BRB No. 00-0950

LONNIE PORTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIX SHIPPING COMPANY	)	DATE ISSUED: June 15, 2001
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Phil Watkins and Suzette S. Kinder (Phil Watkins, P.C.), San Antonio, Texas, for claimant.

Charles F. Herd, Jr., and Mark L. Clark (Rice Fowler), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-LHC-283) of Administrative Law Judge Larry W. Price 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 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).

This case is before the Board for the second time. On March 18, 1988, while claimant

was unloading pipes from the hold of a ship, claimant and two co-workers were injured when the pipes broke free from the crane and fell. Claimant hurt his neck, back, knee and leg, and employer voluntarily paid temporary total disability benefits and medical benefits.[1] In his initial decision, the administrative law judge found that claimant's knee and leg condition reached maximum medical improvement on March 7, 1989, and that his back and neck condition reached maximum medical improvement on December 1, 1993. In April 1995, while at his son's basketball game, claimant stood to cheer and ruptured his C4-5 disc. The administrative law judge awarded claimant periods of temporary total and permanent partial disability benefits. 33 U.S.C. §§908(b), (c)(2), (c)(21).

On appeal, the Board affirmed the administrative law judge's findings that claimant's April 1995 disc herniation at C4-5 and claimant's lumbar condition are related to the work accident. *Porter v. Dix Shipping Co.*, BRB Nos. 99-0443/A (Jan. 24, 2000). The Board also affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment by virtue of labor market surveys. The Board remanded the case for the administrative law judge to commence the awards for permanent partial disability on the dates that the suitable positions employer identified were actually available. The Board vacated the administrative law judge's award for a 30 percent knee impairment, 33 U.S.C. §908(c)(2), commencing on March 7, 1989, and, in the absence of any evidence that employer established the availability of suitable alternate employment before 1994, modified the award to reflect claimant's entitlement to compensation for temporary total disability, 33 U.S.C. §908(b), from the date of injury until December 1, 1993. The Board instructed the administrative law judge that claimant is entitled to compensation for

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[1]Claimant broke his right fibula, and he underwent surgical fasciotomies and a skin graft in March 1988. Claimant also tore the medial meniscus in his right knee, and he underwent arthroscopic surgery in March 1989. MRIs revealed herniated discs in his cervical spine at C5-6 and C6-7, and claimant underwent a diskectomy and double fusion in November 1992. The C6-7 bone plug collapsed and a repeat fusion was performed in April 1993. EX 11. MRIs also revealed abnormalities, including a possible herniation, in claimant's lumbar spine at L4-5 and L5-S1, which had not been treated. CX 1 at 96, 98; CX 2; EX 11.

permanent total disability, 33 U.S.C. §908(a), from December 1, 1993, until the date in 1994 that the administrative law judge determines, on remand, that employer established the availability of suitable alternate employment. Additionally, the administrative law judge was directed to consider the nature and extent of claimant's condition following his April 5, 1995, disc herniation at C4-5. Specifically, the Board noted that the administrative law judge did not discuss medical evidence that claimant's neck condition reached maximum medical improvement on May 20, 1998, and that vocational evidence demonstrated the availability of suitable alternate employment on July 15, 1998.

On remand, the administrative law judge denied employer's motion to admit additional evidence regarding the date suitable alternate employment became available. The administrative law judge found that employer established the availability of suitable alternate employment on December 31, 1994, with regard to claimant's work-related neck, lower back, leg and knee conditions, finding the absence of any evidence of record establishing an actual date in 1994 when the positions were available. The administrative law judge found that claimant's April 5, 1995, C4-5 neck injury reached maximum medical improvement on May 20, 1998, that claimant is unable to perform the alternate employment identified in employer's 1994 labor market survey due to the 1995 neck injury, and that, on July 15, 1998, employer identified the availability of suitable alternate employment given claimant's additional work restrictions after the April 1995 injury. Accordingly, the administrative law judge awarded claimant compensation for permanent total disability from December 1, 1993, to December 31, 1994, and for permanent partial disability from January 1, 1995, to April 4, 1995. The administrative law judge also awarded claimant compensation for temporary total disability from April 5, 1995, to May 19, 1998, for permanent total disability from May 20, 1998, to July 14, 1998, and for continuing permanent partial disability thereafter.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment before December 31, 1994, and the administrative law judge's award of compensation for total disability from April 5, 1995, to July 14, 1998. Claimant responds, urging affirmance.

Employer contends that, because the Board remanded the case for the administrative law judge to determine the date in 1994 that employer established the availability of suitable alternate employment, the administrative law judge erred by denying employer's motion to admit additional evidence establishing this date. Specifically, the administrative law judge denied employer's motion to admit the affidavit of employer's vocational consultant, Nancy Favaloro, averring that the credited jobs in employer's labor market survey were available from December 1, 1993, the date claimant's conditions reached maximum medical improvement, and throughout 1994. The administrative law judge's reasoned, *inter alia*, that employer had been afforded adequate opportunity to develop the record before the hearing;

moreover, the administrative law judge noted that the record was held open post-hearing for the submission of additional evidence, and that employer did not avail itself of this opportunity.

Generally, when the Board remands a case to an administrative law judge, the record need not be reopened for the receipt of additional evidence, providing the parties were provided an opportunity to develop their evidence previously. *See Dionisopoulous v. Pete Pappas & Sons*, 16 BRBS 93 (1984). In this regard, a party seeking to admit additional evidence must exercise diligence in developing its evidence prior to the initial hearing. *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *see also E.P. Paup v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993). Moreover, the Board has interpreted the relevant provisions of the Act's implementing regulations, 20 C.F.R. §§702.338, 702.339, as affording administrative law judges considerable discretion in ruling on requests for the admission of evidence into the record. *See, e.g., Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

In the instant case, we hold that the administrative law judge acted within his discretion in determining that further evidence regarding the date suitable alternate employment became available would not be admitted into the record on remand. The administrative law judge rationally found that employer had ample opportunity to develop the record both before and after the initial hearing. As suitable alternate employment was at issue in the initial proceedings, and as employer bears the burden of proof on this issue, employer could have anticipated the need to develop evidence regarding the date suitable alternate employment was available during the initial proceedings. *See generally Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). Employer has failed to establish that the administrative law judge abused his discretion in declining to admit Ms. Favaloro's affidavit on remand. Accordingly, we affirm the administrative law judge's finding that suitable alternate employment was not established until December 31, 1994, given the absence of evidence concerning an actual date in 1994 when such employment became available.[2]

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[2]We reject employer's alternate contention that there is substantial evidence of record establishing that suitable alternate employment was available on December 1, 1993, or January 1, 1994. The Board determined in the prior appeal of this case that there was no evidence of suitable alternate employment until 1994. *Porter*, slip op. at 9. The Board's decision on this issue constitutes the law of the case, and we decline to consider this issue again. *See Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999). Moreover,

Employer next challenges the administrative law judge's award of compensation for total disability from April 5, 1995, the date of claimant's second injury to his neck, until July 14, 1998, when the administrative law judge found that employer again established the availability of suitable alternate employment. Employer contends that claimant's neck condition following the April 5, 1995, incident did not result in any work restrictions above those that were in place following the initial work injury.

In his initial Decision and Order, the administrative law judge credited Dr. Echeverry's opinion that, due to claimant's neck condition after his April 5, 1995, injury, claimant is limited to sedentary employment with restrictions against lifting more than 10 pounds, and reaching above shoulder height. CX 1 at 85-90. Moreover, Dr. Echeverry opined that claimant is restricted from working an eight hour day. CX 1 at 22. Prior to claimant's April 1995 C4-5 injury, Dr. Echeverry imposed no work restrictions related to claimant's neck condition. CX 2; EX 11 at 65-66. Dr. Barrash opined in 1998 that claimant's neck condition limits him to semi-sedentary employment lifting no more than 20 pounds, Tr. at 189-191, and that claimant should not kneel more than 12 times a day or climb ladders, *id.* at 194.

On remand, the administrative law judge found that, after his April 1995 neck injury, claimant could no longer perform the suitable alternate employment employer identified as available in 1994. In this regard, the administrative law judge credited the opinion of Mr. Kramberg, a vocational counselor, CX 16 at 9, reasoning that Mr. Kramberg's opinion, that claimant is unable to perform the jobs identified in 1994 due to his neck condition, is in accordance with the opinions of Drs. Echeverry and Barrash. The administrative law judge further found that there is no evidence that the credited 1994 jobs were available on a part-time basis.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and

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the administrative law judge rationally found Ms. Favaloro's hearing testimony that suitable alternate employment was available "in 1994," Tr. at 285, 289, 294, was not sufficient evidence to establish its availability on January 1, 1994. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 493 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963)

inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir.1991). In the instant case, we hold that the administrative law judge's decision on remand to credit the testimony of Mr. Kramberg, as supported by the opinions of Drs. Echeverry and Barrash, is rational and supported by substantial evidence. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Louisiana Ins. Guar. Ass′n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). We therefore affirm the administrative law judge's finding that, after claimant's April 5, 1995, neck injury, claimant was unable to perform the jobs identified as suitable alternate employment in 1994. Accordingly, we also affirm the administrative law judge′s award of

compensation for temporary total disability from April 5, 1995, to May 20, 1998, and for permanent total disability from May 20, 1998, to July 14, 1998.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge