BRB No. 05-0763

WOODROW BECK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FRIEDE GOLDMAN OFFSHORE	)	DATE ISSUED: 05/08/2006
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Billie Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration (2004-LHC-2146) 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). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 an injury to his right leg when he fell during the course of his employment with employer on September 25, 2000. Claimant has subsequently

undergone several surgical procedures, has had a rod inserted in his right leg, and presently uses a cane. CXs 12, 13. Additionally, claimant takes antibiotics daily to control an infection which he developed after surgery, as well as medication which he alleges makes him drowsy and woozy. Tr. at 50. Employer voluntarily paid clamant temporary total disability benefits under the Act from September 26, 2000, until February 20, 2004, and permanent partial disability benefits thereafter at the rate of $494.97 per week. CX 5. Claimant subsequently sought ongoing permanent total disability compensation.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant has sustained a 30 percent permanent partial disability to his right lower extremity, and that claimant reached maximum medical improvement on May 23, 2003. Next, the administrative law judge determined that employer established the availability of suitable alternate employment as of January 12, 2004, and that claimant was not diligent in seeking employment post-injury. Accordingly, the administrative law judge awarded claimant permanent total disability compensation for the period of May 23, 2003 to January 12, 2004, and permanent partial disability compensation for 86.4 weeks for a 30 percent impairment to his right lower extremity, based on an average weekly wage of $742.45. 33 U.S.C. §908(a), (c)(2). Claimant's motion for reconsideration was denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment as of January 12, 2004, and his consequent denial of claimant's claim for continuing permanent total disability benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-related injury, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of realistically job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *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).

In the instant case, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon the testimony of Dr. Rutledge and the four employment positions identified by Ms. Favaloro,

employer's vocational consultant.[1] Regarding this issue, the administrative law judge rejected claimant's argument that he is functionally illiterate, as this assessment was based on one test administered by Dr. Davis, who did not explain the results or testify at the hearing. Decision and Order at 22. The administrative law judge reasoned that despite claimant's allegations that he cannot understand what he reads, claimant has not only functioned, but has functioned successfully as evidenced by his lengthy work history, multiple promotions, and possession of a driver's license; specifically, the administrative law judge noted that claimant had received promotions while in the Navy and promotions and commendations over 12-13 years of civilian employment. Ms. Favaloro testified that she informed potential employers about claimant's lack of reading skills, as well as the restrictions placed on claimant by his treating physician, Dr. Rutledge. The administrative law judge also found that Dr. Rutledge, who imposed restrictions on claimant and prescribed the medication that claimant currently takes, approved all of the employment opportunities identified by Ms. Favaloro.[2] CX 12 at 23, 29; EX 2 at 10-11; Decision and Order at 23.

We affirm the administrative law judge's decision to rely upon the testimony of Dr. Rutledge and Ms. Favaloro in finding that employer established the availability of suitable alternate employment. It is well established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge's finding that employer established the availability of light-duty suitable alternate employment opportunities based upon the testimony of Dr. Rutledge and Ms. Favaloro is rational and is supported by substantial evidence, it is affirmed. *See Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Claimant next argues that the administrative law judge erred in finding that employer established the availability suitable alternate employment as of January 12, 2004, based on Ms. Favaloro's report of that date, rather than as of May 18, 2004, when Ms. Favaloro specifically identified the four employers whose employment opportunities she averred established the availability of suitable alternate employment. We disagree. In her January 2004 vocational report Ms. Favaloro listed the names of the available

[1] The following jobs were listed by Ms. Favaloro: an unarmed security guard at Twin City Security; a dental lab worker at Oral Arts; a parking cashier at APCOA; and a checker at Morrison's Cafeteria. CX 2 at 5.

[2] On May 23, 2003, Dr. Rutledge imposed the following restrictions: a sedentary job with no squatting, stooping, climbing, working at heights and no pedal use on the right. CX 12 at 23.

positions which she determined were suitable for claimant, as well as a description of the duties, physical requirements and the hourly wages of each identified position. EX 2 at 5. Thereafter, in a May 18, 2004 letter, Ms. Favaloro provided specific names, addresses and telephone numbers of the employers with positions available at the time of her January 2004 report. EX 2 at 1. Thus, the totality of this evidence establishes the availability of these employment opportunities as of January 12, 2004.[3] As the administrative law judge's finding that suitable alternate employment was available to claimant as of January 2004 is supported by substantial evidence, it is affirmed. *See Turner,* 661 F.2d 1031, 14 BRBS 156; *see generally Avondale Shipyards, Inc., v. Guidry*, 967 F. 2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration are 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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JUDITH S. BOGGS
Administrative Appeals Judge

[3] Claimant's argument that the jobs were not available because they were not communicated to him prior to the hearing is rejected, as such communication is not required in order to establish available jobs for purposes of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Fortier v. Electric Boat Corp.,* 38 BRBS 67 (2004).