

CELESTINE HAWKINS)
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 Claimant-Respondent)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: April 15, 2002
 DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Decision and Order Denying Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Breit, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Decision and Order Denying Motion for Reconsideration (2000-LHC-0124) 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 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).

Claimant, a cleaner, injured her back at work on March 25, 1985. She has been unable to return to her usual work since March 13, 1989, and has not worked at the shipyard since 1990. Employer voluntarily paid periods of disability benefits after the injury, and payments of permanent total disability benefits from April 17,

1996, through April 18, 2000, are not at issue. Prior to the hearing in this case, claimant began working as a telephone surveyor in her own home, and employer sought to reduce her compensation payments based on her earnings at this job. Claimant obtained the job through Smart Telecommunications (Smart) to whom she was referred by employer through Genex Services (Genex) and Expediter Employment Consultants (Expediter). Employer paid Genex and Expediter referral fees to have claimant hired by Smart. Employer also agreed to pay claimant's wages for the first 500 hours of her work and associated costs for equipment and accommodations.¹

The administrative law judge found that Newport News Shipbuilding and Dry Dock Company (NNS or employer) was claimant's true employer for the first 500 hours of claimant's subsidized work through Smart, that claimant's work as a telephone surveyor through Smart was sheltered employment for the subsidized period, and that the work is not suitable for claimant in any event. Consequently, the administrative law judge awarded claimant permanent total disability benefits from April 19, 2000, and continuing. The administrative law judge denied employer's Motion for Reconsideration and did not admit into evidence the exhibits attached to it.

On appeal, employer challenges the administrative law judge's finding that claimant's job as a telephone surveyor is not suitable and his exclusion of exhibits attached to its Motion for Reconsideration. Claimant responds in support of the administrative law judge's decision.

Employer initially contends that the administrative law judge erred in finding that claimant's job as a telephone surveyor is not suitable. Once, as here, claimant establishes an inability to perform her usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997). A job which claimant is not educationally or physically qualified to perform is not suitable. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999).

¹Actually, Smart was to pay claimant's wages, but it was reimbursed by Expediter who in turn was reimbursed by employer.

We affirm the administrative law judge's finding that claimant's job as a telephone surveyor is not suitable, as it is rational and supported by substantial evidence. The administrative law judge rationally found that the opinion of Mr. DeMark, claimant's vocational expert, that claimant's "exertional and non-exertional disabilities, slurred speech, lack of transferable skills, and educational deficits combine in such [a] way . . . that [she] is unable to earn wages in a competitive labor market," is persuasive because he met with claimant, reviewed her records, and had several tests performed to measure her vocational abilities. *See Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT)(8th Cir. 1997), *cert. denied*, 118 S.Ct. 1301 (1998); *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT)(9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); Decision and Order at 18-19; Cl. Ex. 21-4; May 10, 2000 Tr. at 159-160. The administrative law judge also rationally concluded that the opinion of Ms. Holder, employer's vocational expert formerly with Genex, that claimant can do the telephone survey work, was credible but unpersuasive because Ms. Holder never met claimant and she relied extensively on claimant's application with employer which inaccurately reported her education.² *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); Decision and Order at 18; May 10, 2000 Tr. at 74. Furthermore, the administrative law judge's finding that claimant does not possess the intellectual ability to meet the minimum requirements of the job is supported by substantial evidence since the job requires an intelligence quotient (IQ) of 80 and claimant has an IQ of 71. *See generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); Decision and Order at 18; Cl. Ex. 18-1; May 10, 2000 Tr. at 139, 160. Alternatively, the job requires a prospective employee to have vocational experience in the telecommunications field. However, the administrative law judge's conclusion that claimant did not meet this requirement is supported by substantial evidence inasmuch as she does not have prior telecommunications experience, and her previous jobs as a maid, assembler, sewing machine operator, and cleaner did not require the use of verbal skills or interaction with people that the job as telephone surveyor requires. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993); Decision and Order at 18-19; Cl. Ex. 18-1; Emp. Ex. 6c; May 10, 2000 Tr. at 75-76. Moreover, the administrative law judge rationally concluded that the position requires basic reading and writing skills that claimant does not possess and that she needs help with spelling from her adult daughter. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988); Decision and Order at 19; May 10, 2000 Tr. at 218-219. Lastly, the administrative law judge observed that claimant's self-reported difficulties with performing the job (difficulty with pronunciation, persuading people to give her the

²The administrative law judge noted that claimant's employment application reported a high school education but that claimant testified that she did not graduate from high school and earned her grade equivalency diploma (GED) with help on her fourth attempt. Decision and Order at 18; May 10, 2000 Tr. at 205, 225-226.

necessary information and getting them to verify the correct spelling of words, and with understanding what other people say) were apparent to him at the hearing. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); Decision and Order at 19; May 10, 2000 Tr. at 213, 216, 219. As the administrative law judge's finding that the telephone surveyor job is not suitable for claimant is rational and supported by substantial evidence, the award of permanent total disability benefits is affirmed.³

Employer next contends that the administrative law judge erred in excluding an exhibit attached to its Motion for Reconsideration which is a contract between Expediter and the United States Department of Veterans Affairs (VA). Section 702.338 of the regulations provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. 20 C.F.R. §702.338. Additionally, under Section 702.338, the administrative law judge may reopen the record for receipt of relevant and material evidence "at any time, prior to the filing of [a] compensation order." *Id.* This regulation has been interpreted as affording the administrative law judge broad discretion in the admission or exclusion of evidence, and decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

We affirm the administrative law judge's exclusion of the contract between Expediter and the VA submitted with employer's Motion for Reconsideration since employer has not shown that the administrative law judge abused his discretion in not admitting this evidence. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); Decision and Order Denying Motion for Reconsideration at 2; 20 C.F.R. §702.338, 29 C.F.R. §18.54. As the administrative law judge correctly stated, employer did not state how a contract between

³Thus, we need not address employer's challenge to the administrative law judge's additional findings that claimant's work as a telephone surveyor is sheltered employment and that NNS is claimant's true employer for the first 500 hours of subsidized employment. *See* Decision and Order at 16-17.

Expediter and the VA is relevant and material in the instant case which does not involve a contract with either Expediter or the VA.

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Decision and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge