BRB No. 00-433

TIM BARNES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan 12, 2001
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr. (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

Christopher A. Taggi (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-1087) of Administrative Law Judge Fletcher E. Campbell, 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 injured his left shoulder during the course of his employment on November 2, 1993. Tr. at 6. Employer voluntarily paid temporary total disability benefits for various periods between November 23, 1993, and September 10, 1998. Thereafter, employer paid temporary partial disability benefits. Emp. Ex. 1. Claimant filed a claim for permanent total disability benefits.

The administrative law judge held a hearing on the claim on September 13, 1999.

Claimant and employer stipulated as to the facts of the case, including the date of injury, the date claimant's condition reached maximum medical improvement, September 9, 1998, and claimant's average weekly wage, $401.85. Tr. at 6, 9-11. The only issue before the administrative law judge was the extent of claimant's disability, as the parties also agreed claimant is unable to return to his usual work as a painter. The administrative law judge determined that none of the jobs presented by employer constituted suitable alternate employment for claimant; consequently, he stated he need not address whether claimant conducted a diligent job search. Decision and Order at 8. The administrative law judge then awarded claimant permanent total disability benefits from September 10, 1998, and continuing, based upon the stipulated average weekly wage. *Id.* Employer appeals the decision, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in awarding permanent total disability benefits as it established the availability of suitable alternate employment and claimant's job search was not a diligent one. Under the Act, the claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). Where, as here, it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, background, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *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).

In this case, Gary Klein conducted a labor market survey on behalf of employer. On November 18, 1998, he reported six positions he felt were suitable for claimant: security guard, donation center attendant, assembler, hotel desk clerk, inspector, and order taker. Dr. Stiles, claimant's physician, approved four of these positions, rejecting the inspector and assembler positions. Emp. Ex. 3. In an addendum dated August 25, 1999, Mr. Klein identified five more jobs he believed were suitable for claimant: three cashier jobs, assembler, and packer. Emp. Ex. 4. These jobs were not submitted to Dr. Stiles. Meanwhile, claimant worked with rehabilitation counselor Kenneth Vaughan from June 1998 through March 1999. Claimant was unable to find employment, although both counselors believe he is employable.

Initially, we shall review the administrative law judge's individual reasons for rejecting ten of the eleven jobs presented. We hold that his rejection of the order taker job and the hotel desk clerk job was rational. Mr. Vaughan testified that claimant's vocational testing established deficient reading skills and that claimant was not mentally able to perform these jobs. Tr. at 98-99, 103-104. As the administrative law judge found Mr. Vaughan to be a highly credible witness, Decision and Order at 6-7; Tr. at 132, his conclusion based on Mr. Vaughan's testimony is supported by substantial evidence. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Armfield v. Shell Offshore, Inc.*, 30 BRBS 122 (1996). Further, the administrative law judge's rejection of the assembly and inspector positions, based upon the disapproval of Dr. Stiles, Emp. Ex. 3, is supported by substantial evidence and also is affirmed. *Id.*; *see also Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). The administrative law judge's rejection of the job as a packer with an employer which could not be located also is affirmed, as the administrative law judge could rationally find under these circumstances that it was not a realistic job.

The administrative law judge's reasons for rejecting the remaining jobs, however, are not valid. The administrative law judge rejected cashier positions at Colonial Williamsburg and at an airport parking lot because the positions were closed when claimant inquired about them post-hearing. The standard for showing suitable alternate employment requires that jobs be available during the "critical period" when the claimant is able to work. There is no requirement that a job be available at the time of the hearing, *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984), or when the labor market survey is compiled. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996). In this case, claimant's condition reached maximum medical improvement on September 9, 1998, and his restrictions became effective the next day. Mr. Klein conducted his labor market survey and supplement thereto in November 1998 and August 1999. According to the reports and his testimony, the jobs he submitted were available periodically since September 1998, and some were available as of the date of the hearing on September 13, 1999. Emp. Exs. 3-4; Tr. at 23-40. As the positions were available during the period claimant was able to work, *i.e.*, after the date he was released to work and his restrictions went into effect, the administrative law judge's reason for rejecting them was improper. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT).

Additionally, the administrative law judge rejected the security guard and donation

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[1]One assembler position was not submitted to Dr. Stiles, but it was reasonable for the administrative law judge to presume disapproval of it because of Dr. Stiles's disapproval of a similar job. *See* Decision and Order at 7-8; Emp. Exs. 3-4.

center attendant positions because claimant, who applied for the jobs, was not hired. However, an employer is only required to show the availability of jobs which the claimant is capable of performing; it is not required to obtain actual employment for him. *See generally Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT). The fact that claimant applies for jobs shown by employer as available and is unable to obtain employment certainly is relevant to whether claimant diligently sought employment. However, this issue is not reached until employer establishes suitable alternate employment, and the administrative law judge here specifically stated he need not address claimant's diligence. As claimant's ability to actually obtain a job is not determinative of suitable alternate employment, the administrative law judge's rejection of two jobs for this reason is improper. As the administrative law judge's reasoning for rejecting the cashier, security guard and donation center attendant positions is flawed, his findings that these positions are not available alternate employment must be vacated, and the case remanded for reconsideration.

In addition, the administrative law judge rejected all the jobs submitted by employer because he found that none of the prospective employers was informed of claimant's felony conviction. The administrative law judge specifically stated that "no job can be found suitable or available to a person whose prospective employer is unaware of such a history." Decision and Order at 6. Employer argues that this statement is overly broad, as a criminal record does not render all employment unavailable, and as so little is known about claimant's conviction, such as the date, it argues that it should not be held responsible for adjusting its job search. The courts have clearly held that a claimant's criminal record which is part of his pre-injury history is included as his "background" and must be taken into consideration in conducting a search for suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Piunti v. I.T.O. Corp.*, 23 BRBS 367 (1990). In both *Hairston* and *Piunti*, the claimants' prior felony convictions rendered jobs at a bank and as a security guard unsuitable. The Board, however, distinguished those cases from one involving a post-injury conviction, stating that the jobs submitted by the employer were not defeated by the post-injury temporary suspension of the claimant's driver's license, as there was no permanent impediment to employment requiring driving. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). Thus, while a criminal record may permanently eliminate consideration of certain types of jobs, it does not automatically preclude the availability of, or make unsuitable, *all* alternate employment. In this case, employer became aware of claimant's felony conviction near the end of a post-hearing deposition. Emp. Ex. 5 at 37-38. In questioning claimant, employer learned only that claimant had been convicted of a drug-related felony and that he had not been convicted of any felonies involving lying, cheating or stealing. *Id.* Employer was unable to elicit from claimant any specifics, such as when he was convicted. Without additional information, the

[2]Contrary to claimant's assertion that employer could have obtained this information from claimant at the deposition, claimant's counsel advised him not to answer the question of when the conviction occurred, thereby preventing employer from obtaining the necessary

record lacks evidence that claimant's felony conviction is a background factor which would affect claimant's ability to obtain the types of jobs relied upon by employer. *Hairston*, 849 F.2d 1194, 21 BRBS 122(CRT). Accordingly, we also vacate the administrative law judge's rejection of the alternate employment on this ground and remand the case for further fact-finding and consideration.

Consequently, the administrative law judge's finding that employer did not demonstrate the availability of suitable alternate employment is vacated, and the case is remanded for further consideration of whether the named jobs satisfy employer's burden. Specifically, the administrative law judge must first consider whether these jobs are appropriate for claimant, comparing his restrictions, background, and other relevant factors with the job duties. The administrative law judge also must consider the effect of claimant's felony conviction on his ability to obtain these jobs in accordance with this opinion. If the administrative law judge concludes on remand that the jobs satisfied employer's burden, the administrative law judge must then address claimant's diligence in seeking work; specifically, the results of claimant's attempts to secure the work presented by employer should be addressed at this point, as well as any other evidence of claimant's efforts to diligently seek employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Livingston*, 32 BRBS 123.

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information. Emp. Ex. 5 at 37.

[3]On remand, the administrative law judge must also address whether the third-shift cashier position at RaceTrac is suitable for claimant.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge