BRB No. 10-0507

MICHAEL BARABASZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED: 05/31/2011
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits and the Order Granting in Part and Denying in Part Employer's Motion for Reconsideration and Amending Prior Decision and Order of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

David M. Barish (Katz, Friedman, Eagle, Eisenstein, Johnson & Bareck, P.C.), Chicago, Illinois, for claimant.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi LLP), San Diego, California, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits and the Order Granting in Part and Denying in Part Employer's Motion for Reconsideration and Amending Prior Decision and Order (2009-LHC-0156) of Administrative Law Judge Stephen L. Purcell 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 (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 sustained an injury to his back while moving a vending machine in the course of his employment on July 23, 2003. Claimant underwent back surgery on April 13, 2004, and November 20, 2006, and he has not returned to gainful employment. Employer voluntarily paid claimant temporary total and temporary partial disability compensation during various periods of time between August 6, 2003 and July 16, 2008. 33 U.S.C. §908(b), (e), (h).

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant reached maximum medical improvement on October 29, 2007. The administrative law judge determined that claimant is incapable of returning to his usual employment duties because of his injury, and that employer established the availability of suitable alternate employment as of November 30, 2007. Finding that claimant was placed under additional physical restrictions on October 1, 2008, the administrative law judge found that employer did not establish that the identified alternate employment remained suitable. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from July 23, 2003 through October 28, 2007, permanent total disability benefits from October 29, 2007 through November 29, 2007, permanent partial disability benefits from November 30, 2007 through September 30, 2008, and permanent total disability benefits commencing October 1, 2008, and continuing. 33 U.S.C. §908(a), (b), (c)(21). In an Order addressing employer's motion for reconsideration, the administrative law judge amended his decision to reflect employer's entitlement to a credit for benefits previously paid, but he denied employer's motion pertaining to his suitable alternate employment findings.

On appeal, employer challenges the administrative law judge's findings regarding the extent of claimant's work-related disability. Claimant responds, urging affirmance of the administrative law judge's decision.

Where, as in this case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment due to his injury, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. In order to met this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). The administrative law judge must compare claimant's restrictions and qualifications to the requirements of the jobs identified by employer in order to determine their suitability for claimant. *Id.; Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

Employer contends the administrative law judge erred in finding that only two sedentary positions identified by its vocational expert constitute suitable alternate employment as of November 30, 2007. Employer contends that the administrative law judge erred in finding that the remaining ten positions identified in its November 30, 2007, labor market survey were not suitable for claimant.

In addressing the issue of the extent of claimant's work-related disability, the administrative law judge relied on the deposition testimony of Drs. Regan and Goldberg, as well as on claimant's testimony, in determining that claimant continues to experience back pain and is capable of only light-duty work with restrictions on lifting, bending and twisting. CXs 3, 10; Tr. at 35-37. The administrative law judge found claimant's description of his pain to be credible, and he gave weight to Dr. Regan's opinion as he is the most familiar with claimant's medical history. Decision and Order at 19. The administrative law judge specifically found that claimant could not perform medium to heavy-duty work based on Dr. Regan's opinion. CX 3 at 356. The administrative law judge found that ten of the positions identified by employer's expert were not appropriate for claimant; specifically, four positions exceeded claimant's physical restrictions,[1] three positions required basic computer skills that claimant does not possess,[2] two positions required customer service skills which claimant's vocational expert testified claimant does not possess,[3] and one position required restaurant/bar management experience which the administrative law judge found claimant does not possess. Decision and Order at 21–24. The administrative law judge found, however, that the two sedentary positions identified by employer, those of an appointment setter and a recruiter/interviewer, were both suitable and available for claimant as of November 30, 2007, the date of employer's labor market survey.[4] *Id.* at 24 – 25.

[1]These four opportunities were identified as driver positions classified as medium-duty jobs requiring lifting in excess of claimant's restrictions. Tr. at 71-72; EX 6.

[2]These opportunities were identified as dispatcher positions which require basic computer skills. EX 6 at 10-12; CX 5 at 447; Tr. at 47.

[3]These opportunities were identified as a desk service and a cashier position. EX 6 at 12; CX 6 at 490-491.

[4]As the administrative law judge's finding that the identified positions of appointment setter and recruiter/interviewer were suitable for claimant through September 30, 2008, is not challenged on appeal, it is affirmed. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2006); *Larosa v. King & Co.*, 40 BRBS 29 (2006).

In challenging the finding that these ten positions were unsuitable for claimant, employer contends that the administrative law judge erred in failing to fully consider claimant's background and work experience. Employer maintains that claimant's vocational history demonstrates that he possesses telephone, cashier, customer service and restaurant skills such that some of the ten jobs are suitable. We reject employer's contention of error. The administrative law judge, as the trier-of-fact, is entitled to weigh the evidence and to draw his own inferences from it. *See Bunge Corp.*, 227 F.3d at 937, 34 BRBS at 83(CRT); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Contrary to employer's contention, the administrative law judge fully discussed claimant's vocational history as it relates to the identified positions, *see* Decision and Order at 23-25, and employer has failed to demonstrate error in the administrative law judge's weighing of the contrary evidence. The administrative law judge's finding that six jobs are not vocationally suitable is supported by claimant's testimony and the opinion of claimant's vocational consultant. *See* CXs 5 at 447; 6 at 483, 490; Tr. at 44-45. The finding that the medium-duty driver positions are not suitable is supported by the opinions of Drs. Regan and Goldberg, as well as claimant's testimony concerning claimant's physical limitations. As the administrative law judge explicitly addressed each of the employment positions at issue, and his finding that the jobs are not suitable is supported by substantial evidence, we affirm the administrative law judge's finding that these positions do not satisfy employer's burden of demonstrating the availability of suitable alternate employment. *See Wilson v. Crowley Maritime*, 30 BRBS 199 (1996); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer also avers that the administrative law judge erred in finding that the positions of appointment setter and recruiter/interviewer became unsuitable for claimant as of October 1, 2008. In a letter to claimant's counsel dated October 1, 2008, Dr. Regan, claimant's treating physician, stated

> [claimant's] ideal job would require the ability to go through position changes between standing and sitting and lifting no more than 25 pounds. He could have difficulty with a lot of bending, twisting, and ladder work.

CX 3 at 109. Following a re-evaluation of claimant on October 17, 2008, Dr. Regan wrote a progress note indicating that claimant should be able to function in a light-duty job, which would allow for frequent position changes. CX 3 at 105. The administrative law judge found that Dr. Regan gave more detailed physical restrictions which called into question the suitability of the positions of appointment setter and recruiter/interviewer. The administrative law judge found that employer's November 30, 2007 labor market survey provided no information as to whether those two positions would permit claimant to change positions while working; thus, as the job descriptions did not establish their requirements so as to allow the administrative law judge to compare them to claimant's

additional physical restrictions, the administrative law judge concluded that the positions of appointment setter and recruiter/interviewer were no longer suitable for claimant as of October 1, 2008. Decision and Order at 25 – 26; Order on Reconsideration at 4.

While employer correctly contends that it need not contact prospective employers to elicit job requirements, *see Universal Maritime Corp. v. Moore*, 126 F.3d 264, 31 BRBS 119(CRT) (4th Cir. 1997), and that the administrative law judge may rely on standard job descriptions to flesh out general physical requirements, *id.*, employer must provide enough information for the administrative law judge to determine if the jobs are within claimant's capabilities. *See Bunge Corp.*, 227 F.3d 934, 34 BRBS 79(CRT). The administrative law judge found that sedentary work, such as the appointment setter and recruiter/interviewer, require sitting most of the time, according to the *Dictionary of Occupational Titles.* Decision and Order at 24 n.10. He found that employer's vocational consultant did not ascertain whether claimant could sit or stand as needed, as Dr. Regan stated, in October 2008, is necessitated by claimant's pain level and physical capabilities. CX 3 at 109. The administrative law judge rationally credited Dr. Regan's October 2008 opinions, *see Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), and his finding that employer did not demonstrate that the two positions are within claimant's restrictions is supported by the record. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). As the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that, as of October 1, 2008, claimant is totally disabled.[5] *Bunge Corp.*, 227 F.3d 934, 34 BRBS 79(CRT).

[5]As claimant's duty to diligently seek employment does not arise until employer successfully establishes the availability of suitable alternate employment, *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986), we need not address employer's contention that claimant did not seek employment post-injury.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits and Order Granting in Part and Denying in Part Employer's Motion for Reconsideration and Amending Prior Decision and Order are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge