

JEFFREY D. CUNNINGHAM)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	DATE ISSUED: 01/27/2010
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

Janmarie Toker (McTeague, Higbee, Case, Cohen, Whitney & Toker,
P.A.), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & Detroy, LLC), Portland, Maine, for
self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification (2008-LHC-00134) of
Administrative Law Judge Jeffrey Tureck 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 was injured on January 12, 1994, during the course of his employment for employer as a marine electrician. Claimant continued working until September 15, 1995, when he underwent a left ulnar nerve transposition. Claimant returned to light-duty work for employer until August 21, 1996, when there was no further light-duty work available within claimant's restrictions. After leaving work, claimant underwent a left carpal tunnel release on October 16, 1996, a right carpal tunnel release on January 27, 1998, an arthroscopic synovectomy of the right elbow on November 16, 1999, and lumbar disc surgery on June 22, 2000. Employer voluntarily paid claimant benefits through December 3, 1999, under the Maine Workers' Compensation Act, when it controverted the claim. Claimant sought benefits under the Act for temporary total disability commencing December 3, 1999.

In the first decision on this claim, Administrative Law Judge Levin found that claimant's hand, elbow, arm, neck, and back conditions were caused or aggravated by the work accident. Claimant was awarded temporary total disability compensation commencing December 3, 1999, and medical benefits. Subsequently, employer and claimant requested modification of Judge Levin's decision pursuant to Section 22 of the Act, 33 U.S.C. §922. Employer contended that Judge Levin mistakenly found that claimant's neck and back injuries were caused by the work accident and that claimant's total disability had changed to partial based on its evidence of suitable alternate employment. Claimant contended that his temporary disability had become permanent.

In his decision, Administrative Law Judge Tureck (the administrative law judge) found that employer did not establish that claimant's back and neck injuries are not related to the work accident. The administrative law judge found that claimant's work-related conditions reached maximum medical improvement on March 16, 2005. The administrative law judge credited medical evidence that claimant is physically capable of performing light-duty work and he found that employer's February 15 and August 26, 2008 labor market surveys identified the availability of suitable alternate employment. The administrative law judge found that claimant has a loss of wage-earning capacity of \$291.84 per week due to his work injuries. Thus, the administrative law judge modified the decision to award claimant compensation for permanent partial disability commencing February 15, 2008.¹

¹ Employer's request for Section 8(f) relief from continuing compensation liability was denied. 33 U.S.C. §908(f). The administrative law judge also rejected claimant's contention that he is entitled to payment for medical services related to treatment of a left foot injury.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's finding. Claimant has filed a reply brief.

Once, as here, a claimant establishes his inability to perform his usual work, the burden shifts to employer to establish the availability of job opportunities that claimant could realistically secure given his age, vocational history, education and restrictions from the work injury. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). Claimant contends the administrative law judge erred by failing to consider the effects of claimant's psychological and behavioral problems on his ability to obtain and perform alternate work. Claimant asserts that these problems arose from and have worsened as a result of his January 1994 work accident. Although a claimant's behavioral and mental state may be relevant considerations in determining whether an employer establishes the availability of suitable alternate employment, *see generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997),² there is nothing in the record to establish that claimant raised before the administrative law judge on modification the theory that his work accident caused or contributed to a post-injury psychological condition. Claimant also did not oppose employer's motion for modification on the ground that such conditions affect his ability to obtain and perform suitable alternate employment. Consequently, claimant cannot raise this issue for the first time on appeal. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 101 (2009); *see also Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).

Moreover, employer is not required to present evidence of suitable alternate employment that addresses a claim not made by claimant, *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), nor is employer required to account for restrictions arising from post-injury conditions that are not related to the work injury. Restrictions resulting from conditions pre-existing the injury are to be considered in addressing a claimant's ability to work in alternate employment. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). However, disability related to a subsequent non-covered injury is not compensable. *Tracy*, 43 BRBS at 102; *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981) (Miller, J., concurring in result) (Smith, C.J. dissenting); *see also Mississippi Coast Marine v. Bosarge*, 637 F.2d 994, 12 BRBS 969, *modified on reh'g*, 657 F.2d 665, 13 BRBS 851 (5th Cir. 1981); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954). In this case, claimant did not assert that he had pre-existing psychological problems, but

² However an inability to secure alternate employment due to a "negative attitude" and lack of interpersonal skills does not entitle a claimant to total disability benefits. *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J. dissenting).

alleges on appeal that his current psychological condition precludes him from obtaining and holding any employment. Claimant does not challenge the administrative law judge's findings that he is physically capable of performing light-duty work and that employer established the availability of suitable alternate employment within claimant's physical restrictions. Claimant alleges only that the restrictions imposed by the alleged psychological condition would preclude any employment. On the facts presented, such restrictions are severable from those relating to claimant's work-related physical injuries and need not be accounted for in determining the extent of claimant's disability. *Tracy*, 43 BRBS at 102.

As claimant did not raise below his contention that he has a post-injury work-related psychological disability, and as the effects of any post-injury non work-related psychological disability are not compensable, we reject claimant's contention that the administrative law judge erred by failing to consider the effects of his alleged post-injury psychological and behavioral problems on his ability to obtain and perform alternate jobs. We affirm the administrative law judge's conclusion that employer established the availability of suitable alternate employment as it is supported by substantial evidence, and the consequent award of benefits for permanent partial disability.

Accordingly, the administrative law judge's Decision and Order on Modification is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge