BRB No. 98-1537

LINDA A. BELLAMY	)	
	)	
Claimant-Respondent	)	DATE ISSUED: 8/19/99
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Newport News, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2636, 97-LHC-2787, 97-LHC-2788) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 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).

The parties stipulated that claimant suffered injuries in the course and scope of her employment to her left arm, shoulder and neck on January 21, 1987, and to her right hand on June 26, 1995, ultimately resulting in carpal tunnel syndrome. CX

14(a). Employer paid various periods of disability benefits and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Claimant sought a continuing award for permanent total disability.

The administrative law judge found that employer did not establish the availability of suitable alternate employment, and therefore awarded claimant permanent total disability compensation in the amount of $484.64 per week from September 12, 1996, the stipulated date of permanency, and continuing. On appeal, employer contends that the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

When, as here, claimant establishes her inability to return to her pre-injury employment due to her work injury, the burden shifts to employer to establish the availability of suitable alternate employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet its burden, employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform given her age, education, vocational history and physical restrictions. *See Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT)(4th Cir. 1984). Identification of a single job opening does not satisfy employer's burden under this standard. *Lentz v. Cottman Co.,* 852 F.2d 129, 21 BRBS 109(CRT)(4th Cir. 1988).

In the instant case, the administrative law judge found that Ms. Lanman, employer's rehabilitation specialist, identified six positions which she deemed suitable for claimant.[1] The administrative law judge noted that Dr. Freund approved the positions for claimant, but the administrative law judge found all but the Goodwill

[1]The positions consisted of the following: order taker at Papa John's Pizza, door greeter at Walmart, two security guard positions, a dispatcher position, and a cashier at Goodwill. The restrictions identified in the survey were assigned by Dr. Freund on September 11, 1996, and consisted of no lifting from floor to chest, climbing to and from job site only on a vertical ladder, limited frequent climbing (2.5-5 hours), limited firm grasp frequent usage (2.5-5 hours) with right hand, no use of vibratory tools, no foot controls, and no work above the shoulders. EX 14. At the time of Ms. Lanman's labor market survey, she was unaware of any restrictions from Dr. Rashti. EX 14. On March 3, 1998, Dr. Rashti restricted claimant to no working above floor level or in cramped, crawling or squatting positions, and from heavy lifting or carrying over 10 pounds. EX 5.

position to be either physically and/or vocationally unsuitable, recognizing that in addition to claimant's physical restrictions from her work-related injuries, claimant has a very low IQ and, based on her demeanor at the hearing, is inarticulate.[2] The administrative law judge rejected the pizza order taker position as claimant would be required to lift items weighing 25 to 30 pounds, to memorize pizza toppings and to process information quickly over the phone. The administrative law judge rejected the door greeter position based on claimant's lack of articulateness. With regard to the two security guard positions, the administrative law judge took official notice of the fact that security guards in Virginia have to pass a written test to become certified. The administrative law judge found that employer failed to establish that claimant could pass such a test, and moreover, he noted that claimant had applied for similar jobs and was turned down. Lastly, the administrative law judge rejected the dispatcher position based on his observation of claimant's "poor diction" at the

[2]Charles DeMark, claimant's vocational counselor, administered vocational tests to claimant which indicated that she reads at the 2.1 grade level, spells at the 2.4 grade level, and computes mathematics at the 2.2 grade level. Mr. DeMark stated that claimant is unable to spell words containing more than four letters, which caused him to conclude that she is illiterate. Additionally, unlike Ms. Lanman, who did no testing of claimant, and assumed she performed at a much higher level based on claimant's high school diploma, Mr. DeMark's IQ testing of claimant indicated she has an IQ of 52, while previous tests administered in the early 1990's indicated that claimant's IQ was 70. The administrative law judge rationally stated he credited Mr. DeMark's opinion over that of Ms. Lanman due to his superior credentials and because he actually interviewed claimant. *See generally* *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

hearing, Decision and Order at 16, and because employer did not establish that claimant could handle the computer entry portion of the job.

We affirm the administrative law judge's conclusion that employer did not meet its burden of establishing the availability of suitable alternate employment, as his finding that five of the six positions are unsuitable is rational and supported by substantial evidence. Contrary to employer's contention, the facts that the positions were approved by Dr. Freund, and are arguably within the restrictions set by Dr. Rashti, and that the prospective employers told Ms. Lanman that they would consider claimant for the positions does not end the administrative law judge's inquiry into the suitability of the jobs. The claimant's educational background clearly is a relevant factor in determining the suitability of the positions identified. *See, e.g., Canty v. S.E.L. Maduro,* 26 BRBS 147 (1992); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *Lacey v. Raley's Emergency Road Serv.*, 23 BRBS 432 (1990), *aff'd*, 946 F.2d 1565 (D.C. Cir. 1991)(table). Moreover, Ms. Lanman's opinion that the positions are educationally suitable was rejected in favor of the educational test results obtained by Mr. DeMark and the administrative law judge's personal observation of claimant. Such a determination is within the administrative law judge's authority, and his findings regarding these five jobs are supported by the opinion of Mr. DeMark. *See generally DM & IR Ry. Co. v. Director, OWCP [Fransen]*, 151 F.3d 1120, 32 BRBS 188 (CRT) (8th Cir. 1998).

The cases cited by employer are distinguishable and therefore inapposite. In *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997), the Fourth Circuit rejected the proposition that the employer, in identifying alternate jobs, must contact the prospective employer to obtain the position's qualifications, but may instead rely on standard occupational descriptions for the position. In stating the standard for employer's burden, moreover, the court noted that the claimant must be "physically and *educationally* qualified" for the alternate positions. *Moore*, 126 F.3d at 264, 31 BRBS at 124 (CRT) (emphasis added).

In *Fox v. West State, Inc.*, 31 BRBS 118 (1997), the claimant had had a stroke and prior cardiac conditions, but was not functionally impaired by these conditions. The Board held that inasmuch as these medical conditions did not result in any impairment, employer was not required to establish that alternate positions would be available to someone with such conditions. Rather, the Board held, if claimant is unable to obtain alternate positions with such a medical history, it would become apparent in a diligent job search. 31 BRBS at 121-122. Such is not the case here with claimant's limited educational abilities and low IQ, however; these factors are functional impairments that must be accounted for in determining the suitability of alternate jobs identified by employer. *See generally Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999) (administrative law

judge must consider whether the claimant has the mental ability to work as a car salesman, as well as whether job is within the physical restrictions).

As the administrative law judge rationally found only the Goodwill position suitable, and as he correctly stated that the identification of a single job opening does not satisfy employer's burden of establishing the availability of suitable alternate employment under Fourth Circuit precedent, employer has not met its burden under that standard. *Lentz,* 852 F.2d 129, 21 BRBS at 109(CRT). Therefore, the administrative law judge's award of continuing permanent total disability benefits is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge