

RODNEY L. FISHER

Claimant-Petitioner)

V.

STEVENS SHIPPING AND
TERMINAL COMPANY

DATE ISSUED: Sept. 30, 2002

and

ARM INSURANCE COMPANY

Employer/Carrier-)
Respondents)

DECISION and ORDER

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

Rodney L. Fisher, Jacksonville, Florida, *pro se.*

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine 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); 20 C.F.R. §§802.211(e), 802.220.

Claimant injured his back on August 9, 1996, while working for employer as a

latcher/driver. Claimant subsequently underwent a diskectomy and fusion at L4-5 and L5-S1 on May 22, 1997. Thereafter, in September 1998, claimant was admitted to a facility for treatment of psychological and substance abuse problems. Employer voluntarily paid claimant temporary total disability compensation, based upon an average weekly wage of \$399.61, from August 10, 1996 to March 14, 1998, at which time it alleged that it had established the availability of suitable alternate employment which claimant was capable of performing with no loss in wage-earning capacity. 33 U.S.C. §908(b).

In her Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on January 23, 1998, 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 due diligence in seeking such employment. Accordingly, the administrative law judge determined that claimant did not presently have a loss of wage-earning capacity, and she therefore found that claimant was entitled to no further disability compensation.

On appeal, claimant, representing himself, challenges the administrative law judge's denial of his claim for ongoing disability benefits. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). 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 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). 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).

In the instant case, the administrative law judge determined that employer met its

burden of establishing the availability of suitable alternate employment based upon the multiple positions identified by Associated Rehabilitation Services (ARS) and approved by Dr. Rogozinski, claimant's treating physician. See Emp. Exs. 3, 5, 6. After conducting a vocational profile of claimant and reviewing the physical restrictions placed upon claimant by Dr. Rogozinski, ARS prepared labor market surveys in March 1998 and April 2000, each of which set forth numerous employment opportunities, such as cashiers, dispatchers, parking lot attendants, and customer service representatives, as well as multiple longshore job categories such as flagman, hustler and van driver, which were identified as being suitable for claimant. Mr. Robinson, a rehabilitation counselor employed by ARS, testified that each labor market survey took into consideration claimant's age, education, work experience and physical restrictions, and that each employer set forth in the labor market surveys was contacted by ARS.¹ ARS subsequently forwarded these two labor market surveys to Dr. Rogozinski, who approved many of the identified positions.² See Emp. Exs. 1, 3, 6. This evidence is sufficient to establish suitable alternate employment based on claimant's physical restrictions alone.

It is well-established, however, that 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). In this case, claimant asserted that his physical restrictions and ongoing depression resulted in an inability to work. In support of this claim, claimant submitted into evidence a Rating Decision from the State of Florida Department of Veterans' Affairs, medical records from Charter-By-The-Sea Behavioral Health System, and a report and testimony of Mr. Spruance, a vocational counselor. The Rating Decision contains a finding that claimant has major depression, with an assessment of global functioning of 25-30. See Clt. Ex. 1. The extensive medical file compiled by Charter-By-The-Sea reveals that claimant was admitted to that facility from September 11, 1998, through September 22, 1998, for the treatment of depression, which he related to his ongoing back pain, and narcotic dependance, that claimant was ultimately diagnosed with major depression and substance abuse, and that

¹Regarding the longshore positions identified by ARS, Mr. Bushell, employer's safety director, testified that the specific positions identified were continuously available with either employer or other shipping companies in the Jacksonville, Florida, area. See Tr. at 77-78.

²Dr. Rogozinski, who last examined claimant on November 17, 1998, placed the following restrictions on claimant: lifting of 50 pounds occasionally, 20 pounds frequently, and 10 pounds constantly; avoid repetitive bending and twisting; change positions hourly. See Emp. Ex. 1 at 16-17. He did not, however, consider any psychiatric diagnosis regarding claimant when rendering his opinion. See *id.* at 37-38.

claimant upon discharge was referred for outpatient care. See Clt. Ex. 4. After reviewing claimant's medical files, Mr. Spruance, who has continued to assist claimant subsequent to 1998, found claimant to be unemployable based upon his understanding of claimant's physical and psychiatric conditions. See Clt. Ex. 2; Tr. at 41-52. In addition, claimant testified that he continues to receive psychiatric care and take medications for his depression. See Tr. at 24-26.

