BRB No. 89-3502

WALTER J. HIBBARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
KERR-MCGEE CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Robert A. Mahtook, Jr. (Gachassin, Hunter & Sigur), Lafayette, Louisiana, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (89-LHC-1154) of Administrative Law Judge Steven E. Halpern 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

On May 20, 1985, while working as an off-shore welder, claimant injured his back when he struck it against a steel shelf. He continued to work for employer until his discharge in June 1985 for failure to complete a drug rehabilitation program. Tr. at 43-45, 87. That summer, claimant worked for other employers as an on-shore welder, but his back still bothered him, so he contacted employer in October 1985, and, at employer's expense, he received treatment. On November 14, 1985, claimant underwent an L4 discolysis to relieve the pain from his degenerative disc. Jt. Ex. 1 at 13-15. Dr. Brown determined that claimant's condition reached maximum medical improvement on April 10, 1986, and released him from further treatment. Dr. Brown concluded that claimant has a 10 percent permanent partial disability but is able to return to light duty work.[1] Jt. Ex. 1 at 18-19. In an attempt to settle this case, employer sent claimant to Dr. Brown for another evaluation. Tr. at 113. On May 5, 1988, Dr. Brown stated that claimant's condition had improved and that he only has a five percent permanent impairment to his body as a whole. Further, Dr. Brown determined that claimant can return to work as an off-shore welder. Jt. Ex. 1 at 20-26. Employer paid claimant temporary total disability benefits from October 20, 1985, through October 12, 1987, and temporary partial disability benefits from October 13, 1987, through October 10, 1988. Jt. Ex. 2; Emp. Brief at 12. Claimant filed a claim for permanent partial disability benefits.

After a formal hearing on the issues, the administrative law judge determined that, as claimant and employer agreed that claimant's condition reached maximum medical improvement on April 10, 1986, claimant is permanently disabled from this date. Further, he noted that the parties agreed that all compensation due claimant has been paid through October 10, 1988. Decision and Order at 1. Based on claimant's testimony, the administrative law judge found that off-shore welding is more demanding than on-shore welding and that claimant cannot perform the daily activities required of an off-shore welder, but he can do on-shore work. *Id.* at 3-5. Consequently, the administrative law judge ordered employer to pay permanent partial disability benefits from October 11, 1988, and continuing, as calculated by the district director. *Id.* at 6. Employer now appeals the administrative law judge's decision. Claimant has not responded to the appeal.[2]

Employer first contends the administrative law judge erred in finding that claimant cannot return to his usual work. Specifically, employer notes that the undisputed medical reports of Dr. Brown indicate that claimant is able to perform the duties required of an off-shore welder. It is well-established that claimant bears the burden of proving the nature and extent of his work-related disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual work, and such a showing may be supported by claimant's credible testimony alone. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this case, claimant testified that he cannot return to his usual work as an off-shore welder. Tr. at 67-71. The administrative law judge

[1]Dr. Brown restricted claimant to lifting less than 75 pounds and to lifting, bending, and twisting only intermittently. Jt. Ex. 1 at 18-19.

[2]Initially, claimant filed a cross-appeal of the Decision and Order; however, in an Order dated June 29, 1990, the Board granted claimant's request to dismiss the cross-appeal. BRB No. 89-3502A.

credited claimant's testimony and found that "the demands of off-shore welding are beyond [claimant's] residual functional capabilities." *Id.* at 3. Moreover, although the administrative law judge stated he was not convinced that claimant did not need further medical treatment, he noted that Dr. Brown declined to provide further treatment and that neither party chose to depose Dr. Brown. *See id.* at 5-6. As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), it was within his discretion to credit claimant's testimony over the report of Dr. Brown. Because the administrative law judge's decision to credit claimant is reasonable, we affirm his finding that claimant is unable to return to his usual work. *See Anderson*, 22 BRBS at 22. As the administrative law judge also found that claimant is able to perform on-shore welding work, we affirm his finding that claimant is, at most, permanently partially disabled.

Next, employer contends the administrative law judge erred in failing to credit employer for its overpayment of benefits. Specifically, employer argues that, as it paid two years of temporary total disability benefits and one year of temporary partial disability benefits, it is entitled to a credit against its future liability for permanent partial disability benefits. Section 14(j) of the Act, 33 U.S.C. §914(j), allows an employer to receive a credit for prior payments of compensation against its future liability for compensation due. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989). In order to determine the amount of credit to which employer may be entitled, we must ascertain the amount of benefits to which claimant is entitled, as well as the extent of employer's liability for compensation.[3]

In this case, claimant potentially is entitled to benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). Because the parties stipulated that claimant's condition is permanent, payment of his permanent partial disability benefits commences upon the date employer establishes the availability of suitable alternate employment. Until such date, claimant is entitled to receive compensation for a permanent total disability. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). The administrative law judge found that claimant's condition reached maximum medical improvement on April 10, 1986, and that claimant could perform on-shore welding thereafter. The administrative law judge also noted that the record contains evidence of claimant's employment after September 1987. However, he did not discuss whether claimant, after reaching maximum medical improvement in April 1986, worked prior to September 1987, and he made no finding as to when the availability of suitable alternate employment was established.

[3]We note that employer did not raise the Section 14(j) credit issue before the administrative law judge. However, as Section 14(j) operates as a matter of law, as the administrative law judge erred in failing to make the pertinent findings of fact, and as there has been a change in law since this case was before the administrative law judge, *see Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991), we will address employer's argument. *See generally Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991).

Because these findings have not been made, we are unable to determine when employer's liability for total disability compensation ceased and when its liability for partial disability began. Therefore, we remand the case to the administrative law judge for further consideration of this matter. *See Palombo*, 937 F.2d at 77, 25 BRBS at 12 (CRT).

Additionally, the extent of claimant's entitlement to benefits under Section 8(c)(21) can be ascertained only by determining whether claimant has sustained a loss of wage-earning capacity. Claimant's loss of wage-earning capacity can be established by comparing his average weekly wage to the wages he earned in a suitable post-injury job, as adjusted to the time of the injury to compensate for inflationary effects. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Although the administrative law judge found that claimant's wages as of the date of the hearing reflect his post-injury wage-earning capacity, he concluded that the record does not provide for a comparison between claimant's average weekly wage and the amount claimant would have earned in his present job in 1985. Therefore, he ordered the parties to stipulate to the latter figure and to inform the district director, who would make the necessary calculation. *See* Decision and Order at 5. As the administrative law judge failed to make the pertinent finding regarding the amount, if any, of claimant's loss in wage-earning capacity, the amount of benefits to which claimant is entitled cannot be calculated. *See generally Cook*, 21 BRBS at 6-7. Consequently, we cannot determine on the present record whether employer is entitled to a Section 14(j) credit.

On remand, the administrative law judge must determine the date on which suitable alternate employment was established, whether and to what extent claimant sustained a loss in his wage-earning capacity, and the periods and amounts of employer's liability for benefits. Once these figures have been established, the administrative law judge must determine whether employer is entitled to a Section 14(j) credit for benefits it has paid previously.

Accordingly, the administrative law judge's conclusion that employer is liable for permanent partial disability benefits from October 11, 1988, and continuing, is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge