BRB No. 14-0108

MARIE K. WITKO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED: Oct. 16, 2014
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Gary W. Huebner (Law Office of Gerard R. Rucci), New London, Connecticut, for claimant.

Jeffrey E. Estey, 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-00742, 2012-LHC-01823, 2013-LHC-00689, 00690, 00691) of Administrative Law Judge Timothy J. McGrath rendered on claims 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 if they are rational, supported by substantial evidence, 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, who began working as an electrical designer for employer on August 30, 1989,[1] sustained work-related injuries to her back, neck and right hand as a result of separate accidents occurring on June 13, 1991 (back, neck and right hand) and June 11, 1996 (back). As a result of these incidents, claimant underwent surgical procedures on her back in 1995, 1997 and 1998. Each time, employer voluntarily paid periods of temporary total disability benefits and claimant returned to her electrical designer position with employer. In 2000, claimant became a second-shift supervisor in employer's Electrical Design Department. During her time as a supervisor, claimant continued to experience back and neck pain, resulting in additional back surgery on June 23, 2005. In separate treatment records dated October 18, 2005, Drs. Halperin and Jaziri each opined that claimant was not capable of returning to work due, at least in part, to her work-related back condition.[2] Nonetheless, claimant returned to her work as a second-shift supervisor on November 21, 2005, and continued working in that capacity, despite experiencing continued back/neck pain and a stressful work environment.

At the end of January 2006, employer advised claimant that her second-shift supervisory position was being eliminated, but that she could exercise her "regression rights," whereby she could return to her former position as a senior electrical designer, rather than accept termination. Claimant, however, allegedly told her supervisors that she "was physically and mentally incapable of" reverting to such work.[3] Claimant's last day of work was February 2, 2006, when she took medical leave for non-work-related eye and nose surgery. Although Dr. Halperin released claimant to return to work on February 22, 2006, with permanent restrictions on her ability to sit, stand, drive, lift, carry, push and pull, she never returned to work for employer following the eye/nose surgery. Claimant stated that she did not seek employment after this "except for a few jobs described in [employer's] December 2012 labor Market Survey," HT at 67, and has not returned to work in any capacity. Claimant filed claims under the Act for her back, neck, hand and psychological conditions.

In his decision, the administrative law judge initially found, based on the parties'

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[1]Claimant began working for employer in 1983 as an outside electrician. She sustained work-related neck and back injuries in November 1983 and in 1984, prompting employer to place her on medical leave until she resigned in July 1988.

[2]Specifically, Dr. Halperin opined that claimant "clearly is not capable of doing her regular job," JX 1-59, and Dr. Jaziri opined that claimant "is unable to work due to her total disability," JX 2-32.

[3]Claimant's supervisors each testified that claimant provided no explanation for rejecting her regression rights. HT at 98, 129.

stipulations, that claimant's June 13, 1991 back, neck and right hand injuries and her June 11, 1996 back injury are work-related. Addressing claimant's bilateral carpal tunnel syndrome and stress-related conditions, the administrative law judge found that claimant established her prima facie case with regard to both conditions pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not rebut the Section 20(a) presumption. The administrative law judge found that claimant established that she is incapable of returning to work as a senior electrical designer,[4] and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge found claimant entitled to temporary total disability benefits from February 3 to June 22, 2006, and to permanent total disability benefits thereafter.[5] The administrative law judge also found claimant entitled to medical benefits and that employer is entitled to Section 8(f) relief, 33 U.S.C. §908(f).[6]

On appeal, employer challenges the administrative law judge's award of benefits, contending that claimant, as a voluntary retiree, did not incur any loss in wage-earning capacity due to her work-related injuries and, therefore, is not entitled to any disability benefits. Alternatively, employer contends the evidence establishes, contrary to the administrative law judge's finding, that claimant is capable of working as a senior electrical designer, a job made available to her by employer pursuant to claimant's regression rights. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

After consideration of the administrative law judge's findings, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's findings are supported by substantial evidence. Initially, we reject employer's assertion that claimant is a voluntarily retiree and therefore is not entitled to any disability benefits. The Board has previously discussed the effect of a claimant's "retirement" on her

[4]The administrative law judge noted that employer did not dispute claimant's inability to return to work as a second shift supervisor. Decision and Order at 27.

[5]The administrative law judge awarded claimant a scheduled award based on a three percent impairment rating to each of her hands, "if and when claimant's period of total disability ends." Decision and Order at 38.

[6]In an Erratum Order dated January 8, 2014, the administrative law judge clarified that "the date of injury should read March 21, 2005" for the work-related stress claim. Order dated January 8, 2014, at 2.

entitlement to benefits in a traumatic injury case.[7] In *Harmon v. Sea-Land Serv., Inc.*, 31 BRBS 45 (1997), the Board held that a claimant who suffered a work-related traumatic injury and became unable to perform his usual work prior to his retirement remained disabled following his retirement, regardless of the type of retirement he took. That is, because the claimant's work injury precluded his return to his usual work prior to or at the time of retirement, it was immaterial that claimant retired due to eligibility based on his longevity. *Id.* at 47-48. In contrast, in *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), a claimant suffered a traumatic knee injury, returned to light-duty work with his employer which was deemed suitable, and retired three years later by accepting the employer's early retirement package. After claimant's retirement, his knee condition worsened and his physician increased his impairment rating and later performed both arthroscopy and total knee-replacement surgeries, rendering the claimant totally disabled. The Board affirmed the administrative law judge's finding that the claimant's retirement was not due to his injury. Thus, his loss of wage-earning capacity was not caused by his injury, *see* 33 U.S.C. §902(10), and, although he was entitled to increased benefits under the schedule, he was not entitled to permanent total disability benefits. *Hoffman*, 35 BRBS at 149-150; *see also Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989). As the administrative law judge properly found,[8] and contrary to employer's contention, in a case such as this one where it is uncontroverted that claimant sustained traumatic injuries, the only relevant inquiry is whether claimant's work injury precluded her return to her usual work prior to her retirement. *See Hoffman*, 35 BRBS 148; *Harmon*, 31 BRBS 45. The administrative law judge, therefore, addressed the issue of whether claimant has established her prima facie case of total disability.

In order to establish a prima facie case of total disability, claimant must demonstrate that she cannot return to her regular or usual employment due to her work-related injuries. *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). If claimant cannot return to her usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). 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 generally American Stevedoring, Ltd. v. Marinelli*, 248 F.3d

[7]The Act's voluntary retiree provisions apply only in occupational disease cases. 33 U.S.C. §§902(10), 908(c)(23), 910(d).

[8]The administrative law judge properly recognized that "the question of whether claimant retired voluntarily is not a discrete issue and the focus of the inquiry must focus on the claimant's ability to return to her usual employment." Decision and Order at 27.

54, 35 BRBS 41(CRT) (2d Cir. 2001); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

In this case, the administrative law judge accorded greatest weight to the February 2006 restrictions imposed by Dr. Halperin, JX 1-56, as supported by the credible testimony of claimant,[9] HT at 41-48, and Ms. Plante, JX 2-27, as well as the opinions of Drs. Willets, Gaccione and Wakefield,[10] EXs 7, 8; CX 6. The administrative law judge rationally concluded, after a comparison of claimant's restrictions with the job requirements of the senior electrical designer position,[11] that claimant is incapable of

[9]Employer contends that claimant's testimony that she took long flights to Hawaii, Washington and California, as well as long car trips belies her stated inability to sit for long periods. Emp. Brief at 21; HT at 71-74. We note that claimant also stated she would "get up and walk around on the airplane a little bit" during flights, that sitting on prolonged flights is very different from sitting at her desk at work in terms of the concentration needed and use of her arms, and that she would "stop a lot" at rest are as in order to "alleviate my pain in my neck" resulting from driving a car. *Id.* at 83-84. The administrative law judge's finding that claimant is incapable of returning to her usual work for employer is premised on more than claimant's testimony regarding her inability to sit for great lengths of time; thus any error in the administrative law judge's failure to discuss the evidence pertaining to her sitting on plane flights and during car trips is harmless.

[10]The administrative law judge found that Dr. Willetts and Dr. Gaccione each restricted claimant from performing overhead work or tasks involving climbing or crawling. They opined that it would be difficult for claimant to sit or stand for long periods of time without the ability to change positions, and each imposed significant restrictions against lifting; Dr. Willets stated that claimant should avoid lifting more than 20 pounds from floor to waist, more than 10 pounds mid to chest level and avoid any higher lifting while Dr. Gaccione limited claimant from lifting anything greater than 10 pounds. EXs 7, 8. Similarly, Dr. Wakefield limited claimant to part-time sedentary work and indicated that sitting or standing for any length of time would "likely exacerbate [claimant's] lower back condition." CX 6. Moreover, Drs. Willets, Gaccione and Wakefield agreed that claimant would not be able to return to full-duty work. EXs 7, 8; CX 6.

[11]Specifically, the administrative law judge found that senior electrical designers are generally required: to be seated and working at their computer for a "large part" of the workday, HT at 102; to walk around and interact with other groups, *id.* at 102; to carry and transport drawings ranging in weight from five to forty pounds, *id.* at 143; and to

returning to work with employer in that capacity. Decision and Order at 26-29. In reaching this conclusion, the administrative law judge also acknowledged employer's ostensible willingness to modify the senior designer position to accommodate claimant's restrictions but permissibly determined, based on claimant's credible testimony regarding the past unavailability of accommodations, that employer was unlikely to grant accommodations for all of her restrictions every day and every time she needed them. Decision and Order at 14-17, 28-29. As the administrative law judge's findings are supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant's work injuries preclude her from performing the duties of a senior electrical designer. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Rice*, 44 BRBS 63. As employer has not challenged the administrative law judge's finding that it did not establish the availability of suitable alternate employment, the administrative law judge's conclusion that claimant is entitled to total disability benefits is affirmed. *See generally Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding 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

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climb down into ships to investigate potential design problems, *id.* Decision and Order at 28-29.