BRB Nos. 08-0366
and 08-0366A

T.K.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ARCO OIL AND GAS COMPANY	)	DATE ISSUED: 09/25/2008
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Quentin D. Price (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Kenneth R. Baird, Michael D. Williams, and Jeffrey D. Tobin (Brown Sims, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2006-LHC-1561) of Administrative Law Judge Russell D. Pulver (the administrative law judge) 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *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 sought benefits for a lower back injury sustained while he was working for employer on January 14, 1989. In his decision dated August 27, 1993, Administrative Law Judge Ainsworth H. Brown awarded claimant periods of temporary total and temporary partial disability benefits,[1] including a continuing award of temporary total disability benefits from February 2, 1992, as well as medical benefits. Claimant thereafter continued treatment for his lower back pain, including back surgeries in 1993 and 1995, without obtaining any significant improvement. Since 1995, he has been receiving palliative care consisting primarily of extensive use of pain medications.

In June 2006, claimant sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that he had reached maximum medical improvement as of June 1, 1995, and thus, was entitled to permanent total disability benefits from that time including any 33 U.S.C. §910(f) adjustments. At the December 7, 2006, hearing before the administrative law judge, the parties stipulated that claimant reached maximum medical improvement as of June 1, 1995, and identified the sole issue as involving the extent of claimant's present disability. Hearing Transcript (HT) at 6. This prompted the parties to submit, in accordance with the administrative law judge's instructions, post-hearing evidence regarding claimant's physical capabilities and resulting employability.[2]

In his decision, the administrative law judge initially found that claimant is unable to return to his usual employment. With regard to the availability of suitable alternate

[1] Specifically, Judge Brown found claimant entitled to temporary total disability benefits from January 1, 1990, to March 1, 1990, and temporary partial disability benefits from March 2, 1990, to February 1, 1992, followed by the continuing award of temporary total disability benefits. The temporary partial disability award reflects the period of time during which claimant was employed by his father's construction company. Claimant stated that he had to leave that position because he experienced increased back pain and was missing too much work. He has not worked since that time.

[2] This evidence consisted of the depositions of claimant's treating physician, Dr. Theesfeld, claimant's vocational expert, William Kramberg, employer's vocational expert, Carla Seyler, and Joann Krista, who is the Director of Floor Management at All Facilities, Incorporated, which had a work-at-home customer service/survey worker position available to claimant which Ms. Seyler identified, post-hearing, as suitable alternate employment.

employment, the administrative law judge found that claimant is, but for the trainee position with All Facilities, Incorporated (AFI), physically incapable of performing any of the positions identified by Ms. Seyler in her labor market surveys. The administrative law judge, however, found that the AFI position constituted sheltered employment. He thus concluded that employer did not establish the availability of suitable alternate employment. Consequently, he modified Judge Brown's prior award to reflect claimant's entitlement to permanent total disability benefits from June 1, 1995, including all applicable increases pursuant to Section 10(f).

On appeal, employer challenges the administrative law judge's finding that it has not established the availability of suitable alternate employment. BRB No. 08-0366. Claimant responds, urging affirmance of that finding. In his cross-appeal, claimant challenges the administrative law judge's admission of any evidence regarding the AFI position. BRB No. 08-0366A. In response, employer maintains that the administrative law judge properly admitted this evidence into the record. Employer also reiterates the arguments, raised in its appeal, that the labor market surveys of Ms. Seyler establish the availability of suitable alternate employment.

Employer argues that the administrative law judge erred in finding that claimant is unable to perform the suitable alternate employment identified by Ms. Seyler. Employer first contends that the administrative law judge erred by disregarding Dr. Xeller's opinions regarding claimant's physical restrictions and abilities to drive a motor vehicle and concentrate in general, in favor of the restrictions outlined by Dr. Theesfeld. Additionally, employer argues that the administrative law judge erred in finding that all of the jobs identified by Ms. Seyler are inappropriate for claimant given his physical and mental condition. Lastly, employer contends that the administrative law judge erred in finding that the AFI position constitutes sheltered employment, asserting that the record establishes that the AFI position is permanent, that employer is not the true employer during the initial 750 hour training program, and that the position contains sufficient productivity requirements.

Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). In order to meet this burden, employer must show the realistic availability of job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). A job which claimant is not educationally or physically qualified to perform is not suitable. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

In his decision, the administrative law judge rationally rejected each of the eight positions identified in the labor market survey conducted by Ms. Seyler on November 1, 2006,[3] based on his findings that claimant cannot be expected to safely drive the required distance of between 25 and 60 miles one way to work, and because each position involved duties beyond the scope of the credited work restrictions imposed by Dr. Theesfeld. In making these determinations, the administrative law judge, acting within his discretion, accorded greater weight to Dr. Theesfeld's opinion regarding the recommended length of work shift, as well as regarding claimant's work restrictions in general, because the evidence reflects that Dr. Theesfeld's restrictions are more tailored to the management of claimant's pain levels.[4] *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Specifically, the administrative law judge found that Dr. Theesfeld has a better understanding of claimant's condition by virtue of his status as claimant's treating physician since 2003, whereas Dr. Xeller's contact with claimant was limited to three examinations, performed on January 6, 2000, July 24, 2001, and October 5, 2006, as well as a review of claimant's medical records.

In assessing claimant's ability to drive, the administrative law judge rationally found, based on claimant's testimony and the opinion provided by Dr. Theesfeld, that claimant's chronic pain condition, and resulting need for narcotic pain medication, impedes his ability to safely operate a motor vehicle.[5] *See generally Sampson v. F.M.C.*

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[3] Ms. Seyler identified positions as a front desk clerk at different hotels, a restaurant cashier, a convenience store cashier, a sales agent, a PBX operator, a clerk position at a park, and a receptionist. Employer's Exhibit (EX) 26, Dep. at 145-147.

[4] Dr. Theesfeld recommended that claimant not return to work. He nevertheless opined, in the alternative, that claimant should be limited to morning hours for no more than two to three hours per day, that the job should involve alternating between sitting and standing, and that it should require no bending, squatting, climbing, kneeling, fine manipulation, or lifting in excess of 20 pounds.

[5] The administrative law judge rejected Ms. Seyler's testimony that claimant is capable of driving himself to work at either location, finding it based on an inaccurate understanding of claimant's pain levels and driving capabilities. In this regard, the administrative law judge found it significant that Ms. Seyler never met with claimant, that Dr. Xeller testified that it is common for people with low back pain to have difficulty traveling, and that Dr. Xeller also wrote a letter to employer stating that claimant might have some difficulty with driving to and from work in Jasper, Texas.

Corp., 10 BRBS 929 (1979); *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1033, 8 BRBS 658 (5th Cir. 1978) (a claimant's inability to drive as a result of a work-related injury is a factor which the administrative law judge should take into consideration in determining the extent of claimant's disability). Moreover, the administrative law judge found that it was unreasonable and unrealistic to expect claimant's wife, who works a fulltime job, to transport claimant to and from work each day, and that employer put forth no evidence regarding the availability of public transportation.

With regard to the specific positions identified in Ms. Seyler's labor market surveys, the administrative law judge found that the front desk jobs were inappropriate because they required occasional lifting in excess of the 20 pound restriction imposed by Dr. Theesfeld and because it was unclear whether the prospective employers could accommodate claimant's limitation of two to three hour shifts during morning hours. He next rejected the cashier positions at the Lone Star Buffet and the Golden Corral because the former position required standing almost all of the time, and the latter proved to be nonexistent. Claimant's Exhibit (CX) 15, Dep. at 23. Moreover, the administrative law judge rejected the sales agent position because the company was no longer in business, and the PBX operator, receptionist and remaining clerk position because they could not accommodate claimant's need for a two to three hour shift with alternating sitting and standing.

Employer's arguments challenging the administrative law judge's weighing of the evidence with regard to his finding that claimant is incapable of performing the suitable alternate employment identified by Ms. Seyler must be rejected. We decline employer's invitation to reweigh the evidence on this issue, as the Board is not empowered to do so. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge has addressed the totality of the lay and medical evidence of record and rationally found, based on the restrictions imposed by claimant's treating physician, Dr. Theesfeld, that claimant is incapable of performing the alternate work identified by Ms. Seyler. Decision and Order at 18-26; *see Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Employer has not demonstrated error in the administrative law judge's crediting of Dr. Theesfeld's opinion or in the inferences that the administrative law judge has drawn from the evidence of record. We therefore affirm the administrative law judge's finding that employer has not established the availability of suitable alternate employment via the positions identified in Ms. Seyler's labor market survey dated November 1, 2006, as it is supported by substantial evidence.

As for the trainee position with AFI,[6] the administrative law judge found that it appears suitable in the context of claimant's capabilities and limitations, but he nonetheless concluded that it is not evidence of suitable alternate employment, as it constitutes sheltered employment.[7] The identified position is as a Customer Service Associate/Survey Worker subsidized trainee, which would allow claimant to work at home making phone calls on behalf of AFI's clients. The administrative law judge, however, found that employer is the "true employer" for the AFI position during the subsidized training period because, via Catalyst RTW, it controls the payment of paychecks, the hourly rate, and the number of hours offered.[8]

The administrative law judge next found that the AFI position constitutes sheltered employment as it is unnecessary to employer's operations. In this regard, the administrative law judge found that the productivity of the subsidized trainee is not being tracked, nor is it necessary for the trainee to be productive at all in order to gain or retain

[6] AFI is an "inside sales company" that consists of "a group of people that work on the phones calling different businesses throughout the country to set up phone appointments for [their] clients and prospective customers" to see if there is "a need for their goods and services." EX 29, Dep. at 9-10.

[7] Contrary to the contentions raised in claimant's cross-appeal, the administrative law judge properly admitted employer's evidence regarding the AFI position. As the administrative law judge found, claimant was not prejudiced by the admission of the evidence regarding the AFI position because he was given an opportunity to, and did, in fact, respond to employer's evidence on this issue. Decision and Order at 2. In this regard, claimant participated in the deposition of Ms. Krista. EX 29. Additionally, claimant submitted testimony from his vocational expert, Mr. Kramberg, as well as a letter from an employee of Catalyst RTC, in rebuttal to employer's evidence of the AFI position. CXs 15, 17. As the administrative law judge has directly addressed claimant's objections to the admission of employer's evidence as to the AFI position, and provided claimant with every opportunity to submit additional evidence in rebuttal to the evidence submitted by employer, claimant has not been denied its right to procedural due process. 20 C.F.R. 702.338; *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 89 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table).

[8] The administrative law judge found that during the training period, AFI issues paychecks, but that Catalyst RTW reimburses them for the paychecks and any other special needs equipment. Employer then reimburses Catalyst RTW for its payments and also compensates Catalyst RTW for its services. EX 26, Dep. at 44, 102.

the trainee position. Specifically, the administrative law judge inferred that employer "is attempting to facilitate payment of claimant at another company for shifts completed that are not tied to productivity, contribution to company profit, or the completion of any work necessary for the operations of the company, and to then end any such payments after a short period of time in an attempt to manufacture suitable alternative employment." Decision and Order at 26.

Sheltered employment has been described as a job for which the employee is paid even if he cannot do the work or a job that is unnecessary to employer's operations and was created merely to place claimant on the payroll. *See generally Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). Sheltered employment does not exist where, for example, the employee is in a job which is necessary, he is capable of performing it, he is protected by a collective bargaining agreement, and he would have to be replaced if he left. *See Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412, 416 (1981).

We affirm the administrative law judge's finding that employer is, in effect, the employer of the subsidizing trainees at AFI as it is supported by substantial evidence. Specifically, the record indicates, as the administrative law judge found, that employer has, through its connection to Catalyst RTW, extensive control over the individuals hired to work in the AFI subsidized trainee program. In this regard, a letter from Catalyst RTW states, "the first 450-750 hours of [claimant's] employment [with AFI] will be subsidized by your insurance carrier or time-of-injury employer." EX 29 at 121. This is supported by the testimony of Ms. Krista, AFI's Director of Floor Management, that Catalyst RTW reimburses AFI for all money it spends on individuals in the training program, including its portion of the social security tax, such that AFI does "not pay for anything" to employ those individuals. *Id*. at 19, 51-52. Moreover, Ms. Krista acknowledged that Catalyst RTW sets the payscale, *id*. at 62, as evidenced by the fact that its referral letter "shows how much per hour they are going to be making at so many hours per week." *Id*. at 81, 107-108; *see also* EX 30.

Additionally, there is no indication that subsidized trainees are required to meet any specific productivity requirements to keep his or her job, or that the trainee position would lead to a permanent job with AFI. In this regard, Ms. Krista testified that she does not submit any reports to Catalyst RTW relative to workers not being productive, nor does she take any specific action regarding an individual until after the subsidized training program ends. EX 29, Dep. at 89. She stated that she merely sends Catalyst RTW an invoice regarding the hours worked and answers occasional questions regarding a potential fluctuation of those hours. *Id.* At the end of the training session, Ms. Krista stated that she assesses an individual's productivity and makes a determination as to

whether to offer them a non-trainee position with AFI.[9] Given this evidence, the administrative law judge's inference that a claimant's continued participation in the trainee program is dependent exclusively upon employer's sustained payments, through Catalyst RTW to AFI to fund the position, is rational and supported by substantial evidence. As the record establishes that during the subsidized training period, employer would fund claimant's wages, but that employer would receive no benefit from claimant's work in the AFI position, we affirm the administrative law judge's conclusion that said position constitutes sheltered employment.[10] *See generally Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Harrod*, 12 BRBS 10.

Thus, as it is supported by substantial evidence, the administrative law judge's finding that employer has not established the availability of suitable alternate employment is affirmed. Consequently, the administrative law judge's modification of Judge Brown's decision to reflect claimant's entitlement to permanent total disability benefits from June 1, 1995, including all applicable increases pursuant to Section 10(f) is affirmed.

[9] Ms. Krista testified that over the past three or four years she has received approximately 175 referrals from Catalyst RTW. EX 29, Dep. at 99. She also stated, however, that at present, she has only five full-time employees at AFI. *Id.* at 100. Ms. Krista added that this should not be considered as the hiring rate (5 out of 175) at AFI because she has had other individuals who have worked briefly for AFI following their trainee program and have left for other employment, or because they have "settled their case." *Id*. at 39. Ms. Krista noted that between October 1, 2006, and April 1, 2007, she had about 28 referrals from Catalyst RTW, that as of the May 2007, eleven of those individuals remained employed in the subsidized program, and that as of that point in time, she planned to offer permanent employment with AFI to two of those individuals. *Id*. at 84-85. She otherwise did not provide any number regarding the actual hiring rate of AFI from those participating in the subsidized training program. *Id*. at 39.

[10] The administrative law judge's findings as to the speculative nature of a claimant's continued employment in the AFI trainee program, as well as regarding that individual's ability to secure permanent ongoing employment with AFI upon completion of the subsidized training program, further support the administrative law judge's finding that the AFI position is insufficient to establish the availability of suitable alternate employment. *See Edwards v. Director, OWCP*, 999 F. 2d 1374 (9th Cir. 1993), *cert denied*, 114 S. Ct. 1539 (1994) (where claimant's post-injury employment is short lived, it does not constitute realistic and regular work available to claimant in the open market).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits 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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BETTY JEAN HALL
Administrative Appeals Judge