BRB No. 11-0549

RICO T. MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 02/15/2012
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rico T. Mitchell, Pascagoula, Mississippi, *pro se*.

Paul B. Howell (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand and the Order Denying Claimant's Motion for Reconsideration (2008-LHC-2091) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. On June 19, 2007, claimant injured his back at work. Claimant was diagnosed with a back strain and released to light-duty work. Claimant attempted to work on two occasions but was unable to do so

due to continuing symptoms. Employer voluntarily paid claimant temporary total disability benefits on June 20, 2007, and from July 26 through August 13, 2007. Claimant filed a claim under the Act on August 28, 2007, for additional benefits; employer terminated claimant's employment on October 11, 2007. CX 8; Tr. at 53.

The administrative law judge initially found that claimant's back condition reached maximum medical improvement on October 17, 2007, that claimant was unable to return to his pre-injury employment with employer, and that employer established the availability of suitable alternate employment when claimant received an offer of employment from a local Wendy's restaurant. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 20 through October 16, 2007, permanent total disability benefits from October 17, 2007, through October 1, 2008, and permanent partial disability benefits from October 2, 2008, and continuing.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that claimant is capable of employment with restrictions, but vacated his finding that the janitorial position offered to claimant by a local Wendy's restaurant established the availability of suitable alternate employment. The Board held that because "the record contains no evidence regarding the nature, terms or requirements of the janitorial position offered to claimant, it is impossible to determine if claimant is capable of performing this work; therefore the job cannot meet employer's burden of showing a suitable job for claimant." *Mitchell v. Northrop Grumman Ship Systems, Inc.*, BRB No. 10-0244, slip op. at 4 (July 23, 2010) (unpub.). The Board, however, noted that employer submitted a January 14, 2009, labor market survey and a follow-up survey dated August 7, 2009, which may meet its burden of showing suitable alternate employment. Consequently, the Board remanded the case for further findings regarding the extent of claimant's work-related disability.

On remand, the administrative law judge compared claimant's restrictions with the jobs identified in the January 14, 2009, labor market survey and found that the positions at Lowes, Cracker Barrel, and Sprint were within claimant's restrictions.[1] Consequently, the administrative law judge found that employer established the availability of suitable alternate employment as of January 14, 2009. Stating that claimant "conceded he made no attempt to acquire these positions," the administrative law judge awarded claimant permanent total disability benefits from October 17, 2007, to January 14, 2009, and

[1]Although the January 14, 2009, labor market survey also identified jobs available on October 2, 2008, the administrative law judge limited his analysis to the jobs available as of January 14, 2009, because the duties of the earlier jobs were not provided. Decision and Order on Remand at 2.

permanent partial disability benefits from January 14, 2009, onward. The administrative law judge summarily denied claimant's motion for reconsideration.

Claimant, without legal representation, challenges the administrative law judge's finding that employer established suitable alternate employment and that he was not diligent in his job search. Claimant also asserts that he was wrongfully terminated after filing a claim for benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as here, a claimant has established a *prima facie* case of total disability by demonstrating an inability to perform his usual employment duties with his employer, the burden shifts to the employer to establish the availability of suitable alternate employment. *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). In order to meet this burden, an employer must establish that job opportunities are available within the geographic area in which the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156. If the employer makes such a showing, the claimant nevertheless can prevail in his claim for 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. 1986), *cert. denied*, 479 U.S. 826 (1986); *see also Turner*, 661 F.2d 1031, 14 BRBS 156.

The administrative law judge found that Dr. Fontana restricted claimant to lifting no more than thirty pounds and allowed occasional sitting, squatting, stooping and bending, and frequent overhead and side-to-side reaching. The administrative law judge compared these restrictions with the duties of the three jobs listed in the January 14, 2009, labor market survey: Lowes cashier at $7.50 to $8.00 an hour, Sprint retail host at $7.00 to $8.00 an hour, and Cracker Barrel host at $7.00 an hour. Finding that all three jobs satisfied claimant's restrictions, the administrative law judge determined that employer established the availability of suitable alternate employment as of January 14, 2009. The finding that the jobs are within claimant's restrictions is supported by substantial evidence. Therefore, we affirm the administrative law judge's finding that employer established suitable alternate employment. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *see also Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1988). In addition, we affirm the administrative law judge's finding that claimant's post-injury wage earning capacity, as adjusted for inflation, is $297.06 per

week, based on the $8.00 per hour jobs, as that finding is rational and is supported by substantial evidence. 33 U.S.C. §908(h); *see, e.g., Hayes*, 930 F.2d 424, 24 BRBS 116(CRT); *Fulks v. Avondale Shipyards, Inc.*, 10 BRBS 340 (1979), *aff'd*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981).

With respect to whether claimant diligently sought but was unable to secure suitable employment, the administrative law judge summarily stated that claimant "conceded he made no attempt to acquire the positions [identified in the labor market survey]." Decision and Order on Remand at 2. Contrary to the administrative law judge's finding, claimant stated he applied for the position at Lowes listed in the January 14, 2009, labor market survey, and that he also applied to Walmart, Walgreens, Jerry Lee's Grocery Store, Burger King, Wendy's, CVS, and Office Depot, and, one month before the hearing, Target. EX 20 at 58; Tr. at 62. As the administrative law judge did not consider this testimony or fully address whether claimant diligently sought suitable post-injury employment, we must remand the case. On remand, the administrative law judge must address the credibility of claimant's testimony and make findings regarding his diligence in pursuing suitable alternate employment. *See Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). This inquiry is not limited to claimant's diligence in seeking the actual jobs identified by employer. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

Claimant also contends he was wrongfully terminated after he filed his claim under the Act. It is unclear from the record whether claimant raised a claim for discriminatory termination under Section 49 of the Act, 33 U.S.C. §948a, before the district director and the administrative law judge. CX 7-8; EX 12; Tr. at 6. Claimant previously stated he was "wrongfully terminated" or "terminated by mistake" before both the district director and the administrative law judge, but neither official addressed claimant's allegations. On remand, the administrative law judge must determine whether claimant raised a Section 49 claim and, if so, he must address it.

Accordingly, we vacate the finding that claimant is limited to a permanent partial disability award and we remand the case for the administrative law judge to address whether claimant diligently sought suitable alternate employment and to determine whether claimant raised a Section 49 claim. In all other respects, the administrative law judge's Decision and Order on Remand and the Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge