BRB No. 02-0565

HERMAN E. PERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 9, 2003
	)	
Self-Insured Employer-Respondent	)	
	)	DECISION and ORDER

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

Chanda W. Stepney (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-2888) 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 worked as a chipper for employer from 1961 to March 10, 1999, and suffered an injury to his right knee due to cumulative trauma, which was diagnosed in February 1999. Claimant sought treatment for pain in his right knee with Dr. Stiles, who performed surgery on the knee on March 10, 1999. Claimant has not returned to work since the date of the surgery and sought benefits under the Act.

In his decision, the administrative law judge found that it is not disputed that claimant cannot return to his former work. However, he found that employer established the availability of suitable alternate employment based on security guard positions approved by Dr. Stiles. Thus, the administrative law judge concluded that claimant is limited to permanent partial disability benefits under the schedule. 33 U.S.C. §908(c)(2); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

On appeal, claimant contends that the administrative law judge erred in finding suitable alternate employment established based on two security guard positions and that the administrative law judge erred in failing to address whether claimant diligently sought alternate employment. Employer responds, urging affirmance of the administrative law judge's decision.

Initially, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment based on the two security guard positions as claimant is functionally illiterate and two experts testified that claimant cannot realistically compete for, secure, and perform work in the local economy. Moreover, claimant contends that he can perform only sedentary jobs and that security guard positions are light duty jobs. In addition, claimant contends that two security positions do not establish the existence of a "range of jobs," pursuant to *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

Once, as here, claimant establishes that he is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of a range 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. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

In the present case, claimant was treated by Dr. Stiles, who imposed the following restrictions on claimant's activities: no crawling, kneeling, or squatting, occasional standing up to 2.5 hours per day, no climbing ladders, and climbing stairs to and from the job only. In addition, Dr. Stiles stated that claimant could lift 30 pounds and carry the weight 50 feet. *See* Emp. Ex. 4; Cl. Ex. 2. Claimant was also seen by Dr. Tornberg, who assigned the same restrictions, Cl. Ex. 2; Emp. Ex. 5, and by Dr. O'Connell, who opined that claimant is restricted from climbing vertical or incline ladders, from using stairs except to and from work, and from crawling,

kneeling, squatting, and standing longer than two hours. Emp. Ex. 7. In October 2000, Dr. Stiles reported that claimant should not be on his feet for more than 20 to 30 minutes at a time and that due to the constant pain in his knees, he would need to get up and move about at least 3 to 4 times an hour. Cl. Ex. 1.

Claimant was seen by two vocational experts, Mr. DeMark, and Mr. Cooper, a vocational rehabilitation expert hired by the Department of Labor. Mr. DeMark reported on January 23, 2001, that claimant is not in a position to be competitive for any positions that are appropriate for his physical restrictions, given his other vocational deficits, *i.e.,* his work history is labor intensive, he has few transferable skills and he is illiterate. Cl. Ex. 11a. Mr. Cooper concluded that, with Dr. Stiles's restrictions, it is not feasible to develop a vocational goal, and that claimant's age and educational background are likely the biggest impediments to finding suitable alternate employment. Cl. Ex. 9. In August 2000, William Kay, a vocational consultant hired by employer, performed a labor market survey. He testified that he considered the restrictions imposed by Dr. Stiles in November 1999 and the fact that claimant would have a problem reading and writing. H. Tr. at 15-16. Of the jobs identified by Mr. Kay, Dr. Stiles approved positions as a rental car shuttler, as a van driver, and as a donation center attendant. In addition, Dr. Stiles approved the security jobs identified if they would entail minimal walking and standing. Emp. Ex. 10. Employer also offered the testimony of three employers' representatives who stated that they were willing and able to hire someone with claimant's qualifications and restrictions. Billy Fite, a manager with Goodwill Industries, testified that claimant was suitable as a donation center attendant, and that the position could be tailored for claimant's restrictions, including his limited ability to read and write. H. Tr. at 61-62. William Hill, the owner of James/York Security, described various security guard positions for which he stated claimant would be a candidate. He testified that the positions would be appropriate considering claimant's physical restrictions and limited ability to read and write. H. Tr. at 170-171. In addition, Mr. Hill stated that had claimant presented himself as "willing and able and motivated" he would have hired him as an unarmed security guard. H.Tr. at 173. Finally, in a post-hearing deposition, Gary Cote, a branch manager for Security Services of America, testified that he has security positions which would be suitable for claimant, given his physical restrictions, age, and limited ability to read or write. Emp. Ex. 20 at 24; *see also* Emp. Ex. 13.

The administrative law judge reviewed the evidence and concluded that the positions as rental car shuttler and van driver require extensive lifting and driving and thus are not suitable given claimant's restrictions. In addition, the administrative law judge found that the positions of Walmart greeter and donation center attendant required claimant to perform activities beyond his abilities based on the opinion of Mr. DeMark. However, he was not persuaded by Mr. DeMark's opinion that claimant would be unable to perform the positions as an unarmed security guard. Rather, the

administrative law judge relied on Dr. Stiles's approval of the security guard jobs and the testimony of the managers of the two security firms who testified that they would hire someone with claimant's limitations and that they have suitable work available.

We reject claimant's challenge to the adequacy of the evidence relied on by the administrative law judge. The fact that the managers did not explicitly state that they would hire claimant does not negate the sufficiency of employer's evidence, as employer does not have to act as an employment agency to meet its burden of establishing suitable alternate employment. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Citing *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), claimant also contends that employer must establish the existence of a "range of jobs" or types of jobs which are available to the claimant and that the security guard jobs identified in the present case are insufficient to meet employer's burden. We reject claimant's contention that *Lentz* requires that two different types of jobs be identified. The Fourth Circuit in *Lentz* held that the identification of a single job opening is legally insufficient because it is "manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Lentz,* 852 F.2d at 131, 21 BRBS at 113(CRT); *cf. Shiver v. United States Marine Corps, Marine Base Exchange*, 23 BRBS 246 (1990) (*Lentz* is inapplicable if claimant receives one actual job offer). In this case, employer has identified security guard positions with two different companies, thus demonstrating the greater availability of suitable employment and increasing the likelihood that claimant could secure a position. Therefore, we reject claimant's contention that the two security guard positions are legally insufficient to establish suitable alternate employment.

In addition, we reject claimant's contention that the positions identified are not suitable because they require reading and writing; specifically, claimant contends the positions require the preparation of written logs. However, the two managers testified that claimant's limited reading and writing ability would not hamper his ability to perform as an unarmed security guard at their companies because they have positions which do not require written logs and that claimant could take the security guard certification test orally. H. Tr. at 170; Emp. Ex. 20 at 22-24. In *Lacey v. Raley's Emergency Road Serv.*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991), the Board affirmed an administrative law judge's finding that suitable alternate employment was established based on a letter from a rehabilitation specialist stating that after he informed the managers of two McDonald's restaurants of claimant's background, physical restrictions and functional illiteracy, they stated that they were interested in scheduling an interview with claimant, and that some modifications of the duties might be possible to accommodate his restrictions if they determine claimant was interested and motivated. *Lacey*, 23 BRBS 436-437. In the present case, the administrative law judge considered and discussed the testimony of the three vocational experts and the prospective employers. Like the employers

in *Lacey*, the two security managers testified that they would be able to tailor a position to fit claimant's physical restrictions and other limitations. The administrative law judge reasonably relied on the testimony by the two security managers and Dr. Stiles's opinion to find that employer established the availability of suitable alternate employment. Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment.

Once employer meets its burden of demonstrating that suitable jobs are available, claimant may retain entitlement to total disability benefits if he establishes that he diligently, yet unsuccessfully, sought alternate employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). If the positions identified by employer are not truly suitable or available, this fact would be borne out by a diligent, yet unsuccessful, job search. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

In the present case, the administrative law judge did not address claimant's argument that he diligently sought work but was not hired. Claimant testified that he applied for positions with a number of employers, including Goodwill Industries, Top Guard Security and James/York Security, but had not been offered a job. H. Tr. at 75-81; Cl. Ex. 14. In addition, claimant participated in a "job club" sponsored by employer. H. Tr. at 74; Cl. Exs. 14, 15. As there is evidence that claimant may have sought suitable alternate employment unsuccessfully which the administrative law judge did not address, we remand the case for the administrative law judge to make specific findings regarding the nature and sufficiency of claimant's efforts to seek alternate employment. *See 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).

Accordingly, the administrative law judge's finding that employer has established suitable alternate employment is affirmed. However, the case is remanded to the administrative law judge for further findings regarding claimant's diligence in attempting to secure alternate employment.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
PETER A. GABAUER, Jr.
Administrative Appeals Judge