BRB No. 04-0576

EZZARD C. LEE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, AVONDALE SHIPYARD DIVISION	)	DATE ISSUED: FEB 24, 2005
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Judith A. Gainsburgh, New Orleans, Louisiana, for claimant.

Richard S. Vale, Christopher K. LeMieux, Frank J. Towers, and Pamela F. Noya (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-1071) of Administrative Law Judge Clement J. Kennington 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 if they 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, while working for employer as a ship-fitter on June 22, 1999, experienced pain in his lower back while pulling on 80-foot cables and 35-ton shackles. Upon finishing this job, claimant initially sought treatment at employer's first-aid office. That office sent claimant to Dr. Mobley who, after taking x-rays, diagnosed claimant with a ruptured disc. Thereafter, claimant treated with a number of physicians. Following steroid injections which

did not relieve his ongoing complaints of pain, claimant underwent a lumbar fusion at the L5/S1 level. As claimant continued to experience back pain, he was prescribed a narcotic medication and referred for medication management. Additionally, multiple restrictions were placed on claimant's physical activities by his physicians, and claimant has not been gainfully employed since the date of the work-incident. Employer voluntarily paid claimant temporary total disability compensation from June 23, 1999 through September 23, 2002, and permanent partial disability compensation from September 24, 2002 through November 17, 2002. *See* 33 U.S.C. §908(b), (c)(21).

In his Decision and Order, the administrative law judge found that employer conceded that claimant was incapable of returning to his usual employment duties. Next, the administrative law judge found that employer failed to establish the availability of suitable alternate employment. Assuming, *arguendo*, that employer did establish the availability of suitable alternate employment, the administrative law judge concluded that claimant diligently but unsuccessfully sought employment post-injury. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 23, 1999 through May 6, 2002, the date on which the parties agreed claimant reached maximum medical improvement, and permanent total disability benefits from May 7, 2002, and continuing. 33 U.S.C. §908(a), (b).

On appeal, employer challenges the administrative law judge's findings that it failed to establish the availability of suitable alternate employment and that claimant diligently sought employment post-injury. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, claimant has established a *prima* facie case of total disability, thus shifting the burden to employer to establish the availability of suitable alternate employment within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is realistically able to secure and perform. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Employer must establish realistic, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989)(Brown, J., dissenting on other grounds). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one job opportunity, and the general availability of other suitable positions where "an employee may have a reasonable likelihood of obtaining such a single employment opportunity under appropriate circumstances." *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th

Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). According to the court, such circumstances would exist, for example, where the employee is highly skilled, the job relied upon by employer is specialized and the number of workers with suitable qualifications is small. In *Diosdado v. John Bludworth Marine, Inc.*, No. 93-5422 (Sept. 19, 1994)(5th Cir. 1994)(unpublished), the Fifth Circuit discussed its holding in *P & M Crane,* stating that *P & M Crane* establishes that more must be shown than the mere existence of a single job the claimant can perform; specifically, the court stated that in a case where one specific job has been identified and no general employment opportunities that were suitable alternates for claimant had been proffered, employer must establish a reasonable likelihood that claimant could obtain the single job identified.[1] *See Diosdado*, slip op. at 11-12. If employer establishes the availability 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 Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied,* 479 U.S. 826 (1986); *see also Turner,* 661 F.2d 1031, 14 BRBS 156; *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); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In determining claimant's physical restrictions in the case at bar, the administrative law judge relied upon the opinions of Drs. Bobo and Lee, who opined that claimant is restricted to light duty work with no stooping, bending, or lifting more than 25 pounds. *See* Decision and Order at 14. Specifically, in this regard, the administrative law judge noted the testimony of Dr. Bobo, who opined that it was reasonable for claimant to change his activities every 30 minutes, and that claimant was restricted from driving more than 30 minutes at a time on a daily basis, and the testimony of Dr. Lee, who restricted claimant from prolonged standing or walking and lifting no more than 20 pounds. Pursuant to these restrictions, the administrative law judge initially found that the positions identified by employer in Hammond, Loranger, Bogalusa and Folsom, Louisiana, were not suitable for claimant since those locations were beyond claimant's restricted driving radius. Next, the determined that while Ms. Moffett-Douglas, employer's vocational expert, opined that the identified fast-food, cafeteria and deli-worker positions allowed for alternate walking and standing, employer did not indicate how those positions were suitable given claimant's restrictions from prolonged standing or walking. As for the cashier positions identified by employer, the administrative law judge determined that those positions were not realistically available to claimant given his second-grade language skills and seventh-grade arithmetic

[1] Local rule 47.5.3 provides "Unpublished opinions are precedent. . . ." *See* 5th Cir. R. 47.5.3. Although the Fifth Circuit has determined that this opinion should not be published, *see* 5th Cir. R. 47.5.1, the decision in this case can be found at 29 BRBS 125(CRT).

skills.[2] Lastly, the administrative law judge concluded that the single security guard position identified by employer did not establish the availability of suitable alternate employment, as claimant did not have a reasonable likelihood of obtaining that position given his physical restrictions, low level of academic functioning, and his documented failure to obtain employment post-injury.[3] Decision and Order at 15.

In challenging the administrative law judge's determination that it did not establish the availability of suitable alternate employment, employer contends that the administrative law judge erred in restricting its employment search to within a 30 minute driving radius of claimant's residence, in rejecting its identified positions based upon claimant's physical and intellectual capabilities, and in failing to find that the single identified security guard position satisfied its burden of proof. We disagree. It is well-established that, in arriving at his decision, the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Contrary to employer's assertions on appeal, the administrative law judge's determination that claimant is restricted to 30 minutes of driving is rational, and supported by the testimony of Dr. Bobo, who placed this restriction on claimant's driving after considering and accepting claimant's subjective complaints of ongoing back pain. *See* CX 3 at 29-31. Moreover, the administrative law judge rationally found that employer failed to affirmatively establish how its identified fast-food, cafeteria or deli-worker positions were suitable for claimant in light of claimant's restrictions from prolonged standing or walking, and that employer's identified cashier positions were not realistically available to claimant in light of claimant's second-grade language and seventh-grade mathematical skills and Mr. Meunier's testimony that claimant is not employable in light of his age, educational history

[2] The administrative law judge specifically noted that his findings in this regard are supported by the opinion of Mr. Meunier, claimant's vocational expert, who opined that there were no employment opportunities available for claimant given claimant's physical restrictions and intellectual capabilities.

[3] The administrative law judge additionally noted the high unemployment rate in claimant's home Parish.

and academic skill deficiencies, lack of transferable skills, and multiple physical restrictions.[4] *See* Decision and Order at 14-15; Tr. at 100-101. Lastly, the administrative law judge rationally concluded, based upon the record before him, that the single employment opportunity identified by employer, *i.e.*, a position as a security guard, did not establish the availability of suitable alternate employment since claimant did not have a reasonable likelihood of securing that position. *See Diosdado*, slip op. at 12. Thus, as the administrative law judge's findings are rational, supported by substantial evidence, and are in accordance with law, we affirm the administrative law judge's determination that the positions identified by employer are insufficient to establish the availability of suitable alternate employment. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Lastly, employer contends that the administrative law judge erred in determining that claimant diligently sought employment post-injury. Although the duty to diligently seek employment does not arise until employer successfully establishes the availability of suitable alternate employment, *Rogers Terminal,* 784 F.2d 687, 18 BRBS 79(CRT); *Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989), we will address this issue in the interest of administrative efficiency. In this regard, the Fifth Circuit has described claimant's burden as one of "establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person *genuinely* seeking work with his determined capabilities." *Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (emphasis in original). Contrary to employer's contention, there is substantial evidence in support of the administrative law judge's conclusion that claimant diligently, yet successfully, attempted to secure employment post-injury. Specifically, the administrative law judge rationally relied upon claimant's testimony that he unsuccessfully applied for work within his physical restrictions with multiple employers.[5] *See* Decision and Order at 15-16. The administrative law judge thus concluded that claimant demonstrated that he was diligent, yet unsuccessful, in his search to secure employment available within his capacities. *Id.* As the administrative law judge specifically addressed this issue in his decision, and his finding that claimant diligently yet unsuccessfully sought employment post-injury with multiple employers is rational and supported by the record, *see generally DM & IR Ry Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998), we affirm

[4] Claimant was enrolled in special education classes while in high school, and testified that he has difficulty reading, writing and spelling. Tr. at 21.

[5] Specifically, claimant applied for work with Shell, Texaco, Wal-Mart, Winn Dixie, Swifty Serve, Market Max, Fast Car Wash, Bogalusa Job Service, Zelenka Nursury, McDonald's, Popeye's Fried Chicken, and Riverside Medical Center. *See* Decision and Order at 15.

the administrative law judge's determination that, even if employer had established the availability of suitable alternate employment, claimant diligently tried and was unable to secure employment post-injury, thus entitling him to an award of continuing permanent total disability benefits. *See generally Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge