BRB No. 10-0701

DWIGHT W. BRASSEAUX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON U.S.A., INCORPORATED	)	DATE ISSUED: 07/22/2011
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Lawrence N. Curtis, Lafayette, Louisiana, for claimant.

Paul J. Politz and Elizabeth Smyth Rambin (Taylor, Wellons, Politz & Duhe, APLC), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-1642) of Administrative Law Judge Patrick M. Rosenow 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his neck, back, and left arm as a result of an accident that occurred in the course of his work for employer on August 27, 1999. He has not worked since that date. Employer paid temporary total disability benefits from August 11, 2000, through October 31, 2005, and permanent partial disability benefits thereafter. 33 U.S.C. §908(a), (c). Claimant sought additional benefits asserting that his condition had become permanent and that he remains totally disabled. Employer

countered by arguing that it established the availability of suitable alternate employment. Employer also filed an application seeking Section 8(f), 33 U.S.C. §908(f), relief.

The administrative law judge found, based on the parties' stipulations, that claimant sustained a work-related injury which rendered him incapable of returning to his usual employment. The administrative law judge found that employer did not establish the availability of suitable alternate employment, since it did not show that the jobs it identified remained available as of the date claimant's treating physician, Dr. Gillespie, approved them. Accordingly, the administrative law judge found claimant entitled to a continuing award of total disability benefits from the date of his injury, August 27, 1999. The administrative law judge also found claimant entitled to medical benefits and denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment and the consequent award of total disability benefits. Claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in predicating a finding of whether the four jobs it identified were suitable for claimant on the approval of Dr. Gillespie. Employer contends that it presented sufficient evidence to establish the suitability of the jobs at the time they were identified. Employer thus contends that claimant is entitled to only permanent partial disability benefits from the date suitable alternate employment was identified through January 31, 2008.[1]

Where, as in this case, claimant has demonstrated his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (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, employer must establish that job opportunities are available within the geographic area in which 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. 1999). The employer need not establish the precise nature of specific jobs, but

[1]Employer concedes that claimant resumed total disability status on January 31, 2008, based on Dr. Gillespie's statement on that date that claimant should not attempt to perform any work because of increasing neck pain, muscle spasms, headaches, and radicular pain in his hands. EX 24, Dep. at 21-22.

there must be sufficient information to determine whether the job is within the claimant's capabilities. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). The administrative law judge must compare the duties of the positions with the claimant's restrictions, *LaRosa v. King & Co.*, 40 BRBS 29 (2006); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998), and may rely on a vocational consultant's opinion that jobs are within the claimant's credited restrictions. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In a series of vocational reports issued from April through August 2005, employer's vocational consultant, Jill B. Suire, identified four potentially suitable jobs: an unarmed security guard position with Lyons Security on April 29, 2005; and dispatcher positions with Newpark Drilling Fluids on June 3, 2005, with Southern Staffing on June 17, 2005, and with Dynasty Transportation on August 10, 2005. EX 8. The dispatcher positions were sedentary jobs; the security guard job was "light." In each report, Ms. Suire explicitly noted that Dr. Gillespie had indicated during a rehabilitation conference held on January 31, 2005, that claimant was capable of performing light-duty work. Ms. Suire also was aware of the medications prescribed for claimant.[2] Ms. Suire encouraged claimant to look for work on his own, while she searched for suitable positions. In informing claimant of each available position, Ms. Suire wrote that "I will be checking with Dr. Gillespie to obtain his opinion as to whether he feels you can perform this job," and that "I will write to you with regard to his opinion, once I've heard back from him." EX 8 at 24, 35, 46, 57. Ms. Suire also stated "In the meantime, I encourage you to make your best effort to obtain this job." *Id.* Dr. Gillespie approved all four positions on October 6, 2005.[3] EX 24.

[2]Claimant was prescribed Zanaflex, Robaxin, Bextra, Prevacid and Tramadol. EX 8. at 72.

[3]Dr. Gillespie explained that as a result of employer's denial of a requested procedure, there was a gap in claimant's treatment between April 2005 and January 2006, which prevented him from approving the jobs because "any release that I give any patient is based on the clinical progress, either positive or negative, and to what degree of pain management I can obtain." EX 24, Dep. at 17-18. Dr. Gillespie, however, acknowledged that nothing changed regarding claimant's ability to do light duty work after October 2003, "other than the ability to provide pain management." *Id.* at 19, Dr. Gillespie stated that he provided claimant with pain management with the use of prescription pills throughout the entire period in question, that he approved the four jobs on October 6, 2005, at the request of the case manager despite not having had any additional contact with claimant since April 2005, and that he felt that claimant was capable of performing all four jobs as of October 6, 2005. *Id.* at 19-20.

The administrative law judge correctly acknowledged that "it is not necessary for a treating physician to approve a job for it to qualify as evidence of suitable alternate employment," and that "the fact that a doctor did not issue an approving report until October [2005] is not particularly relevant to the question of whether the job was beyond a claimant's physical limitations in April or May." Decision and Order at 38. Nonetheless, the administrative law judge found that claimant was told by employer's vocational expert that he would be informed if the job was approved by the treating physician and that, therefore, "it is not unreasonable to predicate a finding that the jobs were within claimant's medical limitations on that approval." *Id.* The administrative law judge thus addressed whether the jobs identified by employer in April through August 2005 remained available at the time they were approved by Dr. Gillespie, in October 2005. The administrative law judge found that the testimony provided by vocational counselor, Christy Roy, and that of employees with two of the prospective employers, was insufficient to establish that these jobs remained available at the time Dr. Gillespie approved them. The administrative law judge thus concluded that employer did not meet its burden to show the availability of suitable alternate employment.

We cannot affirm this finding. While the administrative law judge set out the appropriate standard regarding employer's burden to establish suitable alternate employment, on the facts of this case his decision to predicate the suitability of the identified jobs on Dr. Gillespie's approval cannot stand. Rather than independently compare claimant's restrictions to the physical requirements of the jobs identified by employer, the administrative law judge exclusively deferred to Dr. Gillespie's approval of those jobs, and then assessed their availability at that time. The administrative law judge's rationale appears to be based on an estoppel theory; Ms. Suire informed claimant that she would let him know if Dr. Gillespie approved the jobs. However, the administrative law judge did not portray the full context of Ms. Suire's reports.[4] Ms. Suire informed claimant and his attorney of each actual job she identified, stated she felt it was within claimant's restrictions, and urged claimant to apply for the job. EX 8 at 24, 35, 46, 57. Ms. Suire contemporaneously sent the job description to Dr. Gillespie so that he could indicate claimant's ability to perform the jobs. EX 8 at 21, 32, 43, 54. She sent the letters to Dr. Gillespie in April, June and August 2005, yet Dr. Gillespie did not respond until October 2005. *See* n.3, *supra.* When he did respond, he approved the jobs and did not change any of the restrictions that had been in place since at least January 2005, or state that claimant had been incapable of working during the period in question. Indeed, the administrative law judge stated that "[b]ased on the opinions of his treating physicians, I find claimant did retain the physical capacity to do some type of work for the period of 4 Aug 03 to 31 Jan 08 and from 17 Jul 08 to the present and continuing."

[4]Nor did the administrative law judge make any specific findings of fact and conclusions of law explicitly addressing estoppel.

Decision and Order at 37.[5] The job descriptions specifically identify three of the positions as "sedentary" and the fourth as "light." EX 8 at 23, 34, 45, 56. Additionally, each vocational report contains a description of the job duties and physical requirements of the identified position. *Id.* Given the totality of this evidence, the administrative law judge should have addressed whether employer established that claimant was capable of performing any of the four positions as of the date it was identified. Dr. Gillespie's approval does not affect the date of availability and is relevant to suitability only if earlier evidence is insufficient to meet employer's burden to establish that any of the jobs was suitable. We thus vacate the administrative law judge's finding that employer did not establish the availability of suitable alternate employment and remand the case for further consideration of this issue. On remand, the administrative law judge must reconsider claimant's ability to perform the four jobs identified by employer by comparing claimant's restrictions as they existed at the time of the jobs' availability to the requirements of the jobs, *LaRosa*, 40 BRBS 29; *Stratton*, 35 BRBS 1; *Hernandez*, 32 BRBS 109, and thus, determine whether employer met its burden to establish the availability of suitable alternate employment for the period from April 2005 until January 31, 2008.

Accordingly, the administrative law judge's finding that employer did not establish the availability of suitable alternate employment and corresponding award of total disability benefits from April 29, 2005, is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is 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

[5]The administrative law judge also found that claimant's testimony concerning his physical abilities was not as credible as the medical evidence describing his restrictions and abilities. Decision and Order at 37.