BRB No. 09-0466

JUAN RODRIGUEZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GULF STREAM MARINE, INCORPORATED	)	DATE ISSUED: 01/15/2010
	)	
and	)	
	)	
AMERICAN LONGSHORE MUTUAL ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Gus David Oppermann V (Wheat, Oppermann & Meeks, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2008-LHC-01220) of Administrative Law Judge C. Richard Avery 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 fell while ascending a ladder on August 8, 2004, during the course of his employment as a crane operator. Claimant sustained a fracture of the right tibia, meniscus tears of the right knee, and a lower back injury. Employer voluntarily paid claimant compensation under the Act for temporary total disability from August 27, 2004 to March 13, 2006, permanent partial disability based on a loss of wage-earning capacity from December 22, 2006 to February 15, 2007, 33 U.S.C. §908(c)(21), and permanent partial disability for a 14 percent right knee impairment, 33 U.S.C. §908(c)(2). The parties disputed the nature and extent of claimant's injuries from the work accident.

In his decision, the administrative law judge found that claimant's work injuries reached maximum medical improvement on May, 1, 2006, based on the report of that date by claimant's treating physician, Dr. Donovan. The administrative law judge credited the opinions of Dr. Donovan and Dr. Nelms to find that claimant is unable to return to his usual employment as a crane operator. The administrative law judge found that employer's offer of work as a scale house operator was sheltered employment, that the labor market survey employer submitted did not establish the availability of suitable alternate employment, and that employer failed to proffer any jobs claimant could physically perform. The administrative law judge found that claimant did not willfully refuse to cooperate with Carolina Valencia, a vocational rehabilitation counselor appointed by the Department of Labor (the Department) in May 2008 to assist claimant in finding work. Claimant returned to work for a different employer on January 6, 2008, as a mechanic's helper earning approximately $7.25 per hour. The administrative law judge found that this job constitutes suitable alternate employment and establishes claimant's post-injury wage-earning capacity. The administrative law judge awarded claimant compensation for temporary total disability from August 8, 2004 through May 1, 2006, permanent total disability, 33 U.S.C. §908(a), from May 1, 2006 through January 6, 2008, and continuing permanent partial disability from January 6, 2008, based on a wage-earning capacity of $257.61 per week. 33 U.S.C. §908(c)(21), (h).

On appeal, employer challenges the administrative law judge's finding that claimant is unable to return to work as a crane operator.[1] Employer also contends that it established the availability of suitable alternate employment prior to January 6, 2008. Claimant responds, urging affirmance of the administrative law judge's decision.

[1] We need not address employer's contention that claimant reached maximum medical improvement on May 1, 2006, as the administrative law judge found that claimant reached maximum medical improvement on this date. Decision and Order at 19.

Employer contends that the medical evidence of record establishes that claimant is able to return to work without any restrictions. In order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the work injury. *See, e.g., McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002); *Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). Dr. Donovan opined in March 2006 that claimant could not work as a crane operator. CX 15; EX 8 at 3. Dr. Nelms, who initially examined claimant at employer's request, opined in December 2006 that claimant cannot work as a crane operator because the sitting would potentially aggravate claimant's back condition, that use of foot controls would be difficult due to claimant's right knee impairment, and that operating heavy equipment is contraindicated by claimant's use of pain medication. EX 5 at 20-22; *see also* EX 5 at 5, 10, 36. Dr. Acosta conducted an independent medical examination for the Department in January 2007. Dr. Acosta opined that claimant suffered no permanent restrictions from his work injury and that he could return to work. EX 10. In his decision, the administrative law judge gave greater weight to the opinion of Dr. Donovan, claimant's treating physician, and to Dr. Nelms, who evaluated claimant several times, over the opinion of Dr. Acosta, who saw claimant only one time more than two years after the work injury. Decision and Order at 20.

There is no requirement that the administrative law judge give greater weight to the opinion of an independent medical examiner; rather, he may accept or reject all or any part of any testimony according to his judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and he may consider a variety of medical opinions in determining the extent of the claimant's disability. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge rationally credited the opinion of claimant's treating physician, Dr. Donovan, as supported by that of Dr. Nelms, to conclude that claimant is unable to return to his usual employment as a crane operator. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *see generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant cannot return to his usual employment. *See Gacki*, 33 BRBS 127.

Employer next generally asserts that it provided evidence that employment was available within the restrictions and work releases issued by claimant's physicians. Once claimant established that he is unable to return to his usual employment, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age,

education, work experience, and physical restrictions, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also 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). A job in the employer's facility within the claimant's restrictions may meet this burden provided it is necessary work. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Claimant must reasonably cooperate with a rehabilitation specialist, and a failure to do so may be considered in evaluating the extent of claimant's disability. *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999).

Dr. Nelms opined in March 2006 after claimant underwent a Functional Capacity Evaluation that claimant could perform sedentary to light-duty work as long as he avoided significant lifting or climbing. CX 10 at 1-4; EX 5 at 25. Dr. Donovan released claimant to light-duty work on January 31, 2007, with restrictions of no squatting, kneeling, crawling, bending or twisting, and a 10-20 pound lifting restriction; he stated that claimant should avoid stairs. CX 14. The administrative law judge credited Dr. Donovan's release as of January 2007 and the restrictions he placed because he examined claimant more often than did Dr. Nelms. Decision and Order at 21-22. Therefore, the administrative law judge found premature a labor market survey employer conducted on October 19, 2006. CX 12. In February 2007, employer offered claimant employment as a scale house operator at his former wages. *See* CXs 16-17; EX 17. The administrative law judge found that this position is sheltered employment that does not establish the availability of suitable alternate employment. The administrative law judge found that this job is a new position employer created for claimant that appears to require very little effort, there is no evidence of its usefulness, and the wages appear excessive in view of its limited duties. The administrative law judge found that claimant sought alternate work, including the jobs identified in the October 2006 labor market survey, until he obtained full-time work on January 8, 2008, as a mechanic's helper paying approximately $7.25 per hour. Tr. at 22-26; CXs 16, 18. The administrative law judge rejected employer's contention that claimant failed to cooperate with Ms. Valencia, who was appointed by the Department in May 2008 to contact claimant and conduct a labor market survey. Claimant did not appear for an appointment with Ms. Valencia, and she closed the file due to "non-cooperation." EX 6 at 8-9. The administrative law judge found that claimant did not act unreasonably because he had been working since January 2008 and he expressed concern to Ms. Valencia about participating in vocational rehabilitation when he already had a job. EX 6 at 7. The administrative law judge found that employer's October 13, 2008, labor market survey identified six positions paying an average wage less than claimant's current job pays. Decision and Order at 24, 24 n.14; *see* EX 18. Accordingly, the administrative law judge found that claimant's job as a mechanic's helper is suitable and claimant's actual post-injury wages establishes his post-injury wage-earning capacity at $290 per week beginning on January 6, 2008, and that claimant was totally disabled prior thereto.

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Moreover, in its Petition for Review and brief, employer does not make any specific allegations of error in the administrative law judge's findings that employer's offer of work as a scale house operator was sheltered employment, that claimant did not fail to cooperate with Ms. Valencia, that claimant's finding work as of January 6, 2008, established the date suitable work became available, and that claimant's post-injury wage-earning capacity is set by his actual post-injury wages. Merely reciting its Post-hearing Brief as the sum of its assertion of error by the administrative law judge is insufficient to satisfy the requirement that a party specify alleged errors in the administrative law judge's consideration of the evidence. Mere recitation of favorable evidence is insufficient. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *see also Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997); 20 C.F.R. §802.211(b). As the evidence cited by the administrative law judge constitutes substantial evidence supporting his conclusion that the mechanic's helper job is the first suitable job after Dr. Donovan released claimant to work, we affirm the administrative law judge's award of compensation for total disability prior to January 6, 2008, and for permanent partial disability thereafter. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

Accordingly, the administrative law judge's Decision and Order 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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JUDITH S. BOGGS
Administrative Appeals Judge