the fee appeal in accordance with the Board's February 26, 1991 Order, we view this issue as waived. 20 C.F.R. §802.218(a).

Section 10(f) adjustments from May 4, 1989, the date of the administrative law judge's Decision and Order awarding permanent total disability compensation or from July 1987, the date permanent total disability was awarded. Finally, employer contends that the administrative law judge erred in awarding claimant a Section 14(e) assessment.

Initially, we will address employer's argument that the administrative law judge erred in allowing claimant to alter his claim from temporary to permanent disability. In response to employer's motion to have claimant's permanent disability claim struck on the basis of surprise and prejudice, the administrative law judge ruled that claimant could proceed with his claim and that employer would be given the opportunity to file a motion requesting permission to conduct a post-hearing medical examination and vocational rehabilitation consultation. Employer filed such a motion on June 30, 1989. By Order of July 18, 1989, entitled First Procedural Order, the administrative law judge denied employer's motion. Citing *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977), wherein the Board indicated no significant difference existed between employer's burden of proof in resisting a claim for permanent total disability as compared to one for temporary total disability, the administrative law judge found that because employer knew that a claim for total disability was pending and had the opportunity to have claimant undergo a medical examination and vocational consultation prior to the hearing, no justification existed for reopening the record.

We hold that the administrative law judge did not abuse his discretion in allowing claimant to modify the claim and in denying employer's request to conduct an independent medical and vocational evaluation post-hearing. Section 702.338 of the regulations states that the administrative law judge has the duty to inquire fully into matters at issue and to receive into evidence all relevant and material testimony and documents. *See* 20 C.F.R. §702.338. The administrative law judge has broad discretion, however, concerning the admission of evidence; such determinations may be overturned only if they are arbitrary, capricious, or an abuse of discretion. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991). In the present case, the administrative law judge correctly recognized that employer's burden of proof is the same regardless of whether the claim is for temporary or permanent total disability compensation. *See Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321, 323-324 (1983).[2] Accordingly, we hold that the administrative law judge did not abuse his discretion in denying employer's request to develop and submit additional post-hearing evidence. *See Olsen*, 25 BRBS at 45. As employer had adequate opportunity to develop the evidence necessary to defeat a claim for total disability prior to the hearing, the administrative law judge's determination that employer was not prejudiced by the denial of its post-hearing motion is also affirmed.

Employer's assertion that the administrative law judge erred in keeping the record open for submission of the claimant's post-hearing deposition of Todd Cox is also rejected. As Mr. Cox was

[2]In, both cases claimant is totally disabled if he establishes an inability to return to his usual work and employer does not demonstrate the availability of suitable alternate employment. *See Bell v. Volpe/Head Construction Co.*, 11 BRBS 377 (1979). Moreover, an award of temporary partial disability is based on a loss of wage-earning capacity as is an unscheduled permanent partial disability award. *See* 33 U.S.C. §908(c)(21), (e).

scheduled to testify at the hearing regarding the requirements of claimant's job at Security, but became unavailable at the time of the hearing, it cannot be said that the administrative law judge's decision to keep the record open for submission of this evidence was unreasonable. Moreover, as Mr. Cox's deposition testimony was never submitted, employer was not, in any event, prejudiced by this decision. *See Olsen, 25 BRBS at 45; Cornell v. Lockheed Aircraft International*, 23 BRBS 253, 259 (1990).

Employer's assertion that the administrative law judge erred in awarding claimant permanent total disability compensation commencing July 2, 1987 is also rejected. To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to a work-related injury. If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where 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); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992).

In the present case, employer conceded that claimant is unable to perform his former work as a sheet metal mechanic due to the 1978 work-related injury. Employer argues on appeal, however, that the administrative law judge erred in awarding claimant permanent total disability compensation since the unanimous medical opinion is that claimant is employable and claimant successfully performed alternate light duty work for Security for over a year and a half. Employer avers that inasmuch as claimant's physical restrictions did not change substantially following the July 1987 shoulder injury and Mr. O'Haver testified that he was willing to provide claimant with a part-time job within his capabilities, the administrative law judge's finding that claimant was permanently totally disabled is against the weight of the evidence. [3]

[3]Employer has affixed copies of earlier vocational records to its Petition for Review. As this evidence, was not part of the record before the administrative law judge, it may not be considered by the Board in resolving this appeal. *See Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985); 33 U.S.C. §921(b)(3),

The Board has previously recognized that suitable alternate employment is established where a claimant performs suitable post-injury work and is no longer able to work in that job for reasons unrelated to his disability. *See Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *appeal pending*, No. 91-70648 (9th Cir. Oct. 24, 1991). The fact that claimant performs post-injury work, however, does not preclude an award of permanent total disability where, as here, the administrative law judge reasonably finds that the post-injury work claimant performed was not suitable. *See Armfield v. Shell Offshore, Inc.*, 25 BRBS 303 (1992)(Smith, J., concurring and dissenting). In order for a job to be suitable, claimant must be physically able to perform it given his medical restrictions. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(9th Cir. 1991); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

In the present case, the administrative law judge found claimant's post-injury work at Security exceeded his physical capabilities. In addition, the administrative law judge found that claimant's July 1987 shoulder injury, which resulted in his leaving this job, was related to the initial injury. If the administrative law judge's finding regarding the suitability of the job is affirmed, then the job cannot be suitable alternate employment. Moreover, if the shoulder injury was work-related, then, unlike *Edwards*, claimant did not leave the job for reasons unrelated to his work injury.

In finding the job was not suitable, the administrative law judge noted claimant's testimony that his work at Security required him to occasionally lift or move objects weighing over 80 pounds, to stock inventory, and to climb ladders, vacuum, and work overtime. The administrative law judge also discussed Mr. O'Haver's contrary deposition testimony indicating that claimant's job at Security did not involve any rigorous work. Finding no basis upon which to question the veracity of either witness, the administrative law judge determined that a reasonable doubt was created which must be resolved in favor of the claimant. Accordingly, applying the " true doubt rule," he determined that claimant's duties at Security involved the performance of physically demanding tasks outside the limits prescribed by the physicians of record and the agreement that Security had with the rehabilitation agency.[4] Inasmuch as claimant's testimony provides substantial evidence to support the administrative law judge's finding in this regard, and employer does not allege any error in the administrative law judge's application of the "true doubt rule" in this case, we affirm the administrative law judge's finding that claimant's job at Security was not suitable given claimant's restrictions. *See Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992). Accordingly, the fact that Mr. O'Haver may have been willing to employ claimant in this job on a part-time basis, if such a position were available, is irrelevant. Moreover, for reasons stated *infra*, we affirm the administrative law judge's finding that claimant's 1987 shoulder injury was related to his 1978 back injury. Claimant, therefore, did not leave this alternate job for reasons unrelated to his work injury, and the Board's decision in *Edwards* thus does not apply on this basis as well. The finding that the job at Security cannot meet employer's burden is affirmed. Inasmuch as employer failed to offer any other evidence sufficient to establish the availability of suitable alternate employment, the

[4]The administrative law judge also discussed an ambiguity he perceived in Mr. O'Haver's testimony which created doubt as to whether he was describing the period after the expiration of the Training Agreement.

administrative law judge's award of permanent total disability compensation is affirmed. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21-22 (1989).

Employer also appeals the administrative law judge's award of medical expenses for claimant's July 1987 shoulder injury, arguing that this injury occurred outside work and did not materially effect claimant's disability status. Initially, we note that claimant is entitled to reasonable and necessary medical expenses for a work-related injury regardless of whether that injury is disabling. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 388 n.5 (1990). Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his condition is work-related if he shows that he suffered a harm and that employment conditions existed, or an accident occurred, which could have caused, aggravated, or accelerated the condition. *See e.g., Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Where claimant sustains a work-related injury and thereafter sustains an additional injury, employer is liable for the entire disability and any related medical expenses if the second injury is the natural or unavoidable result of the first injury. *See Merrill v. Todd Shipyards Corp.*, 25 BRBS at 144.

In the present case, the administrative law judge determined that claimant's July 1987 shoulder injury was the natural or unavoidable result of his 1978 work-related back injury based on the testimony of Drs. Phillips and Filtzer. Dr. Phillips deposed that claimant had subacromial bursitis and bicipital tendinitis of his shoulder, which was caused by his right leg's giving out on him and causing his fall; the doctor related the weakness in claimant's leg to his May 1978 back injury. Dr. Filtzer opined that although it was difficult to understand how claimant could have fallen due to a weakness in his right lower extremity, a sharp paroxysm of pain in that member could have caused such a fall. Although the administrative law judge did not analyze the evidence in terms of the Section 20(a) presumption, his failure to do so is harmless error as he weighed the relevant evidence and his decision that claimant's second injury is work-related is supported by substantial evidence. *See Merrill*, 25 BRBS at 145. Inasmuch as we affirm the administrative law judge's finding that claimant's July 1987 injury was work-related, the administrative law judge's determination that claimant is entitled to medical expenses for this injury is also affirmed. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Employer's assertion that claimant is not entitled to both medical expenses and Section 10(f) cost-of-living adjustments for the July 1987 injury is also rejected as an award of medical benefits and an award of Section 10(f) adjustments are totally unrelated.

We agree with employer, however, that the administrative law judge erred in concluding that claimant was entitled to Section 10(f) adjustments dating back to November 2, 1978. Section 10(f) generally allows claimants who are permanently totally disabled to receive the benefit of intervening cost of living adjustments occurring during prior periods of permanent total disability.[5] *See Bowen*

[5]Section 10(f) provides:

*v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9 (CRT)(9th Cir. 1990). In the present case, however, employer voluntarily paid claimant temporary total disability compensation from May 16, 1978 through February 2, 1986, and the claim before the administrative law judge only involved claimant's disability thereafter. In determining claimant's entitlement after 1986, the administrative law judge found claimant reached maximum medical improvement on November 2, 1978. He did not, however, relate the award of permanent total disability benefits back to that date, but awarded permanent partial disability benefits from February 1986 to July 12, 1987 and permanent total disability commencing July 12, 1987. This case thus presents a claimant voluntarily paid temporary total disability benefits from 1978 to February 3, 1986, who then received an award of permanent partial disability benefits from that date to July 12, 1987, and permanent total disability thereafter.

As claimant did not contest the nature of the voluntary benefits previously paid, and the question of claimant's disability prior to February 2, 1986 was not before the administrative law judge, we agree with employer that the administrative law judge's award of Section 10(f) adjustments dating back to 1978 was improper. We note that claimant would have been entitled to Section 10(f) adjustments during these prior periods of temporary total disability pursuant to *Brandt v. Stidham Tire Co.*, 785 F.2d 329, 18 BRBS 73 (CRT)(D.C. Cir. 1986). In *Brandt*, the United States Court of Appeals for the District of Columbia Circuit, from which the present case arises, accepted the United States Court of Appeals for the Fifth Circuit's interpretation of Section 10(f) in *Holliday v. Todd Shipyards Corp*., 654 F.2d 415 (5th Cir. 1981), which permitted the rate for permanent total disability benefits to include all intervening Section 10(f) adjustments. The court, however, stated it would follow this holding until such time that it was overruled by the Fifth Circuit. The Fifth Circuit overruled *Holliday* in *Phillips v. Marine Concrete Structures*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) and held that Section 10(f) adjustments are increases payable only for periods of permanent total disability. Under current law claimant is limited to prospective cost of living adjustments from July 12, 1987, the date the administrative law judge found him permanently totally disabled. We therefore modify the award of Section 10(f) adjustments made by the administrative law judge to reflect that claimant is entitled to prospective cost of living adjustments commencing July 12, 1987.

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Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of-

(1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

(2) 5 per centum.

33 U.S.C. §910(f)(1988).

The final issue to be addressed on appeal is whether the administrative law judge erred in awarding claimant a Section 14(e) assessment in this case. Section 14(e) of the Act provides that, if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional 10 percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the deputy commissioner. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury. *See Canty v. S. E. L. Maduro,* BRBS , BRB No. 92-453 (Nov. 24, 1992); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 168 (1989).

Employer's contention that the administrative law judge erred in awarding claimant a Section 14(e) assessment in this case is without merit. The administrative law judge found that claimant was entitled to a Section 14(e) assessment from February 2, 1986, when employer ceased voluntary payments of compensation, through the date of the informal conference on January 19, 1988, noting that employer had not objected to claimant's assertion at the hearing that employer had not controverted the claim until the informal conference. Although employer now argues on appeal that the administrative law judge erred in assessing a Section 14(e) penalty because it filed a proper Notice of Controversion, we reject this assertion. We note that no Notice of Controversion was submitted into evidence. Moreover, the administrative law judge's observation that employer did not object to claimant's assertion that the claim was not controverted until the informal conference is supported by the record. Employer's alternate assertion that no Section 14(e) assessment was owed because claimant never asserted a wage loss claim for the period of time he worked at Security is also rejected as it is patently inconsistent with the record. Employer's final assertion that a Section 14(e) penalty should not be assessed any sooner than the date of the administrative law judge's Decision and Order similarly must fail as a Section 14(e) assessment applies to any compensation which is "due and unpaid". As employer has failed to raise any reversible error committed by the administrative law judge, we affirm the administrative law judge's award of a Section 14(e) assessment in this case. *See generally Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17, 20 (1992).

Accordingly, the administrative law judge's Decision and Order is modified to reflect that claimant is entitled to prospective Section 10(f) cost of living adjustments dating from July 12, 1987. In all other respects, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge