BRB No. 01-0231

JESSE WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Nov. 2, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Mager A. Varnado, Jr., Gulfport, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (00-LHC-0308) of Administrative Law Judge Richard D. Mills 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 6, 1998, claimant injured his back during the course of his employment for employer as a shipfitter. Claimant's treating physician, Dr. Holtzman, diagnosed radiculopathy at L5-S1. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), from January 8 to January 10, 1998, and from January 26, 1998, to January 3, 1999. Dr. Holtzman released claimant to return to work on January 4, 1999, with the restrictions of no lifting over 40 pounds, occasional bending and squatting,

and the ability to change position every 30 minutes. Claimant returned to work that day for employer; however, he reported experiencing back pain the next day and did not thereafter return to work. Claimant sought treatment for back pain on January 7, 1999, at the emergency room of Ocean Springs Hospital. Claimant was discharged by employer on January 28, 1999, pursuant to company policy prohibiting unexcused absences from work. In December 1999, claimant was diagnosed with major depressive disorder, pain disorder and post-traumatic stress syndrome related to his previous military service. Claimant received in-patient treatment for these conditions at the Veterans Administration (VA) Medical Center in Biloxi, Mississippi, from December 22, 1999, to January 21, 2000.

In his decision, the administrative law judge found that claimant sustained a work-related back injury and that claimant's psychological condition is related, in part, to his back injury. The administrative law judge found, however, that claimant's psychological condition is not disabling. With regard to claimant's back injury, the administrative law judge credited Dr. Holtzman's opinion that claimant's back condition reached maximum medical improvement on March 25, 1999, and he found that employer established the availability of suitable alternate employment and, consequently, that claimant did not sustain a loss of wage-earning capacity and is not entitled to additional benefits. Specifically, the administrative law judge found that in January 1999 employer provided claimant a job in its facility within Dr. Holtzman's restrictions. The administrative law judge also found that the positions employer identified in a May 1999 labor market survey, those of security guard, cashier, and engine mechanic, establish the availability of suitable alternate employment. Finally, the administrative law judge credited evidence generated in September 1999 that employer could have provided claimant work at its facility within his permanent restrictions.

On appeal, claimant challenges the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not sustain a loss of wage-earning capacity due to his back injury.[1] Employer responds, urging

[1]Claimant also challenges the administrative law judge's crediting of Dr. Holtzman's opinion that claimant's back condition reached maximum medical improvement on March 25, 1999, and Dr. Holtzman's assessment of claimant's work restrictions. Claimant states that he requested authorization after the formal hearing for surgery to receive a spinal cord stimulator implant, which procedure, claimant argues, could affect the extent of his back

affirmance.

Claimant contends that the position employer provided him at its facility on January 4, 1999, does not establish the availability of suitable alternate employment. Moreover, claimant contends that the administrative law judge erred by also crediting as evidence of suitable alternate employment a vocational report stating that, if claimant had not been terminated, employer, in September 1999, could have assigned claimant job duties within his work restrictions. Where, as in the instant case, it is uncontested that claimant is unable to perform his usual employment duties as a shipfitter, 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 his 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). Employer can satisfy this burden by providing at its facility a job suitable for claimant. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In this regard, employer must actually offer claimant the job; merely alleging such work is available will not suffice. *Berkstresser v. Washington Metropolitan Area Transit Authority,* 16 BRBS 131 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *see generally 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 Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 836, 33 BRBS 170(CRT) (4th Cir. 1999); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

In the instant case, the administrative law judge credited claimant's testimony and found that, although employer did not have specific light duty positions available when claimant returned to work on January 4, 1999, employer offered claimant work as a shipfitter with instructions not to exceed his limitations. Decision and Order at 13. Claimant's testimony does not support this conclusion. Claimant testified that when he returned to work for employer at his pre-injury duty station his foreman told him there was no light duty work available. Tr. at 22-23. Thereafter, claimant testified that he asked for and was told there was no light duty work available at the bicycle shop, panel shop, and mole-off [phonetic]. Tr. at 23-25. Finally, claimant was sent to his department superintendent at employer's facility. Claimant testified,

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impairment. This contention rests on events after the record closed and cannot be addressed; assertions of such a change in condition must be addressed via modification proceedings under Section 22 of the Act, 33 U.S.C. §922. *See Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985); 33 U.S.C. §921(b)(3).

"[S]o they told me I needed to go -- could I work? And I was -- I'm willing to work on my regular job and everything, but that -- try not to overdo it. So he put me back to work on my regular duty –." Tr. at 23-24; *see also* CX 6 at 8. Claimant also testified that on his first day at work at his regular duty station he was given small jobs; however, the next day he was instructed to fabricate a tank, that one of the plates on the tank weighed more than 40 pounds, and that the tank weighed approximately 200 pounds upon completion. Tr. at 25-26.

As the foregoing demonstrates, claimant's testimony does not establish that employer instructed claimant to work within Dr. Holtzman's restrictions, and there is no other evidence which could support the administrative law judge's conclusion. Claimant's testimony that he was told to "try not to overdo it" is not substantial evidence to support the administrative law judge's finding that employer instructed claimant not to work beyond his limitations.[2] Moreover, employer presented no evidence contrary to claimant's testimony that he was told by employer there was no available light duty, he was assigned to his pre-injury duty station, and he was actually assigned work on his second, and last day on the job, constructing a tank weighing in excess of his lifting restriction. Accordingly, as employer failed to establish that claimant's job at employer's facility in January 1999 was within Dr. Holtzman's work restrictions, we reverse the administrative law judge's finding that this position established the availability of suitable alternate employment, as it is not supported by substantial evidence. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Ezell*, 33 BRBS 19. Moreover, we agree with claimant that the administrative law judge erred by crediting as evidence of suitable alternate employment the September 13, 1999, report of employer's vocational consultant, Tommy Sanders, in which he opined that employer has work available within Dr. Holtzman's restrictions, as there is no evidence of record that such work was ever actually offered to claimant. *See Berkstresser*, 16 BRBS 231.

Claimant does not challenge the administrative law judge's finding that employer established the availability of suitable alternate employment by virtue of the specific positions Mr. Sanders identified as security guard, cashier, and engine

[2]Claimant testified at his pre-hearing deposition he was told by the superintendent there was no available light duty work, that claimant could try to perform his regular job, and that if claimant was unable to do the work, he would be sent home. CX 6 at 8.

mechanic in a May 12, 1999, labor market survey. Decision and Order at 11, 13. Claimant, however, asserts that he unsuccessfully sought alternate employment and that, at a minimum, employer's labor market survey establishes that claimant sustained a loss of wage-earning capacity due to his back injury.

We must remand this case to the administrative law judge for further findings of fact. On remand, the administrative law judge should discuss the evidence relating to claimant's allegation that he diligently sought, but was unable to obtain, suitable employment; if claimant establishes that despite a diligent job search he was unable to find a position of the general type identified as suitable and available, he is entitled to total disability benefits. *See Roger's Terminal,* 784 F.2d 687, 18 BRBS 79(CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Should the administrative law judge find that claimant did not rebut employer's showing of suitable alternate employment, the administrative law judge must then determine the date on which the suitable jobs became available. *See Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90(CRT) (5th Cir. 1991). Moreover, the administrative law judge must determine claimant's post-injury wage-earning capacity, and any loss thereof, in accordance with Section 8(h), 33 U.S.C. §908(h), taking into account the effects of inflation, if any.[3] *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *see also* 33 U.S.C. §908(c)(21).

Accordingly, the administrative law judge's Decision and Order is reversed insofar as the administrative law judge found that employer established suitable alternate employment by virtue of a position at employer's facility. The administrative law judge's denial of additional disability benefits is vacated, and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[3]If the administrative law judge awards claimant permanent disability benefits in excess of 104 weeks, he must make findings regarding employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f).

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge:

I concur in the result.

REGINA C. McGRANERY
Administrative Appeals Judge