In her discussion of suitable alternate employment, the administrative law judge did not weigh this evidence in finding that claimant is capable of performing suitable alternate employment. See Decision and Order at 13-14. Rather, the administrative law judge based her finding solely on evidence regarding claimant's physical capacity to work and discussed Mr. Spruance's testimony and opinion regarding claimant's post-injury unemployability only in subsequently addressing the issue of whether claimant demonstrated that he diligently sought employment post-injury. The question of claimant's diligence in seeking work, however, does not arise until employer has met its burden of producing evidence of suitable alternate employment. See *Roger's Terminal*, 784 F.2d 687, 18 BRBS 79(CRT). Thus, the case must be remanded for the administrative law judge to weigh the evidence regarding claimant's psychological condition in addressing whether employer met its burden of demonstrating suitable alternate employment. In this regard, we note that in discussing Mr. Spruance's opinion in her discussion of claimant's diligence, the administrative law judge stated that Mr. Spruance "admitted that the psychiatric records he reviewed did not indicate any psychiatric restrictions on claimant."³ Decision and Order at 14-15. Mr.

³In a footnote at this point, the administrative law judge also addressed claimant's medical records from Charter-By-The-Sea. The administrative law judge stated that these records "do not address how this treatment will affect his employment, or more importantly, whether his psychological problems are related to the back injury at work." Decision and Order at 15, n.7. Focusing on causation, the administrative law judge found that the only mentions of the work-injury are notations in claimant's history and that no psychiatrist stated that his psychological problems are related to his work-injury. Thus, she concluded that claimant failed to show a causal connection between his psychiatric problems and his August 9, 1996, work-injury. *Id.* Contrary to the administrative law judge's implication, this conclusion does not support the rejection of Mr. Spruance's opinion. Initially, in assessing claimant's ability to perform suitable alternate employment, the administrative law judge must consider the "specific capabilities of the claimant, this is, his age, background, employment history and experience, and intellectual and physical capacities." *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042, 14 BRBS 156, 164(CRT) (5th Cir. 1981). By their very nature, the relevant factors in addressing suitable alternate employment are not limited to work-related considerations. See *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT)(5th Cir. 2001)(illiteracy, poor mathematical skills, age, and prior work solely in manual labor); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999)(mental ability or skills to work as a car salesman); *Fox v. West State, Inc.*, 31 BRBS 118 (1997)(pre-existing stroke and cardiac problems). Thus, whether claimant's depression is work-related is not dispositive. A condition which develops as a result of, or as a sequela to, a work injury is considered employment-related. See, e.g., *Pietrunti v. Director, OWCP*,

Spruance, however, explained the medical foundation for his opinion, testifying that he relied on the GAF rating of claimant in the clinic records and the records of Dr. Kaleel, a VA doctor. Mr. Spruance explained that the global assessment of functioning, or GAF, is an overall evaluation of the “limiting aspects of the psychiatric condition.” Tr. at 45. Mr. Spruance stated claimant’s GAF was assessed at 25-30 on admission to Charter By-The-Sea, which reflects the acute stage he was in at that time, and at 50 by Dr. Kateel in October 1998. *Id.* He testified that GAF goes from 0 to 100 and a score of 50 is incompatible with employment. *Id.* When asked about specific restrictions based on claimant’s psychological condition, he acknowledged that he had not seen any, but stated that the GAF, while “not exactly a psychiatric limitation . . . is a reflection of the individual’s capacity.” Tr. at 51-52. This evidence, if credited, could establish that claimant’s employability is limited by his depression.⁴ In any event, it is employer’s burden to demonstrate suitable alternate employment, and claimant’s diagnosis of depression and hospitalization after the date the administrative law judge found claimant able to work must be addressed. As the administrative law judge did not consider the evidence regarding claimant’s depression when addressing the issue of suitable alternate employment, we must vacate the administrative law judge’s determination that employer established the availability of suitable alternate employment. The case is remanded for the administrative law judge to fully consider all of the evidence of record regarding this issue.⁵

Lastly, the administrative law judge determined that claimant did not sustain a post-

119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997). The Section 20(a) presumption is also applicable to causation issues. The administrative law judge thus erred in placing the burden of producing evidence regarding a causal relationship on claimant. If causation is at issue, then the administrative law judge must apply the correct law. *See Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); 33 U.S.C. §920(a).

⁴Mr. Spruance referred to the records of Dr. Kaleel, a VA doctor, which do not appear in the record. Claimant also testified that after his discharge from Charter By-The-Sea he continued psychiatric care with Dr. Kaleel and a Dr. Saley, whom he found on his own. No reports from this treatment are in the record. In view of the lack of updated medical information, the record could be reopened on motion by either party or the administrative law judge on her own initiative for the receipt of such evidence. 33 U.S.C. §922.

⁵With regard to whether claimant diligently sought work, the administrative law judge, after finding that claimant attempted to return to work on only one occasion, in March 1998, at a position not approved by his treating physician, and that claimant conceded that he has made no attempts to find employment since that time, determined that claimant did not demonstrate due diligence in attempting to secure employment post-injury. *See* Decision and Order at 14-15. Based upon her evaluation of claimant’s efforts, the administrative law judge’s finding that claimant did not diligently seek employment is affirmed. *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Thus, if on remand, the administrative law judge finds suitable alternate employment established, this issue need not be revisited.

injury loss of wage-earning capacity as a result of his work-related injury. An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); see *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In addressing this issue, the administrative law judge found that the March 1998 and April 2000 labor market surveys submitted into evidence by employer presented a total of 48 jobs, of which approximately 10 were longshore-related, which had been approved by claimant's treating physician for claimant, and that the salaries of the identified non-longshore positions ranged from \$5.15 to \$16.00 per hour, while the identified longshore positions paid between \$12.00 and \$25.00 per hour. See Decision and Order at 15. Next, the administrative law judge determined that, assuming claimant could secure a longshore position at a rate of \$25,000 per annum or a flagman position at a rate of \$21.25 per hour, claimant's post-injury earnings would exceed his pre-injury average weekly wage; the administrative law judge thus concluded that claimant had sustained no loss of wage-earning capacity, and she accordingly denied claimant's alternate claim for ongoing permanent partial disability compensation. See *id.* at 16. In arriving at this conclusion, however, the administrative law judge without discussion eliminated from consideration the salaries from the approximately 38 non-longshore positions identified as being available and suitable for claimant when determining claimant's post-injury wage-earning capacity. As the objective of the inquiry concerning claimant's post-injury wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured, see *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985), the administrative law judge is required to discuss and weigh all of the relevant evidence when rendering her decision.⁶ See 5 U.S.C. §557(c)(3)(A); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). Moreover, at no point in her determination of claimant's post-injury wage-earning capacity did the administrative law judge calculate a figure based on the hourly rates paid by the identified employment positions at the time of claimant's injury so that this inflation-adjusted figure could be compared to claimant's pre-injury average weekly wage. See, e.g., *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Accordingly, should the administrative law judge on remand once again determine that employer has established the availability of suitable alternate employment, she must take into consideration all of the relevant evidence of record in reconsidering this issue in accordance with Sections 8(c)(21) and (h) of the Act.

⁶Regarding this issue, the United States Court of Appeals for the Fifth Circuit has held that an average of the salaries of the positions identified as establishing the availability of suitable alternate employment is a reasonable method for determining a claimant's post-injury wage-earning capacity since the courts have no way of determining which of the range of jobs shown to be available a claimant will obtain. See *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65 (CRT)(5th Cir. 1998); see also *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

Moreover, if the administrative law judge finds that claimant has no current loss in wage earning capacity under the proper standards, she must then consider whether claimant is entitled to continuing permanent partial disability benefits in the form of a nominal award pursuant to *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Accordingly, the administrative law judge's Decision and Order denying benefits to claimant is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge