BRB No. 98-0114

ROBERT L. BOSARGE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	)
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Rickey J. Hemba, Ocean Springs, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-2266) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 which 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).

On or about April 2, 1993, claimant sustained a work-related injury to his right knee. Claimant continued to work until April 16, 1993, at which time he was examined by Dr. Drake, who immediately removed claimant from work and ultimately performed a total right knee replacement on November 2, 1993.

On January 24, 1994, claimant returned to employer's shipyard to file his

application for retirement benefits, and to obtain his personal toolbox from the pipe department.[1] Claimant began to draw his retirement benefits beginning on February 16, 1994. On August 8, 1994, Dr. Drake released claimant to return to work with restrictions and in a subsequent report opined that claimant has a permanent partial impairment of fifty percent of the right knee.[2] Employer voluntarily paid temporary total disability benefits from April 16, 1993, through August 7, 1994, totaling $25,061.28, and permanent partial disability benefits pursuant to the schedule, 33 U.S.C. §908(c)(2), for a fifty percent impairment of claimant's right leg. Claimant thereafter filed his claim seeking permanent total disability benefits.

In his decision, the administrative law judge found that although claimant was not capable of returning to his usual employment, employer met its burden of establishing the availability of suitable alternate employment through the labor market survey and testimony of its vocational expert, Kelly Hutchins. The administrative law judge therefore determined that claimant is not entitled to permanent total disability benefits but rather is limited to a scheduled award of permanent partial disability benefits pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2). Accordingly, as employer is voluntarily paying permanent partial disability benefits pursuant to the schedule, the administrative law judge concluded that claimant is not entitled to any additional benefits.

On appeal, claimant challenges the administrative law judge's denial of permanent partial disability benefits. Employer responds, urging affirmance.

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[1]Claimant testified that in January 1994, he attempted to return to work but was unable to perform any of the tasks that had been assigned. Hearing Transcript (HT) at 48. Claimant stated that thereafter he has not returned to employer for work and has not held any other job. HT at 60.

[2]Dr. Drake opined that claimant could not go back to his previous job with employer, and assigned permanent restrictions of no crawling, climbing or squatting, and no more than four to six hours on his feet. The parties stipulated that claimant reached maximum medical improvement on August 8, 1994. Joint Exhibit (JX) 1, Stipulation No. 9.

Claimant initially argues that the administrative law judge erred in finding that claimant has not established a *prima facie* case of total disability. Claimant also argues that the administrative law judge erred in finding that employer has shown the availability of suitable alternate employment. Claimant maintains that Ms. Hutchins' s ||limited hypothetical labor market survey= contains numerous flaws and thus, contrary to the administrative law judge' s conclusion, is insufficient to establish the availability of suitable alternate employment. Specifically, claimant avers that the survey is severely flawed as Ms. Hutchins never considered whether the positions were compatible with claimant' s physical and mental capabilities, or contacted the potential employers in this regard. Additionally, claimant maintains that Ms. Hutchins' s survey is not sufficiently focused upon claimant' s situation, as Ms. Hutchins never met with claimant, and the survey itself involves a job search and positions identified in 1994 for a different injured worker.[3]

Contrary to claimant' s contention, the administrative law judge explicitly concluded that ||claimant has made such a *prima facie* case [of total disability] . . .= Decision and Order at 4, based on the statements by Drs. Drake and Wiggins that as a result of his right knee injury claimant could not return to his usual employment. Where, as in the instant case, claimant establishes that he is unable to perform his usual employment due to his work-related injury, the burden shifts to employer to demonstrate the availability of jobs within the geographic area where the claimant resides which claimant by virtue of his age, education, work experience, and physical restrictions is capable of performing, and for which he can compete and realistically secure. *See P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh' g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Given that the instant case involves an injury to a scheduled member, *i.e.*, the right leg, if employer does not establish suitable alternate employment, claimant is entitled to permanent total disability benefits and is not limited to a scheduled award of permanent partial disability benefits. *PEPCO v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366-367 n. 17 (1980). If, however, employer establishes suitable alternate employment, claimant is limited to the scheduled award for his right knee impairment. *Id.*

[3]Contrary to claimant' s contention, Ms. Hutchins' s reliance on August 8, 1994, as the date that claimant reached maximum medical improvement is proper, as it is consistent with the parties' joint stipulation that claimant reached maximum medical improvement as of that date. JX 1, Stipulation No. 9.

Claimant's remaining contentions likewise lack merit. In his decision, the administrative law judge discussed the credibility of the labor market survey conducted by Ms. Hutchins in light of claimant's contention that it is flawed in its methodology. Specifically, the administrative law judge acknowledged that instead of contacting employers and giving them an account of claimant's disability and skills, Ms. Hutchins relied exclusively on her research book to identify jobs that had been available seven months earlier in August 1994. In addition, the administrative law judge found that the jobs identified by Ms. Hutchins had been researched, documented, and verified in 1994, for a different injured worker, and that in preparing her report, Ms. Hutchins never talked to, much less interviewed claimant. The administrative law judge, however, determined that Ms. Hutchins was aware of all of the pertinent information required, *i.e.*, claimant's age, education, work history, physical limitations, to conduct a valid labor market survey.[4] *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). In addition, the administrative law judge found that as claimant's treating physician, Dr. Drake, approved the jobs that Ms. Hutchins identified, claimant could physically perform these jobs.[5] EX 9; Decision and Order at 5.

Inasmuch as the administrative law judge's determinations are rational and supported by the evidence of record, we affirm the administrative law judge's conclusion that Ms. Hutchins's labor market survey, unrebutted by any contrary expert vocational

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[4]in her ‖Hypothetical Vocational Evaluation= dated March 16, 1995, Ms. Hutchins accurately outlined claimant's medical and vocational/educational background. Included in her review are the permanent restrictions imposed by Dr. Drake, the extent of claimant's education, and a review of claimant's work history dating back to 1952. From this, Ms. Hutchins conducted a vocational analysis and found that based on claimant's age, education, work experience, transferrable skills and physical abilities, there are a number of jobs which can be identified that claimant can perform. Ms. Hutchins then identified three jobs which were available on or around August 8, 1994. Specifically, she identified a position as a counter helper with Village Cleaners, a picture framer with Ambers, and an embroidery machine operator with City Sports. Employer's Exhibit (EX) 9.

[5]Moreover, contrary to claimant's contention, the fact that Ms. Hutchins's labor market survey identifies suitable alternate employment which was available at the stipulated date that claimant reached maximum medical improvement, August 8, 1994, and thus, may no longer be available, does not effect the credibility of that survey, particularly where, as in this case, the administrative law judge has explicitly addressed the retroactive nature of the survey. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U,S, 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

evidence, is sufficient to satisfy employer's burden to show the availability of suitable alternate employment. *See generally Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Hayes*, 930 F.2d at 424, 24 BRBS at 116 (CRT)*; Turner*, 661 F.2d at 1031, 14 BRBS at 156 (CRT); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Consequently, the administrative law judge's conclusion that claimant is not entitled to permanent total disability benefits but rather is confined to a scheduled award of permanent partial disability benefits for his work-related right knee injury is affirmed. *PEPCO*, 449 U.S. at 277, n. 17, 14 BRBS at 366-367, n. 17; *see also Jacksonville Shipyards v. Dugger*, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979).

Accordingly, the administrative law judge's Decision and Order denying permanent total disability benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge