BRB No. 04-0865

RODNEY L. FISHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED: 07/29/2005
	)	
and	)	
	)	
ARM INSURANCE SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Daniel C. Shaughnessy (Robert P. Eshelman, P.A.), Jacksonville, Florida, for claimant.

Mary Nelson Morgan (Cole, Stone, Stoudemire & Morgan, P.A.), Jacksonville, Florida, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2000-LHC-534) of Administrative Law Judge Mollie W. Neal 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 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To reiterate the facts, claimant injured his back on August 9, 1996, while working for employer as a latcher/driver. Dr.

Rogozinski performed a diskectomy and fusion at L4-5 and L5-S1 on May 22, 1997. EX 4 at 14-15. Claimant returned to work after Dr. Rogozinski pronounced him at maximum medical improvement on January 23, 1998, and recommended he return to medium or medium-light duty work. EX 4 at 17; Tr. at 20. Claimant returned to work for employer in March 1998, driving cars off ships, but worked for only four days due to pain. Tr. at 20, 22, 35-36; Decision and Order 1 at 4. Employer suspended payment of benefits on March 13, 1998. EXs 8, 9. In September 1998, claimant admitted himself to Charter-by-the-Sea, a facility where he was treated for depression and substance abuse problems. CX 4.

In her first Decision and Order, the administrative law judge found that employer established the availability of suitable alternate employment paying in excess of claimant's average weekly wage at the time of his work injury, and that claimant did not establish diligence in seeking alternate employment. Accordingly, she determined that claimant did not have a loss of wage-earning capacity and therefore was entitled to no further disability compensation.

On appeal, the Board vacated the administrative law judge's finding that employer established the availability of suitable alternate employment and remanded the case for the administrative law judge to address whether employer established suitable alternate employment in view of claimant's depression, as the administrative law judge based her finding regarding the extent of claimant's disability solely on evidence regarding claimant's physical capacity to work. *Fisher v. Stevens Shipping & Terminal Co.*, BRB No. 02-0129 (Sept. 30, 2002) (unpub.), slip op. at 4.[1] In her Decision and Order on Remand, the administrative law judge once again found that employer established the availability of suitable alternate employment, and that claimant is not entitled to further benefits as he does not have a reduced wage-earning capacity.

In the present appeal, claimant contends the administrative law judge erred in not taking into consideration claimant's psychiatric condition in finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision. Claimant has filed a reply brief, reiterating his arguments.

Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic

[1] The Board held that the administrative law judge's findings that the jobs identified by employer are physically suitable for claimant and that claimant did not diligently seek alternate employment are supported by substantial evidence. *Fisher*, slip op. at 3, 6 n.5.

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. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also 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. 1986), *cert. denied*, 479 U.S. 826 (1986). Employer must produce evidence of jobs which claimant is capable of performing given his mental and psychological capabilities, as well as his physical restrictions. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Turner*, 661 F.2d 1031, 14 BRBS 156; *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

As discussed by the Board in its prior decision, the record contains a rating decision from the State of Florida Department of Veterans' Affairs (the VA), finding that claimant has major depression with an assessment of global functioning of 25-30, CX 1,[2] as well as an extensive medical file compiled by Charter-By-The-Sea Behavioral Health System which reflects that claimant admitted himself to that facility from September 11 through September 22, 1998, for the treatment of depression which he related to his ongoing back pain and narcotic dependence. Claimant was diagnosed with major depression and substance abuse, and, upon discharge, was referred for outpatient care. CX 4. Additionally, the Board discussed the testimony of Mr. Spruance, a vocational counselor, who found claimant to be unemployable based upon his understanding of claimant's physical and psychiatric conditions. *See* CX 2; Tr. at 41-52. In rendering this opinion, Mr. Spruance explained that the foundation for his opinion that claimant is unemployable was the global assessment of functioning (GAF) score, an overall evaluation of the "limiting aspects of the psychiatric condition" and the records of Dr. Kaleel, a VA doctor. Tr. at 45. Mr. Spruance explained that the 25-30 GAF figure on admission to Charter-By-The-Sea, and the 50 GAF score from Dr. Kaleel in October 1998, reflect the acute stage claimant was in at that time, and that these scores are incompatible with employment. *Id.* He acknowledged that he had not seen any specific restrictions based on claimant's psychological condition, but stated

[2] The letter is a "rating decision" informing claimant that he has met the disability requirements for a non-service connected pension, based on a finding that claimant has a major depression, with an assessment of global functioning of 25-30, low back condition, tension headaches, and pyrophobia, without current clinical findings. CX 1.

that the GAF, while "not exactly a psychiatric limitation . . . is a reflection of the individual's capacity." Tr. at 51-52. In addition, claimant testified that he continues to receive psychiatric care and take medications for his depression.[3] Tr. at 24-26.

In contrast to the opinion of Mr. Spruance, Mr. Robinson, a vocational consultant at Associated Rehabilitation Services (ARS), prepared labor market surveys in March 1998 and April 2000, and Dr. Rogozinski approved several of the positions identified in the surveys as being suitable for claimant. *See* Emp. Exs. 1, 3, 6. Tr. at 56. Mr. Robinson testified that each labor market survey took into consideration claimant's age, education, work experience and physical restrictions.[4] Tr. at 56. Dr. Rogozinski reviewed the documentation from the VA and stated that although he had not seen the rating decision from the VA at the time he released claimant for work, reading the letter did not change his opinion with regard to claimant's ability to return to work and it did not affect the restrictions he placed upon claimant. EX 1 at 39.

Addressing this evidence relevant to claimant's psychological condition in accordance with the Board's instructions on remand, the administrative law judge stated that: "[a]lthough there are references to GAF scores which are relied on by the claimant's vocational expert in coming to his conclusion that the claimant was unemployable, there is no medical opinion in the record with regard to those scores;" Decision and Order on Remand at 5, that the record contains no documentation from any psychiatrist giving an opinion under oath with regard to the significance of those scores; that Mr. Spruance

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[3] Mr. Spruance referred to the records of Dr. Kaleel, a VA hospital psychiatrist, which were not offered for admission at the original proceeding before the administrative law judge. Claimant also testified that after his discharge from Charter By-The-Sea he continued his psychiatric care with Dr. Kaleel and a Dr. Saley, whom he found on his own. No reports from this treatment are in the record. On remand, the administrative law judge declined to reopen the record for the receipt of further evidence on this issue. Decision and Order on Remand at 3 n.1. Claimant may seek modification pursuant to Section 22 of the Act, 33 U.S.C. §922, if he wishes to have this evidence addressed. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

[4] Mr. Robinson explained that his vocational interview included a work history, medical treatment to date, activities of daily living and vocational tests to assess interests, aptitude and ability. He also considered restrictions imposed by Dr. Rogozinski, but did not have the records relating to claimant's mental state from Charter-By-The-Sea, or claimant's global assessment scores from a physician at the VA. Mr. Robinson stated that claimant told him that he was seeing a psychiatrist at the VA, but that he assumed that it was for a service-related condition and not related to the injury. Tr. at 56-57, 65-66.

admitted that the GAF scores are "not exactly a psychiatric limitation;" Tr. at 51, and that there are no psychiatric restrictions on claimant's ability to perform work post-injury. Decision and Order on Remand at 4-5. Lastly, the administrative law judge found that there is no opinion that claimant's psychological condition in any way limited his ability to seek employment or diminished the viability of the jobs approved by Dr. Rogozinski, the only medical doctor to testify in this matter. Decision and Order on Remand at 6. Accordingly, the administrative law judge found that employer established the availability of suitable alternate employment.

Contrary to claimant's contention of error, the administrative law judge did not find that claimant does not suffer from a psychological condition. Rather, she found that the record contains no creditable evidence of employment restrictions based on claimant's psychiatric problems. *See* Decision and Order on Remand at 6. Moreover, this finding is rational and supported by substantial evidence. The administrative law judge rationally declined to interpret Mr. Spruance's opinion as supporting claimant's unemployability in the absence of medical evidence interpreting the report of the VA physicians. The administrative law judge addressed the totality of the lay and medical evidence of record and rationally found that claimant is capable of performing certain types of medium level work. Claimant has not demonstrated error in the administrative law judge's crediting the opinions of Dr. Rogozinski and Mr. Robinson or in the inferences that she declined to draw from Mr. Spruance's testimony. *See generally 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). Thus, we affirm the administrative law judge's finding that claimant is capable of medium-level employment and that employer established the availability of such employment.[5] *See* n.1, *supra.*

[5] In her first decision, the administrative law judge found that claimant had no post-injury loss of wage-earning capacity. The Board instructed the administrative law judge on remand to reconsider the issue. On remand, the administrative law judge reaffirmed her prior finding that claimant has no loss of wage-earning capacity and she did not grant claimant a nominal award. Decision and Order on Remand at 6-8. These findings are not challenged on appeal and are accordingly affirmed.

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

SO ORDERED.

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ROY P. SMTIH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge