

BRB No. 91-535

ELWOOD L. SEE)
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 Claimant-Petitioner)
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 v.)
)
 WASHINGTON METROPOLITAN)
 AREA TRANSIT AUTHORITY) DATE ISSUED: _____
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order on Remand and Decision and Order on Reconsideration of Nicodemo DeGregorio, Administrative Law Judge, United States Department of Labor.

Fred C. Alexander, Jr. (McGuire, Woods, Battle & Boothe), Alexandria, Virginia, for claimant.

Gary L. Crawford (Clarke, Crawford & Bonifant), Gaithersburg, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Decision and Order on Reconsideration (86-DCW-144) of Administrative Law Judge Nicodemo DeGregorio 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(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).

This case is before the Board for the second time. On June 22, 1981, while employed as a bus driver for employer, claimant suffered injuries to his back when the bus he was driving was struck by an automobile. After undergoing a myelogram, claimant was released to return to his usual job on March 1, 1982, but he was allegedly unable to perform his work due to the pain in his back. Claimant retired on total disability in February 1983, and allegedly has not returned to work since March 1982. Employer voluntarily paid claimant temporary total disability benefits from June

22, 1981 to April 20, 1985. 33 U.S.C. §908(b). Claimant thereafter filed a claim for temporary total disability benefits under the Act.

In his initial Decision and Order, the administrative law judge determined that claimant cannot return to his usual work with employer and that employer failed to establish the availability of suitable alternate employment; thus, the administrative law judge awarded claimant temporary total disability compensation commencing April 20, 1985. Employer then appealed the administrative law judge's decision to the Board. *See v. Washington Metropolitan Area Transit Authority*, BRB No. 87-1212 (October 31, 1989) (unpublished). The Board affirmed the administrative law judge's finding that claimant cannot return to his usual work, vacated the administrative law judge's finding that employer had not established the availability of suitable alternate employment, and remanded the case to the administrative law judge to reconsider whether claimant's alleged post-injury employment in 1983 and 1984, and the jobs listed in employer's labor market survey, constitute suitable alternate employment. *Id.*, slip opinion at 4-6.

On remand, the administrative law judge determined that claimant's alleged employment in 1983 and 1984 did not constitute suitable alternate employment since no particular job, nor the nature of the work allegedly performed, was identified by employer. Next, citing *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), the administrative law judge determined that employer established the availability of suitable alternate employment which yielded an hourly rate of \$5.50; the administrative law judge thus awarded claimant temporary partial disability compensation commencing April 20, 1985. 33 U.S.C. §908(e). The administrative law judge subsequently reaffirmed his decision in a Decision and Order on Reconsideration.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment, the administrative law judge's determination of claimant's post-injury wage-earning capacity, and the administrative law judge's decision to commence claimant's temporary partial disability benefits as of April 20, 1985. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in failing to find that he is totally disabled; specifically, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Where, as in the instant case, claimant establishes that he is unable to return to his regular or usual employment, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). While an employer need not actually obtain a job for claimant, it must nevertheless establish the existence of actual, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of establishing the availability of suitable alternate employment. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

In the instant case, the administrative law judge, based upon the labor market survey prepared by Ms. Rega, a vocational rehabilitation consultant, concluded that employer had

established the availability of suitable alternate employment. Ms. Rega set forth several specific available positions with specific employers, such as a mail processor, parking lot attendant, and file clerk, which she believed were within claimant's physical capabilities and limitations, as well as claimant's educational and vocational background. *See* EX 10 at 4-11. Additionally, Ms. Rega noted that each contacted employer was informed of the physical limitations placed on claimant. Based upon the record before us, we hold that the administrative law judge's determination that employer has established the availability of suitable alternate employment is supported by substantial evidence and is consistent with law. *See Southern, supra*, 17 BRBS at 64. Accordingly, we affirm the administrative law judge's finding on this issue, and his consequent award of temporary partial disability compensation. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

Claimant next contends that the administrative law judge erred in failing to consider the inflation rate when determining claimant's post-injury wage-earning capacity. We disagree. In order to neutralize the effects of inflation, the administrative law judge must adjust claimant's post-injury wage levels to the level paid pre-injury so they may be compared with claimant's pre-injury average weekly wage. *See Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). In determining that claimant's post-injury wage-earning capacity is \$5.50 per hour, the administrative law judge relied upon the labor market survey of Ms. Rega conducted in 1986; in that survey Ms. Rega, after setting forth the specific hourly rates paid by the positions which she deemed suitable for claimant, noted that those positions identified in the survey would have paid approximately the same hourly rate in 1981. *See* EX-10 at 11. It is well-established that fact-finding functions reside with the administrative law judge who is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). As the administrative law judge's decision to credit and rely upon the testimony of Ms. Rega is neither inherently incredible nor patently unreasonable, we affirm his consequent finding that claimant retains a post-injury wage-earning capacity of \$5.50 per hour, as that finding is rational and is supported by the evidence of record.

Lastly, claimant asserts that the administrative law judge erred in commencing claimant's temporary partial disability award on April 20, 1985, the date upon which employer terminated its voluntary payment of temporary total disability benefits to claimant. We agree. An award of partial, rather than total, disability benefits commences on the date employer establishes the availability of suitable alternate employment. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989) and 16 BRBS 231 (1984); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *vacating on recon.* BRB No. 88-1721 (January 29, 1991)(unpublished). In the instant case, the administrative law judge determined that employer had established the availability of suitable alternate employment based upon the numerous employment opportunities set forth in the labor market survey of Ms. Rega; our review of that survey indicates that November 1986 is the earliest date upon which those specific employment positions were available. We therefore modify the administrative law judge's decision to reflect claimant's entitlement to temporary total disability

compensation through October 1986, and temporary partial disability benefits commencing November 1986, at which time employer established the availability of suitable alternate employment.

Accordingly, the administrative law judge's award of compensation is modified to reflect claimant's entitlement to temporary total disability benefits through October 1986 and temporary partial disability benefits commencing in November 1986. In all other respects, the Decision and Order on Remand and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge