BRB No. 92-1790

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

Appeal of the Decision and Order Denying Compensation of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Mark L. Reddit (Cherry, Givens, Tarver, Peters, Lockett & Diaz, P.C.), Mobile, Alabama, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation (90-LHC-3170) of Administrative Law Judge Kenneth A. Jennings 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).

Claimant sustained an avulsion chip fracture of the dorsum carpes of the left wrist, a severe sprain of the left wrist, muscle strains of the left forearm and left leg, and a torn rotator cuff injury to his left shoulder, as a result of his employment-related injury on October 29, 1987. Employer's Exhibit 7. Claimant's rotator cuff injury was surgically repaired on January 16, 1989. Claimant was initially released to return to work by his

treating physician, Dr. Semon, on January 3, 1990; however, prior to that date, claimant suffered a heart attack.[1]

In light of claimant's continuing complaints of shoulder pain, a physical capacity evaluation was performed on March 6, 1990, so that Dr. Semon could make a determination as to any limitations he might impose on claimant's return to work.[2] Claimant was released to return to work with the restrictions outlined in the physical capacity evaluation as of March 20, 1990. Claimant returned to work on May 14, 1990, and was placed back to work as a modified chipper.[3] Claimant worked in this capacity until June 18, 1990. At that time, Dr. Semon opined that claimant was not able to work as a chipper at Ingalls and recommended that claimant should either be vocationally retrained to perform a lighter type of work or be medically retired. Employer's Exhibit 7 at 61. Dr. Semon, therefore, restricted claimant from returning to work. *Id.* Claimant has not worked since June 18, 1990, the date he last worked for employer. Hearing Transcript at 47. Claimant filed a claim for permanent total disability benefits under the Act, maintaining that his inability to return to work is related to the injury he sustained on October 29, 1987.

In his Decision and Order, the administrative law judge determined that claimant demonstrated a *prima facie* case of total disability, with claimant having reached maximum medical improvement on March 19, 1990. Additionally, the administrative law judge found that employer met its burden of showing the availability of suitable alternate employment with the light duty job at its facility. Moreover, the administrative law judge found that inasmuch as the alternate employment paid the same wage that claimant made prior to his injury, claimant did not suffer from any remaining disability. Consequently, the administrative law judge denied claimant's claim for additional compensation.

On appeal, claimant argues that the administrative law judge erred in finding that the modified chipping job constituted suitable alternate employment. Additionally, claimant asserts that the administrative law judge erred in failing to give due consideration to claimant's loss of wage-earning capacity on the open labor market. Employer responds, asserting that substantial evidence supports the administrative law judge's Decision and Order.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant

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[1]Dr. Semon opined that claimant's heart condition was totally unrelated to his October 29, 1987 injury. Deposition of Dr. Semon at 25.

[2]The physical capacity evaluation demonstrated the following work tolerance levels: claimant could lift or carry 50 pounds occasionally; claimant could lift or carry 20 pounds frequently; claimant could push or pull 20 to 70 pounds; claimant could climb without restriction; and claimant could work overhead for a maximum of twenty minutes. Employer's Exhibit 8.

[3]Employer voluntarily paid temporary total disability benefits to claimant from October 31, 1987 to May 13, 1990. Joint Exhibit 1.

has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991). An employer can establish suitable alternate employment by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

Claimant contends that the administrative law judge erred in finding that the position of "modified" chipper constituted suitable alternate employment. Claimant specifically argues that the position of "modified" chipper falls beyond the medical restrictions placed upon claimant.

In discussing the relevant evidence, the administrative law judge initially found that employer presented evidence of an alternate job within its own facility which was offered to claimant and which claimant performed for approximately six weeks. The administrative law judge noted that this job was a chipper position with modifications aimed towards relieving claimant from having to perform overhead work and from having to handle heavy material.

The administrative law judge then proceeded to consider opinions offered by vocational rehabilitation specialists who reviewed the job description of the alternate job along with claimant's physical restrictions. Specifically, the administrative law judge found that vocational experts Joe Walker, James Saxon and Tommy Sanders, each opined that claimant could perform the modified chipper position and that the position was within the guidelines of claimant's medical restrictions. Additionally, the administrative law judge considered the testimony of claimant's treating physician, Dr. Semon, noting that "although Dr. Semon restricted claimant from returning to this job on June 18, 1990, after examining claimant and discussing the job with him, Dr. Semon testified that he did so because he had been led to believe that the job requirements exceeded the physical restrictions that he had placed on claimant." Decision and Order at 12; *see also* Dr. Semon's Deposition at 20-22. The administrative law judge also found that Dr. Semon testified that he had never changed his position that claimant could work within the restrictions as described and that if the modified chipper job at Ingalls was within those restrictions, he would continue to authorize claimant to perform that work. Dr. Semon's Deposition at 29. Moreover, the administrative law judge correctly noted that claimant testified at the hearing that the job did not require him to work beyond his physical restrictions. Decision and Order at 12; *see also* Hearing Transcript at 40.

The administrative law judge's discussion of the evidence accurately reflects the record in this case. Thus, inasmuch as the opinions of three vocational experts, notably Joe Walker, James Saxon and Tommy Sanders, the medical opinion of claimant's treating physician, Dr. Semon, and claimant's own testimony, establish that claimant was physically capable of performing employment as a modified chipper, the administrative law judge's finding that employer established suitable alternate employment is affirmed as it is supported by substantial evidence. *See Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988); *Larsen*, 19 BRBS at 54.

Claimant also asserts that the administrative law judge failed to fully consider whether employer met its burden of proving the availability of actual employment opportunities by identifying specific jobs available to claimant within the local community. Specifically, claimant asserts that the administrative law judge failed to consider the testimony of Tommy Sanders, the vocational expert hired by employer, who identified a number of jobs for which claimant might be qualified, and the subsequent testimony of Tom Christiansen, claimant's vocational expert, who testified that claimant was not qualified for any of the jobs suggested by Mr. Sanders. Moreover, claimant asserts that the testimony of Mr. Christiansen conclusively establishes that claimant has no wage-earning capacity in the open labor market.

Contrary to claimant's contentions, the administrative law judge specifically acknowledged the conflicting statements by the vocational experts, notably Mr. Sanders and Mr. Christiansen, regarding the job opportunities available to claimant, given his situation and condition. Decision and Order at 8-9. Additionally, inasmuch as employer presented evidence of alternate employment within its own facility, employer was not obliged to identify other job opportunities available on the open market. *See McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989). Moreover, inasmuch as the administrative law judge could reasonably infer that claimant suffered no loss in wage-earning capacity from the record as a whole,[4] and, as claimant had not established that his post-injury wage-earning capacity continued to be impaired, we affirm the administrative law judge's finding that claimant did not suffer any remaining disability as of May 14, 1990. *Swain v. Bath Iron Works Corp.*, 17 BRBS 145 (1985).

[4]In particular, the administrative law judge found that the record established that the suitable alternate employment paid the same wages that claimant earned prior to his injury. Decision and Order at 12.

Accordingly, the administrative law judge's Decision and Order Denying Compensation is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge