BRB No. 04-0934

HONEYETTA FOGARTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EQUITABLE/HALTER SHIPYARD	)	DATE ISSUED: 08/25/2005
	)	
and	)	
	)	
HALTER MARINE, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order Granting Motion in Limine and the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

David A. Dalia, New Orleans, Louisiana, for claimant.

Andre C. Gaudin and Charles Farr (Burglass & Tankersley, L.L.C.), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order Granting Motion in Limine and the Decision and Order (2003-LHC-00371) of Administrative Law Judge Lee J. Romero, 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).

This case is before the Board for the second time. To recapitulate, claimant, a welder, sustained injuries to her back and neck on June 23, 1992, when she fell into an open manhole during the course of her employment with employer. Claimant has not

returned to work since the date of this incident.

In his initial Decision and Order, the administrative law judge awarded claimant permanent total disability compensation, medical benefits, interest, and attorney fees. Employer appealed, contending that claimant's alleged injuries were either non-existent or unrelated to her work accident and that claimant is capable of returning to her usual job; alternatively, employer argued that it established the availability of suitable alternate employment within its own facility. The Board affirmed the administrative law judge's findings that claimant's neck and back conditions are causally related to her employment with employer. *Fogarty v. Equitable/Halter Shipyard*, BRB No. 97-1258 (June 3, 1998), slip op. at 3. The Board vacated the administrative law judge's finding that claimant is totally disabled, and remanded for the administrative law judge to address the medical evidence that claimant is capable of resuming her usual employment duties and testimony that suitable alternate employment is available at employer's facility. *Id*., slip op. at 4-5.

In his Decision and Order on Remand issued in 1999, the administrative law judge addressed the relevant evidence and found that claimant is unable to return to her usual employment and that employer failed to establish the availability of suitable alternate employment. In November 2002, employer filed a motion for modification, 33 U.S.C. §922, asserting that it established suitable alternate employment from July 8, 1997, to August 1, 1999. The parties stipulated that claimant was unable to work from August 2, 1999, to March 27, 2002, as she underwent a cervical discectomy and fusion at C-4/5 on August 20, 1999. Employer also asserted that it established the availability of suitable alternate employment as of March 28, 2002, after claimant's neck condition reached maximum medical improvement. On September 10, 2003, the administrative law judge issued an Order granting claimant's motion in limine to exclude any testimony or rehabilitation evidence resulting from a meeting on August 4, 2003, between employer's vocational consultant, Ms. Favaloro, and claimant's treating physician, Dr. Jarrott, because neither claimant nor her counsel was provided an opportunity to attend this meeting or even notified of it.

In his Decision and Order on modification, the administrative law judge granted claimant's second motion in limine to exclude evidence gathered by Ms. Favaloro during a meeting with Dr. Jarrott on March 25, 1998. The administrative law judge found that claimant's initial work injuries reached maximum medical improvement on June 29, 1994, and that her neck condition after the August 1999 surgery reached maximum medical improvement on March 25, 2002. The administrative law judge rejected employer's evidence of suitable alternate employment available from July 8, 1997, to August 1, 1999, and as of March 28, 2002. Finally, the administrative law judge granted claimant's change of physician request from Dr. Mandybur, who performed claimant's neck surgery in August 1999, to Dr. Jarrott, as claimant established residence in the New Orleans area in 2002, after moving from Richland, Mississippi.

On appeal, employer challenges the administrative law judge's granting of

claimant's motions in limine and his finding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.[1]

Where, as here, a claimant establishes that she is unable to perform her usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the realistic availability of jobs within the geographic area in which claimant resides which, by virtue of her age, education, work experience, and physical restrictions, she is capable of performing and for which she can compete and reasonably secure.[2] *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See, e.g., Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999). A labor market survey may be rejected if the survey fails to take into consideration all relevant restrictions found by the administrative law judge. *See, e.g., White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

We affirm the administrative law judge's denial of employer's motion for modification, as his rejection of employer's labor market surveys as evidence of suitable alternate employment is rational, supported by substantial evidence and in accordance with law. The administrative law judge credited the work restrictions Dr. Jarrott imposed in 1994 and 2004,[3] and Dr. Mandybur imposed in 2003,[4] claimant's complaints of severe

[1] We accept claimant's response brief, which was accompanied by a motion to accept it out of time. 20 C.F.R. §§802.212, 802.217(e), 802.219.

[2] The administrative law judge credited employer's concession in its brief that claimant is unable to return to her former shipyard employment. Decision and Order at 48-49; Employer's Post-Trial Memorandum at 29.

[3] In his June 29, 1994, discharge summary, Dr. Jarrott opined that claimant is capable of light minimal or sedentary work. He specifically restricted her from bending, jumping, lifting, climbing and squatting, and he opined that claimant may be capable of bench work requiring alternating sitting and standing, and pushing or pulling weights of 10 to 15 pounds. EX 5 at 66-67. In his February 17, 2004, deposition, Dr. Jarrott opined that claimant is limited to part-time sedentary work. CX 1 at 44. He specifically restricted claimant from working outside her home, lifting over 10 pounds, repetitive lifting over 5 pounds, jumping, climbing, constant driving or riding, standing, sitting or walking without rest, and working at table level for sustained periods. CX 1 at 47, 53-54, 59.

[4] In his June 25, 2003, deposition testimony, Dr. Mandybur stated that claimant is restricted from lifting more than 10 to 20 pounds, repetitive use of the hands, or extensive

headaches and pain, and her ongoing use of prescription medication for pain. Claimant's testimony at the February 26, 1996, hearing included her pain symptomatology, which the administrative law judge found is documented in the medical records of Drs. Jarrott and Mandybur, as is her ongoing usage of prescription medication for pain.[5] February 26, 1996, Tr. at 57-64, 82-83, 92-93; CX 3; EX 2.

The administrative law judge addressed the specific jobs identified in all of employer's labor market surveys and found that none was within claimant's work restrictions. Decision and Order at 54-64. Moreover, the administrative law judge rejected employer's March 24, 1997, labor market survey, in part, because Ms. Favaloro did not interview claimant to assess her pain symptomatology prior to conducting the survey. Decision and Order at 54; EX 1 at 9-11. The administrative law judge rejected the August 5, 1997, labor market survey, in part, because Ms. Favaloro did not consider claimant's drug regimen when she contacted prospective employers. Tr. at 125-128. The administrative law judge gave less weight to Dr. Applebaum's approval of the jobs identified in the May 1998 survey than to Dr. Jarrott's restrictions, *inter alia*, because he was claimant's treating physician. The administrative law judge did not find persuasive Ms. Favaloro's opinion that claimant could perform the jobs Ms. Favaloro identified in her March 27, 2002, survey because did not discuss claimant's neck, shoulder and hand complaints, claimant's reliance on prescription medication, and Dr. Jarrott's work restrictions.

We hold that the administrative law judge rationally credited the deposition testimony and medical records of Drs. Jarrott and Mandybur, claimant's pain symptomatology, and her prescription drug regimen to determine her work restrictions. In adjudicating a claim, it is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge is entitled to determine the weight to be accorded to the evidence and he may draw his own conclusions and inferences therefrom. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Based on the administrative law judge's determination of claimant's work restrictions, he rationally found that the jobs employer identified in its labor market surveys are not suitable for claimant.[6] *See generally*

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neck motion, and he prescribed frequent breaks. EX 4 at 35, 39-41, 44, 47-48.

[5] At claimant's final office visit to Dr. Mandybur on March 25, 2002, he prescribed Vicodin and Soma, three times daily, and Elavil, for her pain. EX 2 at 2. Dr. Jarrott continued claimant on this regimen. CX 3 at 1.

[6] We reject employer's contention that the administrative law judge erred by rejecting its June 20, 2003, labor market survey conducted in Jackson, Mississippi. The administrative law judge found that claimant had returned to New Orleans in 2002, and employer was aware of her change in residence; therefore, the survey was not conducted in the geographic area where claimant resides. Decision and Order at 63-64; *see*

Mendoza v. Marine Personnel Co., Inc., 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). As employer has not identified any errors in the administrative law judge's consideration of the evidence and as the Board is not empowered to reweigh the evidence, the administrative law judge's conclusion that employer did not establish the availability of suitable alternate employment is affirmed.[7] *Ceres Marine Terminal*, 243 F.3d 222, 35 BRBS 7(CRT); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *see Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *see generally Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge may draw inferences from the record evidence that "he deems most reasonable in light of the evidence as a whole and the common sense of the situation"). We therefore affirm the administrative law judge's denial of employer's motion for modification and the ongoing award of total disability benefits.

Employer also contends that the administrative law judge erred by granting claimant's motions in limine. Claimant moved that the administrative law judge exclude from the record any evidence generated by meetings between its vocational consultant, Ms. Favaloro, and Dr. Jarrott on March 25, 1998, and August 4, 2003. In his September 2003 Order and his Decision and Order on modification, the administrative law judge granted claimant's motions to exclude this evidence because neither claimant nor her counsel were notified by employer of or provided an opportunity to attend these meetings. The administrative law judge found that employer's representation to Dr. Jarrott in an *ex parte* setting could have influenced Dr. Jarrott's responses. Decision and Order at 40-43. The administrative law judge cited *Perkins v. United States*, 877 F.Supp. 330 (E.D. Tex. 1995), in which the court stated, *inter alia*, that *ex parte* contacts with a

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Decision and Order at 6; CX 3 at 13. In evaluating whether employer has established the availability of suitable alternate employment, the administrative law judge is afforded considerable discretion in determining the relevant labor market. *See Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001) (where claimant relocates after his injury, administrative law judge must weigh a variety of factors to determine relevant labor market). In this case, we hold that the administrative law judge did not abuse his discretion by finding New Orleans the relevant labor market in June 2003 for purposes of establishing the availability of suitable alternate employment. *See Holder*, 35 BRBS 23; *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

[7] As employer did not establish the availability of suitable alternate employment, we need not address employer's contention that claimant did not exhibit diligence in seeking alternate work. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

doctor by a defense attorney may improperly influence the physician's conclusions due to misrepresentations, threats, or intimidation. In his decision, the administrative law judge also found, assuming, *arguendo*, that claimant's motions had been denied, the evidence generated by these meeting is less probative than Dr. Jarrott's deposition testimony, which the administrative law judge credited to find that employer failed to establish the availability of suitable alternate employment. Decision and Order at 44-45.

We reject employer's contention that the administrative law judge erred in excluding this evidence. The administrative law judge is afforded considerable discretion concerning the admission of evidence. *See generally* 33 U.S.C. §923(a); 20 C.F.R. §702.339. It is appropriate for an administrative law judge to exclude evidence obtained in a manner contrary to law. *See Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd,* 32 Fed. Appx. 126 (5th Cir. 2002). Employer has not established that the administrative law judge abused his discretion in excluding from evidence testimony and reports based on employer's *ex parte* communications with claimant's treating physician. *See generally Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951). Moreover, the administrative law judge rationally found that the opinions expressed in Dr. Jarrott's deposition, during which claimant had the opportunity to cross-examine Dr. Jarrott, would be entitled to greater weight on the subject of claimant's abilities to perform alternate work, assuming the *ex parte* reports were admitted into the record. Employer's contentions regarding these opinions are rejected, *supra.* Accordingly, the administrative law judge's granting of claimant's motions in limine is affirmed.

Accordingly, the administrative law judge's Order Granting Motion in Limine and the Decision and Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge