BRB No. 98-1183

MICHELE BRATTOLI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNION DRY DOCK AND REPAIR COMPANY	)	DATE ISSUED: Dec. 16, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Francis M. Womack III (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (97-LHC-443) 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 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).

Claimant, a welder burner, injured his right wrist at work on August 18, 1995, after slipping and falling. Employer voluntarily paid claimant temporary total disability compensation from August 21, 1995, to January 28, 1996, and permanent partial disability compensation for a 10 percent impairment to his right arm. *See* 33 U.S.C. §908(b), (c)(1). Claimant sought continuing disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant is unable to resume his usual employment duties with employer, and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability benefits from January 1996, and continuing. *See* 33 U.S.C. §908(a). The administrative law judge also concluded that claimant's refusal to undergo wrist surgery was reasonable, and that employer was accordingly not entitled to suspend claimant's benefits pursuant to Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4).

On appeal, employer challenges the administrative law judge's findings that it did not establish the availability of suitable alternate employment and that it is not entitled to suspend claimant's benefits under Section 7(d)(4), based on claimant's refusal to undergo wrist surgery. Claimant has not filed a response brief.

We first address employer's argument that the administrative law judge erred in concluding that it failed to establish the availability of suitable alternate employment. Where, as in the instant case, a claimant has established that he is unable to perform his usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability. The burden then shifts to employer to demonstrate within the geographic area where claimant resides, the availability of specific jobs which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he can compete and reasonably secure. If employer makes a showing of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In support of its contention that claimant retains a residual post-injury wage-earning capacity, employer presented the labor market survey of Mr. Pannapacker, a vocational expert. Mr. Pannapacker identified three positions, specifically those of an assembler, bus cleaner, and candy dipper, which he opined were within claimant's physical abilities and within his community. In addressing this issue, the administrative law judge discussed Mr. Pannapacker's testimony as well as the testimony of Mr. Phillips, claimant's physical therapist, Dr. Nehmer, employer's physician, and Dr. Carmody, claimant's physician, in concluding that the positions identified by employer were insufficient to establish the availability of suitable alternate employment. Specifically, the administrative law judge

found that Mr. Pannapacker's survey was unreliable since it was based exclusively on the restrictions imposed on claimant by Dr. Nehmer to the exclusion of Dr. Carmody's restrictions and that Mr. Pannapacker did not inform the prospective employers of claimant's condition.[1] *See generally DM & IR Ry Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988); Decision and Order at 7-8; Emp. Exs. 12-14; Mr. Pannapacker's deposition at 10, 33, 50. Additionally, the administrative law judge credited the testimony of Dr. Carmody, claimant's physician, that claimant is incapable of performing the identified positions.[2] *See Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969); Decision and Order at 8. Based upon the foregoing, the administrative law judge concluded that the identified positions of assembler, bus cleaner, and candy dipper, did not satisfy claimant's burden.

It is well-established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, in the case at bar, the administrative law judge's decision to rely upon the testimony of Dr. Carmody and Mr. Phillips, and his subsequent determination that Mr. Pannapacker's labor market survey is insufficient to establish the availability of suitable alternate employment is rational. Accordingly, as his findings are supported by the record, we affirm the administrative law

[1]Dr. Nehmer restricted claimant from lifting more than 20 pounds and performing repetitive motions. Dr. Nehmer's deposition at 24; Emp. Ex. 4. Dr. Carmody restricted claimant from performing multiple repetitive activities, heavy physical work, and lifting, pushing, or pulling with the right hand. Dr. Carmody's deposition at 18.

[2]The administrative law judge additionally noted his disagreement with Mr. Phillips opinion that claimant could perform the bus cleaner job by only using his left hand or by using both hands without repetitive use of the right wrist; the administrative law judge did, however, agree with Mr. Phillips that claimant cannot perform the two assembler positions.

judge's finding that employer failed to establish the availability of suitable alternate employment, and his consequent award of permanent total disability compensation to claimant.

Lastly, employer argues that the administrative law judge erred in finding that it is not entitled to suspend claimant's benefits pursuant to Section 7(d)(4); specifically, employer avers that the administrative law judge imposed too stringent a standard in requiring that claimant's proposed wrist surgery guarantee an improvement in his condition. We disagree. Section 7(d)(4) provides:

> If at any time the employee unreasonably refuses to submit to medical or surgical treatment, or to an examination by a physician selected by the employer, the Secretary or administrative law judge may, by order, suspend the payment of further compensation during such time as such refusal continues, and no compensation shall be paid at any time during the period of such suspension, unless the circumstances justified the refusal.

33 U.S.C. §907(d)(4).

The Board has held that Section 7(d)(4) sets forth a dual test for determining whether benefits may be suspended as a result of claimant's failure to undergo surgical treatment. *See Hrycyk v. Bath Iron Works Corp.*, 11 BBS 238 (1979)(Smith, S. dissenting). In *Hrycyk*, the Board held that employer must make an initial showing that claimant's refusal to undergo surgical treatment is unreasonable; the reasonableness of claimant's actions must be appraised in objective terms. If employer meets this burden, the burden shifts to claimant to show that the circumstances justify his refusal; appraisal of the justification of claimant's actions is a subjective inquiry. *Id.*, 11 BRBS at 241-243. *See also Malone v. International Terminal Operating Co.*, 29 BRBS 109, 110 (1995); *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245, 249 (1989).

In the instant case, the administrative law judge, citing *Hrycyk*, determined that employer was not entitled to suspend claimant's benefits since employer did not establish that claimant's refusal to undergo wrist surgery was objectively unreasonable, and that if it did, claimant established sufficient justification to refuse the surgery. Specifically, the administrative law judge found that employer did not establish that claimant's refusal to undergo wrist surgery was objectively unreasonable based on the opinions of Drs. Nehmer and Carmody, who both recognized that while the proposed surgery might help claimant, it could also cause loss of strength and may not alleviate his pain.[3] *See* Dr. Carmody's

[3]The administrative law judge additionally acknowledged Dr. Nehmer's admission that a radial osteotomy is more complicated and carries the risk that claimant's bone might

deposition at 14, 16-17, 22; Dr. Nehmer's deposition at 15, 21; Cl. Ex. 1; Emp. Exs. 2, 4. Contrary to employer's argument, the administrative law judge's statement that "[n]either doctor could guarantee that surgery would definitely improve the Claimant's situation," did not require that these physicians guarantee claimant a successful surgical result; rather, this comment represents a statement of fact by the administrative law judge, which employer has not shown affected his determination regarding the claimant's reasonableness in declining to undergo the surgical procedure in question. Decision and Order at 10. Rather, in addressing this issue, the administrative law judge rationally concluded that claimant's fear of surgery, the fact that he never had surgery before, and the risks involved in this specific procedure provided sufficient justification for claimant to refuse the surgery.[4] *See Malone*, 29 BRBS at 109; *Dodd*, 22 BRBS at 245; *Hrycyk*, 11 BRBS at 238; Decision and Order at 10; Tr. at 25, 27, 41-43. We, thus, affirm the administrative law judge's finding that employer did not establish the reasonableness prong of the *Hrycyk* test, and his consequent determination that employer is accordingly not entitled to suspend claimant's benefits under Section 7(d)(4), as that finding is supported by substantial evidence, is rational, and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

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not heal. *See* Decision and Order at 10.

[4]Dr. Nehmer identified the risks of wrist surgery to include the possibility that claimant's wrist pain will not get better, that an infection would arise at the surgical site, and of the risks associated with anesthesia. Dr. Nehmer's deposition at 21-22.

Administrative Appeals Judge