BRB No. 97-799

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| PAULETTE GRACE NESBITT<br><br>Claimant-Respondent<br><br>v.<br><br>DEPARTMENT OF NAVY, CBC<br><br>and<br><br>INSURANCE COMPANY OF NORTH AMERICA<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED:<br><br>DECISION and ORDER |

Appeal of the Decision and Order on Modification of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Bobby G. O'Barr, Biloxi, Mississippi, for claimant.

Elisa A. Roberts (Hamilton, Westby, Marshall & Antonowich, L.L.C.), Atlanta, Georgia, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Modification (92-LHC-3404) 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.,* as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 injured her lower back while working as a bartender for employer as a result of a slip and fall on May 31, 1985. In his initial Decision and Order, the administrative law judge awarded claimant temporary total disability benefits from June 21, 1985, and continuing. Upon employer's motion for modification, the administrative law judge found that claimant is entitled to continuing permanent total disability benefits from January 14, 1994, the date claimant reached maximum medical improvement, as employer did not establish suitable alternate employment. The administrative law judge granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's denial of its motion to compel a medical examination and his finding that employer did not establish suitable alternate employment. Claimant responds in support of the administrative law judge's decision.

Employer first contends that the administrative law judge erred in denying its motion to compel a medical examination. We reject this contention. The administrative law judge denied employer's motion to compel a medical examination after finding the motion untimely and noting that if he allowed employer to have the examination performed, claimant's counsel would seek to cross-examine the doctor who performed it, and the parties would end up trying the case post-hearing, which he was unwilling to permit. Tr. at 29-31. After a review of the record, we hold that the administrative law judge did not abuse his discretion in denying employer's motion to compel. *See Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

The record supports the administrative law judge's finding that employer had ample opportunity to request a medical examination before the eve of the hearing. Employer was aware that claimant's ability to return to work was the determinative issue in the modification proceedings inasmuch as employer filed the motion for modification alleging claimant was no longer totally disabled. The case was referred to the Office of Administrative Law Judges in October 1995. Claimant was deposed on November 20, 1995, and at that time stated she could not go back to work because of her back injury. Cl. Ex. 9 at 31; Emp. Ex. 1 at 31. The notice of hearing was sent to the parties on March 19, 1996, and required them to exchange exhibits and witness lists not later than 10 days before the hearing. The notice stated that failure to comply with these provisions may result in exclusion of the exhibits and of the testimony of witnesses. Employer deposed Dr. Longnecker, claimant's treating physician of 20 years, on March 25, 1996; he stated that claimant currently is not able to work. Cl. Ex. 2 at 29; Emp. Ex. 3 at 29. Employer sent a notice to claimant on July 11, 1996, almost four months after Dr. Longnecker's deposition, scheduling a medical examination for July 23, 1996, two days prior to the hearing; claimant's counsel instructed her not to attend this examination. The administrative law

judge denied employer's verbal motion to compel claimant to attend the examination in a telephonic conference with the parties on July 17, 1996. Employer filed a written motion to compel on July 24, 1996, which was denied on the following day, at the hearing. Tr. at 29-31. Given that employer had several months after Dr. Longnecker's deposition to arrange its own examination of claimant, the administrative law judge's finding that employer's attempt to have claimant examined on the eve of the hearing was untimely thus is rational, and his denial of employee's motion to compel does not constitute a abuse of discretion. *Martiniano*, 23 BRBS at 363; *see also Durham v. Embassy Dairy,* 19 BRBS 105 (1986). Consequently, we affirm the administrative law judge's denial of employer's motion to compel a medical examination.[1]

Employer next contends that the administrative law judge erred in finding that it did not establish suitable alternate employment. Once claimant establishes that she is unable to perform her usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

After determining that claimant established her *prima facie* case of total disability, the administrative law judge rationally found that employer did not establish suitable alternate employment. The administrative law judge discredited the labor market survey of employer's vocational expert, Mr. Carlisle, because it was based on claimant's "light to sedentary" work restrictions imposed by Dr. Longnecker before claimant attempted to return to work in November 1993. Decision and Order on Modification at 9-10; Tr. at 68-92. The administrative law judge reasoned that while the work restrictions might have been pertinent at the original 1993 hearing, claimant's attempt to work in November 1993 and Dr. Longnecker's subsequent testimony that claimant is unable to work in any capacity superseded claimant's earlier work restrictions. Cl. Ex. 2 at 22-24, 29-30.

[1]Moreover, despite employer's assertion to the contrary, the administrative law judge was not required to grant its motion to compel pursuant to 20 C.F.R. §§702.409 and 702.410, as these sections outline the procedures to be followed when an independent medical examination is scheduled by a district director. No such independent medical examination was scheduled in this case.

Dr. Longnecker's opinion that claimant is unable to work at all supports the finding that she cannot perform alternate employment. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other gounds sub nom. Director, OWCP v. Campbell Industries, Inc.,* 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied,* 459 U.S. 1104 (1983). We, therefore, affirm the administrative law judge's finding that employer did not establish suitable alternate employment and his award of permanent total disability benefits.[2]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

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[2]We note that, contrary to employer's assertion, the administrative law judge did not find claimant totally disabled based solely on her complaints of pain. *See generally Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).