BRB Nos. 04-0178
and 04-0178A

HAROLD SMALLS, JR.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED:Oct. 29, 2004
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER
Cross-Respondent	)	

Appeal of the Decision and Order – Awarding Benefits and the Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Warren Miller (Miller & Phillips, LLC), New London, Connecticut, for claimant.

Edward W. Murphy (Morrison, Mahoney & Miller, LLP), Boston, Massachusetts, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals, and claimant cross-appeals, the Decision and Order–Awarding Benefits and the Order (2002-LHC-2056, 2057, 2058) of Administrative Law Judge Gerald M. Tierney 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).

On October 24, 1991, claimant was working as a grinder for employer when a wooden block fell approximately three stories and landed on claimant. Claimant reported to the infirmary, which sent him to the hospital for an examination. Claimant was treated

for back pain and released from the hospital. After treatment with Dr. Jones, he returned to work in late November 1991. Claimant injured his back again on December 9, 1991, and was off from work until January 9, 1992, when he returned with a light-duty work restriction. On that day, he became stuck behind pipes and injured his back when he was pulled out. He reported to the infirmary, where he was provided ice and pain medication and was sent home. Claimant attempted to return to work on February 11, 1992, but again experienced spasms and sharp pain in his back. Dr. Jones advised claimant to discontinue working and claimant did not return to work after this period.

In April 1992, claimant was incarcerated. During his time in prison, claimant took pain medication and performed exercises for his back that were prescribed by Dr. Jones, but was not under the care of Dr. Jones and did not receive physical therapy. He testified that his physical condition was poor and that he suffered back pain throughout this period. The record indicates that claimant visited the prison infirmary for back pain and was treated away from the prison on two separate occasions for back pain. Claimant was released from prison in 2000, and he sought disability benefits under the Act.

In his decision, the administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his back condition is causally related to his employment. In addition, the administrative law judge found that employer established rebuttal of the presumption. Thus, the administrative law judge weighed the evidence as a whole and concluded that the work-related accidents significantly contributed to claimant's physical condition. In addition, the administrative law judge found, after weighing the evidence as a whole, that claimant suffers from a psychological condition, specifically depression, that is causally related to his work-related injuries. In considering the nature and extent of claimant's disability, the administrative law judge found that claimant reached maximum medical improvement on August 1, 2001, and that he retained some wage-earning capacity during the time he was in prison. Therefore, the administrative law judge awarded claimant temporary partial disability benefits from October 24, 1992 to August 1, 2001, and permanent partial disability benefits from August 1, 2001, continuing. The administrative law judge subsequently clarified his decision by ordering employer to pay temporary partial disability benefits beginning on October 24, 1992 and continuing for five years at the weekly rate of $58.40, 33 U.S.C. §908(e), and permanent partial disability benefits from August 2, 2002, and continuing at the weekly rate of $58.40. 33 U.S.C. §908(c)(21).

On appeal, employer contends that the administrative law judge erred in finding that claimant's back condition is related to his work injuries and that claimant suffers from work-related depression. In addition, employer contends that the administrative law judge erred in finding that claimant established a *prima facie* case of total disability. In his cross-appeal, claimant contends that the administrative law judge erred in finding that he did not reach maximum medical improvement until August 1, 2001. Claimant also contends that the administrative law judge erred in finding that he was partially disabled

prior to the date that he found suitable alternate employment established. Moreover, claimant contends that the administrative law judge erred in finding that the positions identified by employer constitute suitable alternate employment and that claimant did not exercise diligence in seeking alternate work. Claimant also contends that the administrative law judge erred in failing to award any benefits from April 29, 1992 to October 23, 1992, and that the administrative law judge erred in his calculation of claimant's rate of compensation.

Causation – Back Condition

Initially, we address employer's contentions regarding the administrative law judge's findings that claimant's back and psychological conditions are causally related to his work injuries in October and December 1991 and February 1992. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

On appeal, employer contends that the administrative law judge erred in finding invocation of the Section 20(a) presumption that claimant's back condition is causally related to the work injuries. We disagree. The administrative law judge credited claimant's testimony that work-related accidents occurred on October 24, 1991, December 9, 1991, and January 9, 1992, which injured his back. The administrative law judge found that the medical records corroborated claimant's accounts of the accidents. Moreover, the administrative law judge found that Dr. Abramovitz opined that claimant's back condition was caused, at least in part, by his being struck by a wooden block on October 24, 1991. Cl. Ex. D; Cl. Ex. R at 19-21. The administrative law judge considered and rejected employer's contentions regarding the sufficiency of Dr. Abramovitz's opinion, finding that Dr. Abramovitz's opinion is supported by claimant's credible testimony and the consistency of claimant's complaints since the date of the work-related injuries. As the administrative law judge's finding is supported by substantial evidence and employer has raised no reversible error on appeal, we affirm the administrative law judge's finding that the evidence is sufficient to invoke the Section 20(a) presumption regarding claimant's back condition. *See Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175, 179 (1996).

Once Section 20(a) is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th

Cir. 1999)(*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). In the instant case, the administrative law judge found that employer presented sufficient evidence to rebut the Section 20(a) presumption, including the opinions of Drs. Willet and Jones. Dr. Willet testified that it would be difficult to attribute claimant's current complaints to his injuries in October 1991 or January 1992. Emp. Ex. 1. When asked about the cause of claimant's back complaints, Dr. Jones attributed claimant's condition to his weak abdominal muscles rather than the work-related injuries. Emp. Ex. 11. As it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the Section 20(a) presumption.

Therefore, the presumption falls from the case, and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of his condition. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). On appeal, employer contends that the administrative law judge should have rejected Dr. Abramovitz's opinion and given determinative weight to the opinion of Dr. Jones. In weighing the evidence as a whole, the administrative law judge found that Drs. Villegas and O'Keefe equivocated on the issue of the cause of claimant's back pain. Moreover, he rejected Dr. Jones's opinion as he found that it is equivocal and not well-reasoned. The administrative law judge found that Dr. Jones initially stated in December 1991 that claimant should remain off his feet or else he would continue to experience pain from "the related injury of October 24, 1991." Emp. Ex. 11. However, Dr. Jones later attributed claimant's condition solely to his weak abdominal muscles without explaining why the work-related injury did not contribute to claimant's condition. *Id*. The administrative law judge also noted that Dr. Jones reported signs of a back strain and diagnosed non-permanent recurrent lower back pain on February 27, 1992.

The administrative law judge accorded Dr. Abramovitz's opinion that claimant's back pain is causally related to his work injuries in 1991 and 1992 determinative weight as he was claimant's treating physician and his report is consistent with the objective evidence of record. The administrative law judge found that claimant presently complains of the same or similar symptoms he experienced immediately after the accident. Moreover, the prison records indicate that claimant complained of lower back pain, and received conservative treatment, during the eight years of his incarceration. As the administrative law judge's conclusion is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's back condition is causally related to his work injuries in October and December 1991 and February 1992. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT)(2d Cir. 2001).

Causation – Psychological Condition

Employer also contends that the administrative law judge erred in finding that claimant suffers from a work-related psychological condition. We affirm the administrative law judge's finding that Dr. Kern's report that claimant's back pain significantly contributes to his depressive symptoms, Cl. Ex. P, is sufficient to establish invocation of the Section 20(a) presumption with regard to claimant's psychological condition. *See Manship*, 30 BRBS at 175. We reject employer's contentions that Dr. Kern's report was obtained for trial and thus should be accorded less weight, and that Dr. Kern's opinion is outweighed by the other evidence, as these contentions go to the weight to be accorded the report rather than whether the report is sufficient to establish invocation.

In addition, we affirm the administrative law judge's finding that, after weighing the evidence as a whole, claimant's psychological condition is causally related, at least in part, to his persistent back pain as it is supported by substantial evidence.[1] In addition to the report of Dr. Kern, the record contains the opinions of Drs. O'Keefe and Villegas. Dr. O'Keefe stated that it is typical for a person with chronic pain to experience depression, Cl. Ex. R, and Dr. Villegas testified that claimant's depression is caused in part by his inability to work, Cl. Ex. Q, but both physicians admitted that psychology is not their area of expertise. Claimant was examined at Integrated Behavioral Health, Inc. (IBH) and Community Health Services following his release from prison. The therapist from IBH reported that claimant had no signs of psychosis or residual symptoms of a psychotic disorder. Cl. Ex. H.

Contrary to employer's contention, claimant's work-related injury does not have to be the sole cause of claimant's condition. As long as it contributes to the overall condition, the entire resultant disability is compensable. *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). The administrative law judge found that Dr. Kern's report is more consistent with the evidence than the report from IBH. Dr. Kern recognized that claimant had psychological problems before the work-related injuries, but concluded that claimant's persistent pain since the injury is a "significant stressor that magnifies these prior difficulties." Cl. Ex. P. Moreover, the administrative law judge found that Dr. Kern's opinion is corroborated by the opinions of Drs. O'Keefe and Villegas. Therefore, we affirm the administrative law judge's finding that claimant's

[1] Although the administrative law judge did not make a finding regarding whether employer established rebuttal of the Section 20(a) presumption, this error is harmless as we affirm the finding that claimant's psychological condition is related to claimant's work injury based on the evidence as a whole. *See Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126 (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 366 F.3d 1045, 38 BRBS 25(CRT)(9th Cir. 2004).

psychological condition is work-related as it is rational and based on substantial evidence. *See generally Marinelli*, 34 BRBS at 117.

Nature of Disability

On cross-appeal, claimant contends that the administrative law judge erred in finding that his condition did not reach maximum medical improvement until August 1, 2001. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

The administrative law judge noted claimant's contention that he had reached maximum medical improvement in October 1992, one year after his initial injury because his condition did not improve from April 1992 to August 2000. The administrative law judge found that claimant's condition had not stabilized by April 1992, as evidenced by the deterioration of his condition while he was imprisoned. Decision and Order at 14. In discussing the medical evidence, the administrative law judge found that Dr. O'Keefe determined that claimant had chronic low back pain and had reached maximum medical improvement by July 23, 2002, and that Dr. Abramovitz stated that, absent surgery, claimant reached maximum medical improvement on or before March 27, 2001, the date on which he first examined claimant. Cl. Ex. R at 18-19. Dr. Jolda opined that claimant had long-standing back pain. Emp. Ex. 16. The administrative law judge noted that Dr. Willett reported that claimant told him that he had reached maximum medical improvement in August 2001. Emp. Ex. 1. Dr. Villegas stated on December 4, 2002, that claimant's condition had improved since his incarceration ended. Cl. Ex. Q at 21. The administrative law judge found August 1, 2001, to be the date of maximum medical improvement, based on claimant's report to Dr. Willet on that date and as claimant had improved after his release from prison per the opinion of Dr. Villegas. Decision and Order at 13.

We conclude that this issue must be remanded for reconsideration. The administrative law judge found that claimant's condition declined after his incarceration. The administrative law judge noted that several physicians opined that claimant had a longstanding back problem, but the administrative law judge did not offer a rationale for rejecting claimant's contention that his condition has been long-lasting and beyond the normal period of healing. The *Watson* test for permanency does not require the condition to be "eternal or everlasting" but only of a long-standing duration. *Watson*, 400 F.2d at 654; *see, e.g., Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979)(condition had persisted for three years); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979)(condition

"chronic" as it had lasted for two years). In addition, where claimant's condition continues to deteriorate, rather than to improve, the claimant's condition is permanent under the *Watson* test. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996)(claimant's condition deteriorated in the five years since injury). A finding of permanency does not preclude the possibility that the claimant's condition will someday improve. *Watson*, 400 F.2d at 654; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

In this case, although the administrative law judge cited *Watson*, he did not discuss the medical evidence in terms of whether claimant's condition, which had lasted for 11 years as of the time of the hearing, was permanent prior to August 1, 2001. The medical evidence does not preclude an earlier date of permanency because the reports state that claimant had reached maximum improvement *by* a certain date, not *on* that date. Moreover, the administrative law judge's reliance on claimant's statement to Dr. Willett is not dispositive as to the date claimant's condition became *medically* permanent. In this regard, the medical reports are the more probative evidence. Thus, as the administrative law judge did not address the medical evidence in the context of *Watson*, we vacate the administrative law judge's finding that claimant reached maximum medical improvement on August 1, 2001, and we remand this case for reconsideration. *See Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS at 120 (1988).

Extent of Disability

With regard to the extent of claimant's disability, employer contends that the administrative law judge erred in finding that claimant established a *prima facie* case of total disability. It is claimant's burden to establish his inability to perform his usual work due to his work injury. *Marinelli*, 34 BRBS at 118-119; *Delay*, 31 BRBS 197; *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In the instant case, the record contains the opinions of Drs. Willett and Jones who opined that claimant's back condition does not prevent him from returning to his usual work. However, the administrative law judge found that these opinions are less persuasive than the weight of the contrary evidence. Specifically, the administrative law judge found that Dr. Abramovitz opined that claimant cannot return to his usual work and has been unable to do so since 1992, Cl. Ex. R, and Dr. Doherty concluded on November 20, 2002, that claimant is "100 percent" disabled. Cl. Ex. I. The administrative law judge also weighed the report by Ms. Hassett, a vocational expert, who concluded that claimant is unable to perform some tasks required by his last position as a grinder, Cl. Ex. N, and the report by Ms. Mattus, a vocational expert, who determined that claimant cannot return to his usual employment, but is capable of performing light duty for eight hours a day. H. Tr. at 124. Dr. Kern, a reviewing psychiatrist, opined that claimant's pain, negative thoughts about pain, and feelings of hopelessness would interfere with his ability to maintain employment. Cl. Ex. P. In addition, the administrative law judge

found that the credible testimony of claimant and his father demonstrates that claimant could not return to work as a grinder after he was initially injured. H. Tr. at 37, 101-103.

Claimant's return to work was postponed two times before he was incarcerated due to continued symptoms and complaints of pain, and Dr. Jones projected only that claimant would be released for work by the end of April 1992. As the administrative law judge found, claimant continued to seek treatment for his back throughout his incarceration and after his release. Therefore, we reject employer's contention that claimant would have been able to return to his usual employment on April 30, 1992, if it had not been for his imprisonment. Moreover, as the administrative law judge acted within his discretion in crediting the opinions of Drs. Abramovitz and Doherty over the contrary opinions of Drs. Willet and Jones, we affirm the administrative law judge's finding that claimant is unable to perform his usual employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

Once a claimant has shown his inability to return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. The employer must show the realistic availability of jobs that claimant can perform in order to meet its burden. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Claimant contends that the administrative law judge erred in awarding partial disability benefits as of October 1992 based on the labor market survey which identifies jobs available in November 2002. The United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, has held that claimant's entitlement to total disability benefits continues until the date when suitable alternate employment is found to be first available to claimant, and such a showing may not be applied retroactively so as to commence partial disability before suitable alternate employment is shown to exist. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

In the present case, the administrative law judge considered claimant's work activity while in jail and found that he worked as a plumber assistant, a detail worker,[2] a cook, and a personnel clerk. The administrative law judge found that this activity establishes at least a partial work ability while claimant was incarcerated. The administrative law judge also considered the opinions of the physicians of record and the testimony and reports of the vocational experts. He concluded that the positions identified in the November 2002 labor market survey are compatible with claimant's abilities and limitations, and thus found that claimant was partially disabled from October 24, 1992 and continuing. The administrative law judge did not address whether employer

[2] As a detail worker, claimant's duties included pushing a broom, filling out paperwork, passing out toilet paper, and assisting prison personnel for approximately one to two hours a day on random days of the week. H. Tr. at 59-60.

established the availability of suitable jobs as of October 24, 1992. We hold that employer's evidence is legally insufficient to establish the availability of suitable jobs in October 1992.

Ms. Mattus, employer's vocational expert, submitted a labor market survey dated November 4, 2002, in which she identified five positions which were available at the time of the report. The details of the positions include the hourly wage in 1991, but do not specifically address whether the positions were available prior to November 2002. Ms. Mattus testified that it "was reasonable to assume that those jobs were available" prior to September 2002, but she did not have any specific knowledge of their availability before that date. H. Tr. at 148. In addition, Ms. Mattus testified that she reviewed a colleague's labor market survey from 1992 which indicated that there were entry level positions available in 1992. H. Tr. at 135. However, this labor market survey was not submitted into the record in this case.

To meet its burden of establishing suitable alternate employment, employer must produce evidence of jobs that claimant "can realistically compete for," and it is insufficient to show that claimant possesses certain skills or can perform certain physical tasks. *Pietrunti*, 119 F.3d at 1041, 31 BRBS at 89(CRT). As a matter of law, claimant remains totally disabled until employer establishes the availability of suitable alternate employment. *Palombo*, 937 F.2d at 76; 25 BRBS at 11(CRT). The Board has held that a claimant's incarceration does not preclude an award of total disability where employer has made no showing of suitable alternate employment during the period of incarceration. *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). As there is no evidence of the availability of suitable alternate employment during the period prior to the November 2002 labor market survey, other than the expert's testimony that it would be reasonable to assume that such positions were available, we reverse the administrative law judge's finding that claimant is entitled to partial, not total, disability benefits from April 29, 1992 to November 4, 2002, the date of the labor market survey.

In addition, claimant contends that the administrative law judge erred in failing to award any benefits from April 29, 1992, to October 24, 1992, in spite of his findings that claimant could not return to his former employment due to his work-related injury and that employer did not establish suitable alternate employment during this period. As we have affirmed the administrative law judge's finding that claimant has been unable to perform his usual duties as a grinder due to his work-related back condition since February 1992, including the period from April 1992 to October 1992, and there is no evidence in the record of suitable alternate employment during this period, we modify the administrative law judge's decision to include an award of total disability benefits for the period from April 29, 1992 to October 24, 1992 as a matter of law. *See Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

Claimant contends that the administrative law judge erred in finding that the positions identified in the labor market survey establish the availability of suitable alternate employment after November 2002. The administrative law judge summarily found that positions as a customer service representative, front desk clerk, receptionist, assembler, and cashier are compatible with claimant's "specific abilities and limitations." Decision and Order at 17. The administrative law judge based this conclusion on the finding that all provide the option to sit or stand as needed and require occasional or less than occasional bending, reaching, squatting, kneeling, and/or climbing.[3] However, as claimant correctly contends on appeal, the administrative law judge did not address relevant evidence on the issue of claimant's ability to perform the identified positions. Specifically, Dr. Abramowitz testified that it is unlikely that claimant would be successful in performing the jobs identified by Ms. Mattus. Dep. at 15-16. In addition, Dr. Villegas opined that claimant would not be able to perform the jobs identified and that he will need a work-hardening program so that he does not exacerbate his back condition. Further, the administrative law judge stated that Dr. Kern did not offer an opinion regarding claimant's employability but did not weigh the effect of Dr. Kern's opinion that claimant's pain, negative thoughts about pain, and feelings of hopelessness would interfere with his ability to maintain employment. Cl. Ex. P. In determining the extent of claimant's disability, the administrative law judge found that claimant was able to work for only four hours per day based on the physician's opinions and the testimony of claimant and his father, Decision and Order at 17, but did not address whether the positions identified were for full or part time work. As there is evidence of record contrary to the administrative law judge's finding that claimant is capable of performing the jobs identified in the November 2002 labor market survey which the administrative law judge did not address in his decision, we vacate the administrative law judge's finding and remand the case for further consideration of this issue.

Once employer demonstrates that suitable jobs are available, the burden shifts back to claimant to demonstrate that he was unable to secure employment although he diligently tried. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). Thus, if the administrative law judge finds on remand that employer established the availability of suitable alternate employment, his findings regarding the diligence of claimant's search for employment will be relevant. The administrative law judge considered claimant's testimony that he had unsuccessfully sought work with the employers identified in the labor market survey. The administrative law judge found that claimant's testimony was outweighed by the testimony of Ms. Mattus, who stated that she had personally confirmed that claimant's physical restrictions would be accommodated, and verified the availability of the positions after claimant's job search. Tr. 131-132, 148. At that time, three of the

[3] The administrative law judge appears to have based his finding of claimant's restrictions on Dr. Doherty's "Medical Assessment of Ability to Do Work-Related Physical Activities" dated November 20, 2002. *See* Cl. Ex. I

employers were still hiring and all except one of the identified employers stated that they would be willing to hire a felon. Tr. 132-133. Ms. Mattus suggested that the reasons why claimant had difficulty obtaining employment related more to his appearance, his approach to the employers he contacted, and the statements that he made to them.

The Board has held that although a claimant may unsuccessfully try to secure the suitable alternate employment identified by employer, the administrative law judge may still find that he is not entitled to total disability benefits because the claimant's inability to secure employment is due to his lack of interpersonal skills, since those factors are, unlike age, education, physical restrictions and vocational background, within claimant's control. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J., dissenting). The administrative law judge in the instant case rationally found that claimant's inability to secure employment is due to his inadequate job searching skills. Decision and Order at 18. Thus, if the administrative law judge finds on remand that the positions identified in the labor market survey are sufficient to establish suitable alternate employment, the administrative law judge's finding that claimant did not exercise diligence in his search for alternate employment is affirmed as it is rational and supported by substantial evidence.

Wage-earning Capacity

Lastly, on cross-appeal, claimant contends that the administrative law judge erred in his calculation of claimant's wage-earning capacity. The administrative law judge rationally averaged the wages of the jobs identified in the labor market survey to determine claimant's post-injury wage-earning capacity. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). In order to neutralize the effects of inflation, the administrative law judge must adjust post-injury wage levels to the level paid at the time of the injury. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). The administrative law judge found that the average wage the jobs identified in the labor market survey paid in 1991 is $4.98 per hour, and he awarded partial disability benefits based on this figure.

Claimant, however, contends that the administrative law judge erred in calculating his wage-earning capacity based on a 40-hour work week when the administrative law judge found that claimant was only able to work for four hours a day.[4] We must vacate the administrative law judge's finding that claimant is entitled to partial disability compensation at the rate of $58.40. On remand, the administrative law judge must

[4] Using the administrative law judge's finding that claimant had the ability to earn $4.98 per hour at entry level jobs yields a wage-earning capacity of $99.60 (4.98 x 4=19.92 x 5=99.60). This amount subtracted from claimant's average weekly wage of $286.80 yields a compensation rate of $124.80 (286.80-99.60=187.20/ 2/3 = 124.80), rather than $58.40 as found by the administrative law judge.

reconcile claimant's post-injury wage-earning capacity with the number of hours he finds claimant can work.

Accordingly, the administrative law judge's finding that claimant suffers from a work-related back and psychological condition is affirmed. However, the administrative law judge's finding that claimant reached maximum medical improvement on August 1, 2001, is vacated and the case remanded for further consideration consistent with this opinion. The administrative law judge's finding that claimant established a *prima facie* case of total disability is affirmed, but the administrative law judge's finding that employer established the availability of suitable alternate employment is vacated and the case is remanded for further findings consistent with this opinion. If the administrative law judge finds on remand that the positions identified establish suitable alternate employment, the administrative law judge's finding that claimant did not exercise diligence in attempting to find alternate work is affirmed. The administrative law judge's finding that claimant is entitled to partial benefits from April 29, 1992, to November 4, 2002, is reversed, and the decision is modified to reflect claimant's entitlement to total disability benefits for this period. In addition, the decision is modified to reflect claimant's entitlement to total disability benefits from April 29, 1992, to October 24, 1992, as a matter of law. Lastly, if the administrative law judge finds on remand that claimant is partially disabled after November 2002, the administrative law judge must determine claimant's wage-earning capacity with reference to the number of hours the administrative law judge finds claimant is capable of working.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I agree with the majority's decision except insofar as it vacates the administrative law judge's determination of August 2001 as the date of maximum medical improvement. The record reflects that the administrative law judge fully considered claimant's contention that the date of maximum medical improvement is October 1992, and the administrative law judge rejected that contention because analysis of the evidence showed August 2001 to be the date of maximum medical improvement.

The administrative law judge stated that the "medical evidence and the complainant's credible medical testimony established that he reached maximum medical improvement on August 1, 2001 . . . ." Decision and Order at 14. There are no credible

medical reports of record which reflect a date of maximum medical improvement prior to August 1, 2001.[5] The record supports the administrative law judge's determination that claimant's back condition worsened during his incarceration (April 1992 until August 2000), and improved with medical treatment following his release. Decision and Order at 13-14. Dr. Villegas stated that the medical regimen which claimant has followed after his imprisonment has enabled him to get better. Cl. Ex. Q at 21-22. Because the law is clear that the date of maximum medical improvement is "the time at which no further medical improvement is possible," *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312, 24 BRBS 69, 74(CRT) (D.C. Cir. 1990), and the record establishes that claimant's condition medically improved after his return to society in August 2000, the administrative law judge correctly rejected claimant's contention that he had reached maximum medical improvement in 1992.

Nevertheless, the majority states that the administrative law judge must reconsider claimant's contention in light of the Fifth Circuit's decision in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968) *cert. denied*, 394 U.S. 976 (1969). The majority's reliance upon *Watson* is misplaced. The claimant in *Watson* had lost a leg as a result of a work accident. Three and one-half years after he was fitted with a prothesis, he developed an ulcer and was unable to use the prothesis. That condition was unchanged at the time of the hearing and employer conceded that claimant was unable to work. Employer argued that claimant's condition should not yet be deemed permanent because "doctors think that *Watson* will sooner or later be successfully treated and that he will then be able to use his artificial leg and to return to supervisory work in the docks." *Id.* at 654. The Fifth Circuit rejected employer's argument, stating:

> An employee [is] permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration. . . .

Id. Watson has no application to the instant case because we are not speculating about whether claimant's condition may improve after October 1992. The uncontradicted evidence is that claimant's condition did medically improve following his release from prison in August 2000. Moreover, Dr. Villegas's professional observation of improvement is corroborated by claimant's candid statement to Dr. Willett.

[5] The record reflects that Dr. Willett opined that claimant had reached maximum medical improvement in "approximately July 1992;" the doctor also stated that claimant had returned to pre-accident status and that his back injuries do not prevent him from performing his normal work duties. Emp. Ex. 1 at 9. Although Dr. Jones agreed that claimant could resume his duties on April 23, 1992, the administrative law judge correctly found that these opinions were against the weight of the medical evidence. Decision and Order at 14.

The standard applicable to the case at bar is set forth in *Palombo v. Director, OWCP*, 937 F.2d 70, 76, 25 BRBS 1, 10 (2d Cir. 1991) by the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises. The Second Circuit declared that maximum medical improvement is "the point when the injury has healed to the full extent possible." *Id.*, 937 F.2d at 76, 25 BRBS at 10(CRT). Since the evidence established that claimant's condition improved after October 1992, that cannot be the date of maximum medical improvement. *Id.*

In determining that August 2001 was the date of maximum medical improvement, the administrative law judge was relying on both Dr. Villegas's observations and upon claimant's explicit statement to Dr. Willett that he had reached maximum medical improvement in August 2001. Emp. Ex. 1 at 2. Because substantial evidence supports the administrative law judge's determination of August 2001 as the date of maximum medical improvement, I believe it should be affirmed. 33 U.S.C. §921(b)(3).

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REGINA C. McGRANERY
Administrative Appeals Judge