BRB No. 98-1632

LEE H. CAFIERO, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHELL PIPE LINE CORPORATION	)	DATED ISSUED: 9/21/99
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Martin S. Triche (Risley C. Triche & Associates), Napoleonville, Louisiana, for claimant.

Jeffrey I. Mandel (Larzelere & Picou, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (93-LHC-385) of Administrative Law Judge Richard D. Mills 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (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).

Employer appeals a decision on remand from the United States Court of Appeals for

the Fifth Circuit. The sole issue on appeal is whether the administrative law judge's determination on remand of claimant's post-injury wage-earning capacity is consistent with the directive of the Fifth Circuit in its decision in this case, *Shell Offshore, Inc. v. Director, OWCP [Cafiero],* 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 118 S.Ct. 1563 (1998).

Claimant sustained an employment-related back injury on April 24, 1990, and was subsequently diagnosed with a herniated disc with radiculopathy and degenerative disc disease. Claimant has not returned to work since his April 24, 1990 injury. It is undisputed that claimant is unable to perform his former work as a meter technician.

In his initial Decision and Order, the administrative law judge found, *inter alia,* that employer established the availability of suitable alternate employment on the basis of labor market surveys identifying various insurance sales positions; accordingly, the administrative law judge awarded claimant permanent partial disability benefits.[1] The administrative law judge further determined, after considering the evidence of record regarding the earnings listed for the insurance sales positions identified in employer's labor market surveys, that claimant's annual post-injury wage-earning capacity was $35,000. In a Decision and Order on Reconsideration, the administrative law judge denied employer's request that claimant's post-injury wage-earning capacity be found to be $42,500, reaffirming his previous determination that $35,000 reasonably represents claimant's post-injury wage-earning capacity.[2]

---

[1]Claimant had previously worked as an insurance salesman from 1969 to 1971.

[2]The administrative law judge noted that claimant presented no objective evidence to contravene the testimony of employer's vocational expert Thomas Mungall that a reasonable annual salary range for claimant was $35,000 to $50,000.

The case was administratively affirmed by the Board on September 12, 1996, pursuant to Public Law No. 104-134, Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321 (1996), and was subsequently appealed by employer to the United States Court of Appeals for the Fifth Circuit. In its discussion of the post-injury wage-earning capacity issue, the Fifth Circuit cited the Board's holding in *Abbott v. Louisiana Ins. Guaranty Ass'n.,* 27 BRBS 192, 204-205 (1993), *aff'd* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), that an average of the range of salaries in the jobs identified as suitable alternate employment is a reasonable method of determining post-injury wage-earning capacity. Stating that the administrative law judge failed to provide an explanation for his conclusion that claimant's wage-earning capacity is $35,000 and that it found no evidence in the record to support the administrative law judge's decision not to use the average of the range of earnings,[3] the court vacated the administrative law judge's wage-earning capacity determination and remanded the case to the administrative law judge for further consideration. *Cafiero,* 122 F.3d at 318, 31 BRBS at 133 (CRT).

On remand, the administrative law judge, having noting that the Fifth Circuit had not ordered him to use the average of the salaries of the available post-injury jobs as claimant's wage-earning capacity, cited the Board's decision in *Abbott,* 27 BRBS at 205, for the proposition that while averaging is a reasonable method of determining wage-earning capacity, its use is not required in every circumstance. Thereafter, the administrative law judge concluded that his original determination of $35,000 represented an amount which fairly and reasonably represents claimant's post-injury wage-earning capacity in light of claimant's physical condition, age, education, industrial history, availability of employment, earning power on the open market, and probable future wage loss due to the work-related injury. Accordingly, the administrative law judge reinstated his prior finding that $35,000 represents claimant's post-injury wage-earning capacity.

On appeal, employer contends that the administrative law judge failed to follow the directive of the Fifth Circuit by not employing the average of the salary range established by employer in determining claimant's post-injury wage-earning capacity. Claimant responds, urging affirmance.

---

[3]The court noted, in this regard, that claimant had previous insurance sales experience and that employer presented uncontradicted evidence that claimant's post-injury wage-earning capacity ranged from $35,000 to $50,000. *Cafiero,* 122 F.3d at 318, 31 BRBS at 133 (CRT).

Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award of partial disability benefits based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If claimant has no actual earnings or if his earnings are determined not to be representative of his wage-earning capacity, the administrative law judge must evaluate all relevant evidence in accordance with a range of relevant considerations, and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Louisiana Ins. Guaranty Ass'n. v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108 (CRT)(5th Cir. 1990); *Mangaliman v. Lockheed Shipbuilding Co.,* 30 BRBS 39 (1996). Some of the factors to be considered in calculating a reasonable wage-earning capacity include claimant's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. *See Abbott,* 27 BRBS at 204, *aff'd,* 40 F.3d 122, 29 BRBS at 22 (CRT); *Warren v. Nat'l Steel & Shipbuilding Co.,* 21 BRBS 149, 153 (1988); *Devillier v. Nat'l Steel & Shipbuilding Co.,* 10 BRBS 649 (1979); *see also Argonaut Ins. Co. v. Patterson,* 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988).

Employer contends that, pursuant to the Fifth Circuit's decision in the present case, *Cafiero,* 122 F.3d at 318, 31 BRBS at 133 (CRT), and the court's subsequent decision in *Avondale Industries, Inc. v. Pulliam,* 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998), the administrative law judge was required to average the salary ranges established by employer inasmuch as claimant failed to produce contravening evidence to refute the suitable alternate employment and range of earnings established by employer. We disagree.

At the outset, we note that an administrative law judge has significant discretion in fashioning a reasonable post-injury wage-earning capacity. *Louisiana Ins. Guaranty Ass'n*, 40 F.3d at 129, 29 BRBS at 27 (CRT). *See also Pulliam,* 137 F.3d at 328-329, 32 BRBS at 66 (CRT); *Penrod Drilling Co.,* 905 F.2d at 87, 23 BRBS at 111 (CRT). Moreover, an administrative law judge must take into consideration all record evidence relevant to determining a reasonable wage-earning capacity. *See Penrod Drilling Co.,* 905 F.2d at 88, 23 BRBS at 112 (CRT); *Mangaliman,* 30 BRBS at 43. *See generally Rambo II,* 521 U.S. at 121, 31 BRBS at 54 (CRT); *Rambo I,* 515 U.S. at 54, 30 BRBS at 1 (CRT).

While the Fifth Circuit and the Board have held that averaging a range of salaries is a

reasonable method of determining an employee's post-injury wage-earning capacity, neither the court nor the Board has mandated the use of averaging. *See Pulliam,* 137 F.3d at 326, 32 BRBS at 65 (CRT); *Cafiero,* 122 F.3d at 318, 31 BRBS at 133 (CRT); *Louisiana Ins. Guaranty Ass'n,* 40 F.3d at 129, 29 BRBS at 27 (CRT), *aff'g Abbott,* 27 BRBS at 204-205. Contrary to employer's assertion on appeal, the Fifth Circuit's opinion in this case, *Cafiero,* 122 F.3d at 318, 31 BRBS at 133 (CRT), does not mandate that the administrative law judge calculate the average of the earnings range established by employer; such a reading would limit the administrative law judge's inquiry to exclude relevant evidence concerning claimant's ability to perform the insurance sales employment identified by employer and to earn the salaries and/or commissions listed for each employment opportunity. In this regard, employer's interpretation of Fifth Circuit case precedent would effectively create a presumption that the average of the earnings for all of the jobs establishing the availability of suitable alternate employment fairly and reasonably represents an employee's wage-earning capacity. Moreover, in view of the holding of the Fifth Circuit in *Penrod Drilling Co.,* 905 F.2d at 88, 23 BRBS at 112 (CRT), that the creation of a presumption that a claimant's actual earnings equaled his wage-earning capacity erroneously foreclosed examination of the record as a whole, we hold that employer's contention that the decisions in *Pulliam* and *Cafiero* compel the use of averaging in the instant case is without merit. *See also Mangaliman,* 30 BRBS at 43.

We conclude, rather, that, on remand from the Fifth Circuit, the administrative law judge properly evaluated the record as a whole, specifically addressing the factors relevant to determining claimant's reasonable post-injury wage-earning capacity, including claimant's physical condition, age, past history of employment in insurance sales, availability of employment, and earning power on the open market.[4] *See, e.g., Abbott,* 27 BRBS at 204, *aff'd,* 40 F.3d at 122, 29 BRBS at 22 (CRT). Recognizing the commission-based nature of

---

[4]The administrative law judge also considered whether medical and other circumstances indicate a probable future wage loss due to the work-related injury, concluding that as claimant has been diagnosed with a degenerative disc disease, his condition will likely worsen, resulting in probable future wage loss. Employer challenges this determination as speculative. We note that the Supreme Court has stated that in cases in which the claimant already has a compensable loss of wage-earning capacity, there is no need to account for the possibility of further loss in the future in calculating the claimant's immediately compensable wage-earning capacity, as Section 22 modification, 33 U.S.C. §922, makes provision for the future effects of disability. *Rambo II,* 521 U.S. at 121, 31 BRBS at 54 (CRT). Thus, there was no need for the administrative law judge in the instant case to consider future contingencies in calculating claimant's present wage-earning capacity. We conclude, however, that the administrative law judge's inclusion of this factor, in the overall context of his wage-earning capacity determination, does not constitute reversible error.

insurance sales work, the administrative law judge determined that any time lost from work due to claimant's physical condition would necessarily affect claimant's earnings. Having previously credited claimant's physical complaints as well as claimant's description of the physical demands of his previous insurance sales job,[5] the administrative law judge found that claimant's physical condition and age hinder his ability to pursue such a position as aggressively as he did in 1971 and to earn the average earnings of an insurance salesman. The administrative law judge has considerable discretion in evaluating the evidence of record, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962), and we may not engage in a *de novo* review of the record. *See Burns v. Director, OWCP,* 41 F.3d 1555, 1562-63, 29 BRBS 28, 37-39 (CRT) (D.C. Cir. 1994). Contrary to employer's assertion that the administrative law judge's determination that claimant's age and physical condition limits his wage-earning capacity is not supported by substantial evidence, the administrative law judge rationally credited claimant's complaints of pain, and these complaints constitute substantial evidence to support the administrative law judge's finding that claimant's ability to perform insurance sales work is adversely affected by his physical condition. *See generally Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 944, 25 BRBS 78, 80 (CRT)(5th Cir. 1991). Accordingly, we reject employer's assignment of error in this regard.[6]

---

[5]The administrative law judge credited claimant's testimony that his previous insurance sales job involved constant car travel and required him to repeatedly get in and out of the car during the course of a day.

[6]The administrative law judge's misstatement that employer has not challenged claimant's credibility is insufficient to establish reversible error inasmuch as the administrative law judge fully considered the medical evidence upon which employer relies to challenge claimant's credibility.

Lastly, we reject employer's challenge to the administrative law judge's evaluation of the evidence regarding both the earnings listed for the insurance sales positions identified in employer's labor market surveys and claimant's past earnings as an insurance salesman. While employer offers a competing characterization of the record evidence, it has not provided a basis for overturning the administrative law judge's factual findings. It is well established that the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Todd Shipyards Corp.,* 300 F.2d at 742. In contesting the administrative law judge's evaluation of the vocational evidence, employer asserts that the realistic salary range identified by employer's vocational expert is based on actual salaries listed for the insurance sales positions contained in the labor market surveys. Our review of the labor market surveys reveals, however, that most of the individual jobs identified list an "average" salary, "expected," "potential," or "estimated" income, or a broad salary range. Moreover, earnings for most of the listed positions are based partially or entirely on commissions. Thus, as the labor market surveys do not provide precise wages for each of the listed jobs, we reject employer's argument that only the average of the salary range established by employer could fairly and reasonably represent claimant's post-injury wage-earning capacity. We further reject employer's contention that the administrative law judge misconstrued the evidence concerning claimant's past insurance sales earnings inasmuch as the inferences drawn by the administrative law judge with respect to claimant's prior earnings, the industrywide averages, and claimant's present inability to earn the income he previously received as an insurance salesman are reasonable and supported by substantial evidence.[7] *See generally Mendoza,* 46 F.3d at 498, 29 BRBS at 79 (CRT); *Todd Shipyards Corp.,* 300 F.2d at 742.

As the administrative law judge provided, on remand, a comprehensive review of all factors and evidence relevant to determining claimant's post-injury wage-earning capacity in accordance with the applicable law and as his inferences and factual findings are reasonable and supported by substantial evidence, we affirm the administrative law judge's determination that annual earnings of $35,000 fairly and reasonably represent claimant's post-injury wage-earning capacity.

---

[7]Contrary to employer's argument on appeal, the administrative law judge's inference that claimant earned approximately $18,000 in 1971 as an insurance salesman is well supported by the record evidence; claimant testified that he earned from $200 to $300 per week and vocational expert Mr. Mungall testified that claimant earned from $300 to $400 per week in 1971. Moreover, while we disagree with employer that the administrative law judge's extrapolation regarding the insurance sales industrywide average earnings in 1992 is unreasonable, we note that, in any case, this inference is not central to the administrative law judge's wage-earning capacity determination.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge