BRB No. 08-0631

B.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARATHON ASHLAND PETROLEUM	)	DATE ISSUED: 01/27/2009
	)	
and	)	
	)	
MARATHON ASHLAND PETROLEUM COMPANY, L.L.C., c/o FRANK GATES SERVICE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

John J. Osterhage, Florence, Kentucky, for claimant.

John L. Duvieilh (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-1560) of Administrative Law Judge Thomas F. Phalen, 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 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, who had worked for employer for approximately 25 years, was working as a senior barge welder at employer's facility in Ashland, Kentucky, along the Ohio River, when he sustained an injury to his right shoulder on February 15, 2003. Claimant testified that his shoulder had been bothering him but that it "went out" on him that day after he had thrown a piece of "old barge" into a hopper. Claimant initially was placed on sick leave and received pay at 100 percent of his wages for six months. Thereafter, he received long-term disability payments for 18 months at 75 percent of his wages. In November 2003, claimant filed a claim for compensation which employer controverted. Except for mowing grass during the summer of 2006, claimant has not returned to any work.

The administrative law judge found, *inter alia*, that claimant cannot return to his usual work, that his condition has reached maximum medical improvement, and that employer has not satisfied its burden of establishing the availability of suitable alternate employment. Decision and Order at 13-15. Consequently, the administrative law judge awarded claimant temporary total disability benefits from February 15, 2003, through May 31, 2005, and permanent total disability benefits thereafter. The administrative law judge granted employer a credit for amounts already paid. *Id.* at 15. Employer appeals the administrative law judge's decision, contending he erred in finding claimant entitled to total disability benefits, as it asserts that claimant can either return to his usual work or that it established the availability of suitable alternate employment and claimant did not diligently pursue employment. Claimant responds, urging affirmance.

A claimant bears the burden of establishing the extent of his disability, *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985), including any loss in his wage-earning capacity, *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). In order to establish a *prima facie* case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001).

Employer first contends claimant is capable of returning to his usual work. It asserts that the medical opinions of Drs. Best and Zerga demonstrate that claimant's injury has fully healed with no residual impairment. A claimant's "usual" employment is defined by his regular duties at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). In order to determine whether a claimant can return to his usual work, the administrative law judge must compare the claimant's medical restrictions with the physical requirements of

his former job. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). In this case, the administrative law judge found that claimant's usual job as a barge welder required him to repeatedly carry 150-pound weights and throw heavy pieces of metal. Decision and Order at 3. Dr. Goodwin, claimant's treating orthopedic surgeon, diagnosed winged scapula and impingement syndrome of claimant's right shoulder. An EMG established that claimant had right long thoracic nerve neuropathy. *Id.;* Cl. Exs. 3, 6-7. After a short term of physical therapy, Dr. Goodwin referred claimant to a shoulder specialist, Dr. Brems, who concluded that claimant could perform light-duty work if he limited weights to 20 pounds or less and all activity was below shoulder level. Additionally, Dr. Brems advised that, even if claimant were to return to his original work, he should limit overhead lifting indefinitely. Decision and Order at 3-4; Cl. Exs. 3-4. In 2004, claimant underwent two more EMGs at employer's behest with Drs. Best and Zerga. After the third EMG, Dr. Zerga concluded that claimant's nerve neuropathy had resolved. Dr. Best agreed and, after two functional capabilities evaluations, he determined that claimant was fully capable of working under modified job restrictions and could return to full and unrestricted work activities in the medium to heavy category.[1] Decision and Order at 4-5; Cl. Ex. 5; Emp. Exs. 3-5, 7, 16. Claimant was told to report to work on May 31, 2005, and he did, but he refused to perform his duties as he felt he could not. Emp. Ex. 10; Tr. at 86. As of October 3, 2005, however, Dr. Goodwin had not released claimant to return to work because he still found clinical evidence of scapula winging. Decision and Order at 4; Cl. Ex. 3.

The administrative law judge found that claimant cannot return to his usual work. He stated he placed great weight on claimant's credible testimony, as well as on the opinions of Drs. Best and Goodwin. Specifically, he found that the restrictions placed on claimant by Dr. Goodwin would not allow him to return to his work as a welder.[2] Decision and Order at 14. Claimant testified that he cannot return to his usual work as a

[1]Employer submitted into evidence the job requirements of a barge welder as compiled on August 25, 2004. The requirements included a list of suggested modifications which included the use of a hoist and working in teams to lessen the lifting/ carrying load for each employee. Emp. Ex. 6; *see also* Decision and Order at 5, n.9. Dr. Best praised this change and considered it as reducing a welder's work load from very heavy to heavy, making claimant capable of performing it without restrictions. Emp. Ex. 5.

[2]Dr. Goodwin consistently has stated that claimant cannot return to his usual work as a welder. Dr. Goodwin originally set restrictions at five pounds with no overhead work; however, the parties stipulated that he ultimately restricted claimant from lifting or carrying more than 20 pounds or performing overhead work. Cl. Ex. 15 at 11, 16, 26-27; Jt. Ex. 1.

welder. Tr. at 66, 86. Dr. Best opined that claimant could return to a modified welder position, the description of which differed from claimant's work at the time of his injury. Emp. Ex. 5. Dr. Best's opinion therefore does not support a finding that claimant can return to the very heavy work he performed at the time of injury. *Manigault*, 22 BRBS 332. The record, therefore, contains substantial evidence supporting the administrative law judge's conclusion that claimant cannot return to his former job, and we affirm the finding. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

As claimant cannot return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *Washnock*, 135 F.3d 366, 32 BRBS 8(CRT); *see also Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether jobs are realistically available and suitable for the claimant. That is, if it identifies a list of job openings within the claimant's physical and mental abilities, it need not identify the precise nature and terms of specific jobs in order to satisfy its burden. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). However, the administrative law judge must be able to compare the duties of the positions with the claimant's work restrictions. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (standard job descriptions may satisfy burden of establishing job demands).[3]

In this case, employer submitted the vocational report of its expert, Ms. Hathaway. Between August and October 2006, she identified 20 specific jobs she considered suitable for claimant. The jobs ranged from sedentary to light-duty to medium-duty. Emp. Exs. 1-2; Tr. at 101-103. The administrative law judge rejected these jobs because although Ms. Hathaway noted Dr. Goodwin's restrictions in her report, she could not recall whether she took them into account in selecting suitable jobs. Decision and Order at 15; Tr. at 105-106. In addressing suitable alternate employment, the administrative law judge found Dr. Best's opinion entitled to little weight in comparison to that of Dr. Goodwin.

[3]In *Moore*, the vocational expert used the Dictionary of Occupational Titles to flesh out the physical requirements of the specific jobs he found available in the local market to satisfy employer's burden.

We affirm the administrative law judge's determination that employer has not satisfied its burden of showing the availability of suitable alternate employment. The inclusion of medium-duty jobs in her labor market survey, and the fact that Ms. Hathaway defined medium work as requiring the exertion of between 20 and 50 pounds of force occasionally, supports the administrative law judge's conclusion that she did not consider Dr. Goodwin's 20-pound limit in her job search. *See Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). While this omission potentially could have been remedied by her inclusion of sedentary- and light-duty positions, Ms. Hathaway did not specify whether the requirements of those jobs fell within claimant's other work restrictions. Emp. Exs. 1-2. That is, although she identified the category of each job in her second report, there is no evidence from which it can be ascertained whether the jobs satisfy the lifting and overhead work restrictions placed on claimant by Dr. Goodwin. Emp. Ex. 2. Absent that information, the administrative law judge cannot make a comparison between claimant's work restrictions and the demands of the potential jobs, in order to determine whether they are suitable for claimant. *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT); *Washnock*, 135 F.3d 366, 32 BRBS 8(CRT); *Davenport*, 16 BRBS 196. Because employer has not supplied sufficient information to establish the suitability of alternate employment in this case, the administrative law judge properly found that claimant is entitled to total disability benefits. *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge