BRB Nos. 98-0724 and
99-0267

JOYCE A. TOWNSELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Nov. 2, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification and Order Granting Employer's Motion for Summary Judgment and Canceling Hearing of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

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

Donald P. Moore (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification and Order Granting Employer's Motion for Summary Judgment and Canceling Hearing (94-LHC-1815) 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 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, while working as a cable puller for employer, allegedly sustained work-related injuries to her hands. Dr. Cope, an orthopedist, diagnosed bilateral carpal tunnel syndrome in both arms, and performed surgery on claimant's left hand on October 29, 1992, and her right hand on December 9, 1992. Dr. Cope, thereafter, opined that claimant reached maximum medical improvement for both hands on June 14, 1993, released claimant to return to work with restrictions, and later assigned a 10 percent permanent partial impairment to claimant's right hand and a 5 percent permanent partial impairment to her left hand. Upon her release to return to work, claimant alleged continuing problems with her hands and was referred by Dr. Cope to a neurologist, Dr. Millette, who concluded that there were no objective findings to support claimant's continued complaints and concurred with Dr. Cope's assessment that claimant reached maximum medical improvement and could return to work with limitations as of June 14, 1993.

Claimant was also examined by Dr. Kline, who recommended a second surgery on both hands, and by Dr. Jackson, a neurologist, who diagnosed severe dysesthesia of both hands with evolving sympathetic dystrophy caused by her two surgeries. Dr. Jackson opined that claimant was disabled from work, and recommended additional treatment in the form of occupational therapy and nerve blocks. Based on Dr. Jackson's opinion, claimant filed a claim seeking continued total disability benefits.[1]

In his original Decision and Order dated June 29, 1995, the administrative law judge concluded that claimant had not as yet reached maximum medical improvement for her hand injuries, and is totally disabled. He therefore awarded temporary total disability and medical benefits. Claimant underwent additional surgery on her right hand on June 6, 1995, by Dr. Kline, who subsequently opined by report dated January 25, 1996, that claimant had better function of her hands than her complaints indicated, that she would reach maximum medical improvement on her right hand in approximately six months, that she needed no surgery on her left hand, that she should not return to her former employment as a cable puller and that she perhaps needed rehabilitation toward another career. Additionally, Dr. Kline assessed claimant with a permanent impairment rating to each hand of 15 percent. Dr. Millette, by letter dated May 29, 1996, opined that claimant reached maximum medical improvement, was able to return to work but should avoid repetitive physical activities, and assessed her with a 15 percent permanent disability to her right hand

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[1]Employer voluntarily paid temporary total disability benefits from October 16, 1992, through June 14, 1993, and an additional $7,158.96 in permanent partial benefits based on a 5 percent impairment to her left and right arms.

and a 10 percent permanent disability to her left hand.

Meanwhile, on December 16, 1996, claimant again sought out Dr. Jackson who attributes claimant's lack of relief from her surgeries to her diabetes, describes her condition as "fixed," and placed a 50 percent disability to each of her arms which he converted to a total body disability of 75 percent.

Employer subsequently filed a petition for modification of the administrative law judge's Decision and Order, asserting a change in condition, and that claimant is capable of performing suitable alternate employment, as evidenced by the identification of suitable jobs, approved by Dr. Millette, in its labor market survey dated July 12, 1996. In his Decision and Order on Modification dated February 3, 1998, the administrative law judge determined that claimant reached maximum medical improvement on May 29, 1996, and that she established a *prima facie* case of total disability, but that employer demonstrated the availability of suitable alternate employment. In light of these findings, the administrative law judge awarded temporary total disability benefits up to May 29, 1996, followed by a scheduled award for partial loss of use of both hands based on a 15 percent permanent partial impairment rating of each hand, pursuant to Section 8(c)(3), (19), (22) of the Act, 33 U.S.C. §908(c)(3), (19), (22).

Claimant thereafter appealed the administrative law judge's decision on modification to the Board; however, the case, which was assigned BRB No. 98-0724, was returned to the Office of Administrative Law Judges by Order dated May 22, 1998, for consideration of claimant's petition for modification of the administrative law judge's decision.[2] In response to claimant's petition, employer filed a motion for summary judgment alleging that no new evidence exists to support claimant's position. The administrative law judge issued his Order Granting Employer's Motion for Summary Judgment and Canceling Hearing on October 20, 1998.

Claimant then appealed the administrative law judge's Order to the Board, and requested reinstatement of her prior appeal. The Board, by Order dated December 24, 1998, reinstated claimant's initial appeal, BRB No. 98-0724,

[2]Claimant's petition for modification is based on her assertion that Dr. Millette altered his opinion and that Dr. Jackson declared her to be totally disabled.

assigned the second appeal BRB No. 99-0267, and consolidated the cases for purposes of decision.

On appeal, claimant challenges the administrative law judge's modification of her award of temporary total disability benefits and subsequent denial of her petition for modification. Employer responds, urging affirmance.

Claimant argues that contrary to the administrative law judge's determination, employer's labor market survey, in conjunction with Dr. Millette's approval of the jobs identified therein, is insufficient to meet its burden of demonstrating the availability of suitable alternate employment. In addition, claimant argues that the administrative law judge failed to fully consider her credible testimony regarding her physical limitations and the opinion of Dr. Jackson which clearly establish her inability to perform any work.

Where, as in the instant case, it is undisputed that claimant is unable to perform her usual employment as a cable puller due to her work-related hand injuries, the burden shifts to employer to demonstrate the availability of jobs within the geographic area where the claimant resides which claimant by virtue of her age, education, work experience, and physical restrictions is capable of performing, and for which she can compete and realistically secure. *See P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Although the instant case involves an injury to a scheduled member, *i.e.*, claimant's hands, if employer does not establish suitable alternate employment, claimant is entitled to permanent total disability benefits and is not limited to a scheduled award of permanent partial disability benefits. *PEPCO v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366-367 n. 17 (1980). If, however, employer establishes suitable alternate employment, claimant is limited to the scheduled award for the loss of use of her left and right hands under Section 8(c)(3). *Id.*

In his decision on modification, the administrative law judge initially determined, based upon the opinions of Drs. Millette and Kline, that claimant reached maximum medical improvement with regard to her right and left hand injuries on May 29, 1996. After observing that it is undisputed that claimant cannot perform her regular employment as a cable puller, the administrative law judge considered employer's evidence as to the availability of suitable alternate employment, and concluded that the positions identified by Mr. Stewart in his

vocational rehabilitation report dated July 12, 1996, as approved by Dr. Millette,[3] are sufficient to meet employer's burden. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., concurring and dissenting). The administrative law judge then determined, based on claimant's own testimony, that she made no effort whatsoever to seek the employment set out in the vocational report despite the

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[3]Contrary to claimant's contention, Dr. Millette's limitation that claimant should avoid "repetitive physical activity with hands," does not preclude the positions listed in Mr. Stewart's vocational rehabilitation report, as Dr. Millette considered the physical requirements of the positions in question prior to rendering his opinion that the occupations listed therein are "perfectly fine" for claimant. Additionally, the administrative law judge explicitly considered claimant's credible testimony regarding her symptoms but rationally elected to accord greater weight to the medical opinions of Dr. Millette, who found claimant's symptoms to be "atypical," and Dr. Kline, who opined that claimant had better function of her hands than her complaints indicated.

fact that no doctors, including Dr. Jackson, declared her to be totally disabled or unemployable.[4] In addition, the administrative law judge observed that claimant's past experiences and mental ability are obviously such that she would be of value to some employer if she would make a diligent effort to seek work utilizing her skills.

Inasmuch as the administrative law judge's weighing of the relevant evidence in this matter is rational and within his authority as factfinder, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), we affirm the administrative law judge's finding that claimant is no longer totally disabled. Thus, his conclusion that she is entitled to a scheduled award for a permanent partial loss of use of her right and left hands is affirmed, as it is supported by substantial evidence. *PEPCO*, 449 U.S. at 277 n.17, 14 BRBS at 366-367 n. 17.

[4]Pertaining to Dr. Jackson's opinion, the administrative law judge specifically observed that although Dr. Jackson assessed a much higher impairment rating to claimant's hand injuries than those provided by Drs. Kline and Millette, he never declared her to be totally disabled or unemployable. The administrative law judge rationally accorded greatest weight to the 15 percent impairment rating to both hands assessed by Dr. Kline, as supported in part by Dr. Millette's assessment of claimant's impairment, as he was the one who last operated on claimant and who, along with Dr. Millette, provided continual care to her.

In considering claimant's petition for modification, the administrative law judge observed in his order, that "claimant's motion amounts to a re-argument of evidence previously considered," and as such "nothing has changed from my previous consideration of this claim." Order at 3. Specifically, he determined that contrary to claimant's contentions in support of her petition for modification, Dr. Millette did not alter his opinion regarding her condition,[5] nor did Dr. Jackson now declare claimant to be totally disabled.[6] As this finding is rational and supported by substantial evidence, the administrative law judge's Order Granting Employer's Motion for Summary Judgment and Canceling Hearing is affirmed.

Accordingly, the administrative law judge's Decision and Order on Modification and subsequent Order Granting Employer's Motion for Summary Judgment and Canceling Hearing are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[5]The administrative law judge found that claimant's alleged new evidence in the form of Dr. Millette's statement that: "the patient cannot use her hands at all due to her neurologic problems," is incorrect, as Dr. Millette clarified that what he wrote was: "this patient cannot use her hands *well* at all due to her neurologic problems," which the administrative law judge found does not conflict with Dr. Millette's prior overall assessment of claimant's physical condition.

[6]The administrative law judge fully considered the September 9, 1998, medical report of Dr. Jackson submitted by claimant, and determined that, when read closely, it does not say that claimant cannot work but rather merely disagrees with the level of work recommended by Dr. Millette as well as the use of claimant's hands in any gainful way. In particular, the administrative law judge found that Dr. Jackson's opinion does not say that claimant is now unemployable.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge