BRB No. 03-0746

KATHERINE (HALEY) DUMONT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: July 30, 2004
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (Marcia J. Cleveland, LLC), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-0990, 0991) of Administrative Law Judge Jeffrey Tureck 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, a preservation technician in employer's paint shop, injured her back at work on June 30, 1999, and April 27, 2001. Employer voluntarily paid compensation from July 16, 1999, to July 9, 2000, and September 24, 2001, to October 23, 2001. Claimant sought temporary total disability benefits from October 23, 2001, through October 21, 2002.

Following her 2001 injury, claimant worked in a light-duty capacity at employer's facility within the restrictions imposed by employer's clinic in May 2001 and by Dr. Bamberger on June 14, 2001. Claimant was laid off for economic reasons sometime after June 18, 2001. Employer recalled claimant to work in October 2001, but she was told that there was no available work when she presented new restrictions imposed by Dr. Dustin Slocum on September 18, 2001. Claimant returned to work on October 21, 2002, with accommodations due to her physical limitations. The administrative law judge denied claimant's claim for additional benefits, finding that employer established the availability of suitable alternate employment at its facility during the time for which claimant sought disability benefits.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's decision to which claimant filed a reply brief.

Claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment at its facility, and that the evidence is insufficient to establish the availability of suitable alternate employment on the open market. Once, as here, claimant establishes her *prima facie* case of total disability, the burden shifts to employer to demonstrate within the geographic area where claimant resides, the availability of realistic opportunities for employment which she, by virtue of her age, education, work experience, and physical restrictions, is capable of performing and for which she can compete and which she could reasonably expect to secure. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). Employer may meet this burden by offering claimant a suitable light duty position in its facility. *See 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).

The administrative law judge initially credited the restrictions imposed by Dr. Bamberger over those imposed by Dr. Dustin Slocum. We affirm his weighing of the medical evidence. The administrative law judge rationally credited Dr. Bamberger's restrictions based on his qualification as a Board-certified physiatrist, as his limitations appear to be compatible with claimant's symptoms, and because his reports are well-explained and supported by objective medical evidence.[1] *See* Decision and Order at 8; Emp. Ex. 30 at 156, 169; Cl. Ex. 10. The administrative law judge rationally rejected the

[1] Dr. Bamberger issued two sets of restrictions. On June 14, 2001, he limited claimant to no overhead work, no confined spaces, and no lifting over 25 pounds. Emp. Ex. 30 at 169; Cl. Ex. 10. On January 21, 2002, he reduced the restrictions to occasional overhead lifting, moderate bending and twisting, and occasional lifting and carrying no more than 35 pounds and regular lifting and carrying no more than 25 pounds. Emp. Ex. 30 at 156.

restrictions imposed by Dr. Dustin Slocum, a chiropractor, because he did not adequately explain why he increased claimant's restrictions in September 2001 despite finding no change in her physical condition, he was unfamiliar with much of the data in the file, and provided no written explanation of his treatment of claimant.[2] *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), c*ert. denied*, 373 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 7; Emp. Ex. 33 at 180; Cl. Ex. 13; Tr. at 63-76.

After crediting Dr. Bamberger's restrictions, the administrative law judge relied on the testimony of Stephen Bernier, a foreman who assigns light-duty work, to find that employer would have had light-duty work for claimant in October 2001 if her restrictions were the same as they had been at the time of the lay-off in June 2001. The administrative law judge inferred from employer's ability to find light-duty work for claimant after her 2001 injury that the only reason she could not be placed in light duty work upon recall in October 2001 was that she presented Dr. Dustin Slocum's increased restrictions.

Claimant was working within Dr. Bamberger's 2001 restrictions at the time of the layoff in late June 2001. *See* Emp. Ex. 30 at 164, 167; Tr. at 18-19. Dr. Bamberger's June 2001 restrictions were the same as the restrictions imposed by employer's clinic in May 2001.[3] Emp. Exs. 22 at 56, 30 at 169; Cl. Exs. 10, 13. At the hearing, Mr. Bernier testified that work was available at employer's facility from October 2001 onward within the restrictions imposed by Dr. Jeffrey Slocum on April 4, 2000; these limitations were more restrictive than those of Dr. Bamberger imposed on June 14, 2001.[4] Thus, the administrative law judge rationally inferred that employer had suitable work available for claimant at the time of her recall in October 2001 which was within the credited medical restrictions. *See*

[2] Dr. Dustin Slocum increased claimant's restrictions on September 18, 2001: no kneeling, crawling, stooping or overhead work; no using vibratory tools, grinding, or cutting material; occasional climbing; and moderate standing, walking, sitting, and 20 pound carrying and lifting. Emp. Ex. 33 at 180; Cl. Ex. 13.

[3] On June 14, 2001, Dr. Bamberger stated, "I would keep the [claimant] at full time capacity, but I would maintain her on the current restrictions that you had her on initially which included no overhead work, no lifting greater than 25 pounds and no working in confined spaces." Emp. Ex. 30 at 169. Employer's clinic records indicate that claimant was placed on similar restrictions on May 31, 2001. Emp. Ex. 22 at 56.

[4] On April 4, 2000, Dr. Jeffrey Slocum, a chiropractor, had imposed the following restrictions: no overhead work; minimal kneeling, crawling, stooping, climbing, and sitting; moderate twisting and bending; and frequent lifting and carrying up to 20 pounds. Emp. Ex. 25 at 116; Cl. Ex. 13.

Sprague v. Director, OWCP, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 8; Emp. Exs. 22 at 56; 30 at 159, 169.

The administrative law judge also credited Mr. Bernier's additional testimony that as of early March 2002, employer had additional employment available within Dr. Bamberger's less restrictive January 2002 limitations. Tr. at 85. On March 6, 2002, employer sent claimant a letter stating that two jobs were available. The letter stated,

> As I previously indicated to you, BIW is able to accommodate Ms. Dumont's limits as set out by Dr. Bamberger. She could perform work as a brush painter and/or cleaner. Attached please find GENERAL requirements of those jobs. Hopefully the physical task analyses will provide the information you need.

Emp. Ex. 15 at 15. Task analyses for the two jobs were enclosed with the letter. Although claimant contends that these jobs were not within her restrictions, we disagree. The letter described two jobs, and the requirements of the sweeper/cleaner position are clearly within Dr. Bamberger's 2002 restrictions.[5] Thus, substantial evidence in the form of Dr. Bamberger's restrictions, Mr. Bernier's testimony, and employer's March 2002 letter supports the administrative law judge's finding that employer had a suitable position available for claimant as of the date claimant was recalled to work in October 2001. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 Fed.Appx. 126 (5th Cir. 2002); *see generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). Consequently, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility and the resultant denial of additional disability benefits.[6] *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT).

[5] The other job, as a preservation technician (painter), required among other things frequent overhead work, frequent to occasional bending and twisting, and occasional lifting and carrying more than 50 pounds. These duties are outside Dr. Bamberger's 2002 restrictions. Emp. Ex. 15 at 16.

[6] Based on our affirmance of the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility, we need not address claimant's argument that the evidence is insufficient to establish the availability of suitable alternate employment on the open market. Emp. Ex. 20 at 38-41.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge