BRB No. 14-0065

FREDERICK CRANDALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Sept. 23, 2014
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

James P. Berryman (Suisman Shapiro), New London, Connecticut, for claimant.

Robert J. Quigley, Jr. (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-LHC-01241) of Administrative Law Judge Jonathan C. Calianos 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, rational, 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 an injury to his back on March 27, 2003, while working in a modified welding position with employer.[1] Prior to the March 2003 injury, claimant

[1]Claimant previously injured his back while working as a welder for employer in April 1987, underwent surgery and remained out of work until 1989. Upon his return to

performed 20-25 hours of arc welding and fabrication work per week for his twin brother's trash hauling business, F.E. Crandall Disposal (FEC), in addition to his job with employer. Claimant attempted to work through the pain following the March 27, 2003 incident, but found himself having increasing difficulty performing his job duties both with employer and FEC, prompting Dr. Thompson to remove him from all work as of August 12, 2004. Claimant returned to light-duty work as a security escort with employer on December 15, 2004, but stated that this position involved physical requirements beyond his capabilities. Claimant continued in this work until January 10, 2005. Employer, thereafter, determined that it could not accommodate claimant's restrictions in a modified welder position, thus ending its work relationship with claimant.

Claimant testified that after he stopped working with employer and at FEC, he became depressed, prompting his brother to invite him to FEC. Claimant stated that his initial visits to FEC involved sitting around and having coffee but that he started to perform other minor tasks such as sweeping, cleaning, picking up tools, ordering supplies and occasionally opening the gate in the morning for a delivery. Claimant also admitted to occasional welding, 15 to 30 minutes at a time, for FEC, but added that his total daily work effort while at FEC did not exceed one hour per day. Claimant testified he went to FEC three or four days per week, for only three or four hours at a time, and spent the majority of it sitting in a recliner watching television.[2] Claimant stated that he was never paid for his time at FEC, he would set his own hours, and would show up whenever he wanted. Claimant stopped going to FEC in October 2009. Employer voluntarily paid claimant temporary total disability benefits from August 12, 2004 through December 14, 2004, and from January 14, 2005 until April 28, 2010, when it ceased paying disability benefits. Claimant, thereafter, filed a claim seeking temporary total disability benefits from April 30, 2010. The parties agreed that the only issue in dispute was the nature and extent of claimant's disability.[3]

In his decision, the administrative law judge found that claimant remains incapable of performing his usual work as a welder, and that employer did not establish the availability of suitable alternate employment. Thus, the administrative law judge

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work with employer, claimant was put on permanent light duty in a modified welding position.

[2]Claimant also stated that in three of the four winters between 2005 and 2009, he went to Florida for roughly three months at a time.

[3]The parties stipulated that claimant sustained a work-related back injury on March 27, 2003, which had not yet reached maximum medical improvement, and that claimant had filed a timely claim under the Act.

awarded claimant ongoing temporary total disability and medical benefits commencing April 30, 2010. 33 U.S.C. §§907, 908(b).

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends that, contrary to the administrative law judge's finding, the only reasonable inference that can be drawn from consideration of all the evidence of record is that claimant is not a credible witness. Specifically, employer contends that claimant is not credible as to his limited work at FEC, asserting, instead, that the record establishes that he worked as a welder at FEC between 2005 and 2009 such that he has a wage-earning capacity and is not totally disabled. Consequently, employer maintains that any determinations made by the administrative law judge based on his finding that claimant is a credible witness, and thus the consequent award of benefits under the Act, must be reversed.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses, to weigh the evidence, and to draw his own inferences and conclusions from the evidence, and that the Board is not empowered to reweigh the evidence. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *see also John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Recognizing the "critical role" that claimant's credibility plays in resolving the disability issue, Decision and Order at 7, the administrative law judge addressed employer's contentions challenging claimant's testimony regarding his post-2005 activities at FEC and statements he made to physicians regarding his physical capabilities. After review of the relevant evidence regarding claimant's post-2005 activities at FEC, the administrative law judge found that claimant's overall testimony is credible. While the testimony provided by employer's witnesses, notably Bryan Buckley, David Williams and Norman Emmons, may have contradicted some of claimant's testimony, the administrative law judge acknowledged that "all three witnesses also testified that they only visited the New London [FEC] facility a few times a month, for limited durations each visit."[4] Decision and Order at 5. Thus, the administrative law

[4]Mr. Buckley testified that between 2004 and 2009, he would visit FEC once or twice a month, averaging "maybe 20 minutes, maybe 25" per visit, and that he actually saw claimant welding at FEC "maybe 10, 12 times" between 2005 and 2009. HT at 218, 225, 228, 232-233. Mr. Williams testified that he might have been at FEC only one hour a week, but he had seen claimant working "sometimes," and that "sometimes [claimant] was there just for coffee in the afternoon." *Id.* at 312, 319-320. Mr. Williams also stated that he had seen claimant welding at FEC no more than 16-18 times between 2005-2009. *Id.* Mr. Emmons testified that he would have welding work for claimant to do, "on the average, twice a month," and that while it was his understanding that claimant "was there

judge found that these witnesses lacked a sufficient basis of personal observation to refute the totality of claimant's testimony, i.e., that his activity at FEC between 2005-2009 did not constitute a working relationship, which the administrative law judge found was further supported by statements made by claimant's brother and by Carl LaFlamme.[5] Moreover, the administrative law judge found that the medical evidence, as demonstrated by MRIs taken in 2003, 2004 and 2012, showed significant and progressive degenerative disc disease. CXs 6, 19. The administrative law judge determined that the opinions of Drs. Thompson and Willets, confirming the presence of objective studies which are in line with claimant's physical complaints,[6] EXs 3, 12, support claimant's subjective reports of pain and other symptoms. As we cannot say that the administrative law judge's credibility determinations are either "inherently incredible" or "patently unreasonable," we affirm his findings that claimant credibly testified regarding his "work" at FEC, that claimant's minimal physical activities at FEC did not rise to the level

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welding every day," his own personal knowledge of claimant's welding at FEC involved only the limited times he was there with a project. *Id.* at 380-382.

[5]Claimant's brother, Franklin Crandall, testified that between 2005-2009, claimant "was his own boss," that to his knowledge over that time, Carl LaFlamme did all the FEC welding and repair work during that period, and that while he was aware that claimant may have performed some small tasks on behalf of FEC between 2005-2009, he was unaware of any instances where claimant worked on company trucks. HT at 167-168, 189-193. Mr. LaFlamme confirmed that claimant "kind of made his own hours," and that claimant "decided what he wanted to do and what he didn't want to do." *Id.* at 397, 399. He also stated that he saw claimant "weld a couple times" after January 2005, and that when he was at the FEC facility claimant "might be working, might be welding, might be grinding, might be drinking coffee." *Id*. at 397, 405. Mr. LaFlamme also indicated that there were days where the majority of claimant's time at FEC was spent just drinking coffee with people and that this happened "quite often." *Id.* at 414. Mr. LaFlamme also testified that he would personally weld at FEC, that FEC welding projects would be outsourced on occasion, and that a string of independent contractors would also weld at various times at that facility. *Id*. at 409. Mr. LaFlamme added that FEC's business slowed down in 2005, such that FEC did not require a full-time welder from that point forward, and that equipment required attention only "a couple times a week." *Id.* at 424.

[6]Specifically, Dr. Thompson recognized that there was objective evidence showing "pretty significant degenerative spine disease," EX 3, and Dr. Willets noted that claimant "does appear to have the pain of which he complains," as he has "some significant abnormalities on imaging studies, and has supporting electrical diagnostic studies of bilateral radiculopathy." EX 12.

of employment, and that such limited activity was consistent with his continued complaints of back pain.[7] *Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT); *Hughes*, 289 F.2d 403; *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.), *cert. denied*, 440 U.S. 911 (1970).

Employer next contends the administrative law judge erroneously relied on the opinion of Dr. Thompson to find that claimant was incapable of performing his usual occupation as a welder. Employer also asserts that since claimant provided a false history regarding his capabilities and his activities at FEC, to all of the examining physicians, those opinions should have been accorded no weight by the administrative law judge. Employer thus avers that claimant has not presented any credible evidence establishing that he is incapable of performing his usual work for employer.

In order to establish a prima facie case of total disability, claimant must demonstrate that he cannot return to his regular or usual employment due to his work-related injury. *See, e.g., Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). Claimant's usual employment is that which he was performing at the time of his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Thus, in this case, claimant's usual employment is his work as a modified welder, not the light-duty work he subsequently performed as a security escort for employer. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

As the administrative law judge found, Drs. Willets, Gaccione, Paonessa and Hurley each opined that claimant cannot return to a welding position. Dr. Willets opined, in his November 23, 2005 report, that claimant "cannot return to the full or essential duties of pipe welder and will never be able to do so," adding that claimant will likely be permanently limited to sedentary work for no more than four hours per day. EX 12. In his report dated September 16, 2004, Dr. Gaccione opined that claimant was not capable of returning to full-duty work at that time. CX 4, EX 4. Subsequently, on August 9, 2012, Dr. Gaccione opined that claimant "would be permanently restricted from returning to his prior level of employment as a welder." *Id.* Dr. Paonessa similarly opined, on May 4, 2012, that claimant "is never going to go back to, I believe, safely working within a welding capacity." CX 7. Lastly, Dr. Hurley testified that as of December 15, 2004, he had limited claimant to performing "escort work only" with significant physical

[7]Moreover, contrary to employer's contention, the administrative law judge adequately addressed employer's surveillance video evidence and accompanying investigative report, EXs 13, 14, at the formal hearing and rationally explained why this evidence has little probative value other than to establish that claimant would show up at FEC; a fact which is not disputed by either party. *See* HT at 299-300.

restrictions, HT at 246-247, but that on January 13, 2005, he issued new restrictions placing claimant "out of work per Dr. Thompson."[8] *Id.* at 260. Moreover, while Dr. Hurley testified that he believed that claimant remained capable of performing sedentary work with restrictions in January 2005, employer's Accommodations Review Committee (ARC), upon presentation of those restrictions, voted, on January 20, 2005, that employer "could not accommodate these restrictions" as a welder, and did not consider whether he could be moved permanently to escort work. *Id.* at 264. Consequently, as the opinions of Drs. Willets, Gaccione, Paonessa and Hurley constitute substantial evidence to support the administrative law judge's finding that claimant established his prima facie case of total disability, that determination is affirmed.[9] *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Devor v. Dep't of the Army*, 41 BRBS 77 (2007).

Employer further contends the administrative law judge's rejection of its evidence of suitable alternate employment is not supported by substantial evidence and therefore must be vacated.[10] Where claimant has established a prima facie case of total disability, the burden shifts to the employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Marinelli v. American Stevedoring*,

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[8]In his August 12, 2004 progress note, Dr. Thompson opined that claimant was disabled for his current work with employer and was unable to return to work because of his back condition, a position the physician reiterated in notes dated December 27, 2004, January 7, May 17 and July 19, 2005, June 7, 2006, June 1, 2007, May 29 and November 26, 2008, May 27, 2009, and April 21, 2010. CX 9. The administrative law judge observed that while Dr. Thompson suggested at his deposition that had he known claimant had been welding at FEC, he would not have found him to be totally disabled, EX 3, Dep. at 6, 17-18, the physician did not otherwise provide an opinion in his deposition as to whether claimant could return to his usual employment as a modified welder, or state that claimant was capable of working an 8-hour day. *Id.* at 54.

[9]Given that the reports of Drs. Willets, Gaccione, Paonessa and Hurley, as well as employer's ARC findings noting the lack of welding work for employer at its facility, support claimant's prima facie case of total disability, employer's contention that the administrative law judge erroneously relied on the opinion of Dr. Thompson to find claimant incapable of returning to his usual employment is without merit.

[10]Employer relies upon the following evidence: 1) claimant successfully performed the security escort position within employer's facility until he left in January 2005; 2) claimant continued working at FEC after January 2005; and 3) the labor market survey prepared by Susan Chase establishes the availability of suitable work on the open market.

Ltd., 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to meet this burden, an employer must show the availability of realistic job opportunities in the relevant community, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Id.*

The administrative law judge's rejection of claimant's 2005-2009 post-injury activities at FEC and brief work with employer in December 2004-January 2005 as a security escort, as evidence of suitable alternate employment is affirmed as it is rational and supported by substantial evidence. As the administrative law judge found in addressing claimant's credibility, claimant's limited post-2005 activities at FEC involved his pursuit of a hobby and, thus, did not rise to the level where it could be considered "employment." Specifically, the testimony of claimant, as bolstered by that of his brother and of Mr. LaFlamme, support the administrative law judge's finding that claimant was not paid for his time and work, he had no set schedule, he could choose the projects on which he worked, and could come and go as he pleased. HT at 56-58, 62, 108, 160-163, 187, 397, 399, 407 Additionally, the record supports the administrative law judge's finding that a majority of the time claimant spent at FEC involved sitting around with friends, making trinkets for personal use, or sleeping and watching television from a recliner. *Id.* at 53, 62, 108, 160-163, 407, 414. Thus, employer did not establish that claimant's activities at FEC constitute suitable alternate employment. *See Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). As for the security escort position, the administrative law judge found that claimant was removed from this work by Dr. Hurley on January 13, 2005, "per Dr. Thompson's medical note" that claimant is disabled and unable to return to any work. In addition, the ARC concluded it could not accommodate claimant's restrictions in a welder position and did not return claimant to any work. Thus, employer did not establish the availability of suitable alternate employment at its facility. *See Ryan v. Navy Exchange Serv. Command*, 41 BRBS 17 (2007).

With respect to Ms. Chase's labor market survey, the administrative law judge found that she either did not consider, or was not aware of, the complete restrictions imposed by Drs. Gaccione or Willets,[11] and that she did not fully address the effects of claimant's pre-existing conditions, i.e., his diabetes and use of a cane following left leg bypass surgery. Moreover, the administrative law judge found that while the labor market survey listed six positions as "part-time/full-time," none of these positions indicates whether the employer would be able to accommodate the restriction imposed by Drs. Paonessa and Willets that claimant work in short, 3-4 hour, shifts. Thus, the administrative law judge rationally rejected the jobs identified by Ms. Chase because it

[11]The administrative law judge noted that, most importantly, there is no indication that the jobs identified by Ms. Chase "would allow frequent rests" as required by Dr. Willets. EX 12.

was not clear that she considered all of claimant's physical limitations in identifying prospective jobs for claimant. *See Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Consequently, as the administrative law judge's findings that employer did not establish the availability of suitable alternate employment, by virtue of claimant's activities at FEC and his brief stint as a security escort for employer, or through Ms. Chase's labor market survey, are rational, supported by substantial evidence and in accordance with law, they are affirmed. Therefore, we affirm the administrative law judge's conclusion that claimant is entitled to temporary total disability benefits from April 30, 2010.

Accordingly, the administrative law judge's Decision and Order Award Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge