BRB No. 03-0626

CLARENCE L. STRINGFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: JUN 14, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP) Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick) Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-LHC-1245/1246) of Administrative Law Judge Richard K. Malamphy 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, a painter, injured both knees at work on November 27, 1999. He ceased work on April 21, 2000, and subsequently underwent surgical replacement of both knees. Claimant sought compensation for permanent total disability. Employer contended that it established the availability of suitable alternate employment and that claimant is, therefore, limited to compensation under the schedule for partial disability. In his

decision, the administrative law judge found that employer failed to establish the availability of suitable alternate employment. Accordingly, he awarded claimant compensation for permanent total disability commencing March 1, 2001, and continuing.[1]

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision. Where, as in the instant case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability. The burden thus shifts to employer to establish the realistic availability of 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. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

In his reports and deposition testimony, Dr. Nevins outlined the restrictions he placed upon claimant following the knee replacement surgeries. He opined that claimant is limited to sedentary work and: (1) should not be on his feet for extended periods of time; (2) should avoid heavy lifting, ascending or descending ladders, extreme temperatures, and an outdoor environment; (3) should only infrequently go up and/or down stairs; and (4) should be able to sit and stand periodically at will. CX 1 at 13; 9 at 8. Employer's vocational expert, William Kay, identified four driving jobs that he opined are suitable for claimant.[2] CX 10 at 70-71. Mr. Kay explored these driving positions initially because claimant had driven a commuter bus to the shipyard for 23 years, until 1987, and had maintained his commercial driver's license. HT at 23. The administrative law judge found that the identified positions are not suitable because Mr. Kay conceded that the driving positions are not indoor work and that a driver could not sit or stand at will. CX 10 at 41. 43-44, 47. The administrative law judge also found that the positions require the driver to open and close bus windows and doors, to remove trash and debris from the vehicle, and, in the case of the van driver, to assist elderly or disabled

[1] Employer paid claimant compensation for temporary total disability from April 21, 2000 to March 10, 2002.

[2] Mr. Kay identified three positions as a school bus driver and one position as a van driver for a company that provides transportation to medical appointments. Although Dr. Nevins was sent descriptions of the identified positions, he never responded to employer's request that he approve or disapprove them. CX 10 at 33.

passengers into the van. CX 10 at 39, 44. The administrative law judge further observed that Mr. Kay acknowledged that the Dictionary of Occupational Titles lists "school bus driver" as requiring a medium level of exertion, whereas claimant is limited to sedentary work. CX 10 at 42; Decision and Order at 7. The administrative law judge thus concluded that the physical requirements for the identified positions are beyond claimant's restrictions and that the jobs therefore do not constitute suitable alternate employment.

We affirm the administrative law judge's finding that the job requirements exceed claimant's physical restrictions as it is rational and supported by substantial evidence. *See Ceres Marine Terminal v. Hinton*, 243 F.2d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1988); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). Employer seeks to have the Board reweigh the evidence of record and arrive at conclusions different from those reached by the administrative law judge. We decline to do so as this is beyond the Board's scope of review. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). It is well established that an administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Although Dr. Nevins did not restrict claimant from driving, the administrative law judge rationally found that the totality of claimant's restrictions prevent him from performing the medium-duty work entailed in driving a bus or van. We, therefore, affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment and the consequent award of total disability compensation to claimant.

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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge