

BRB No. 08-0532

W.S.)
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 Claimant-Respondent)
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 v.)
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 CHEVRON U.S.A., INCORPORATED) DATE ISSUED: 12/29/2008
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 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Pete Lewis (Lewis & Caplan), New Orleans, Louisiana, for claimant.

Christopher S. Mann (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LHC-01213) of Administrative Law Judge Patrick M. Rosenow 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b) (3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related back injury on August 11, 2003, while working on an offshore platform. Employer voluntarily paid temporary total disability and medical benefits. After claimant's condition reached maximum medical improvement on September 2, 2004, employer paid claimant permanent total disability benefits until September 21, 2006, when it alleged claimant's disability became partial. Employer averred that claimant retained a post-injury wage-earning capacity of \$400 per week and therefore reduced claimant's benefits.

Based on the parties' stipulation that claimant cannot return to his usual employment, the administrative law judge found that claimant established his *prima facie* case of total disability. Decision and Order at 2, Stip. 8. The administrative law judge found that employer did not establish the availability of suitable alternate employment. The administrative law judge credited claimant's credible complaints of pain to find that claimant cannot perform any work. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from August 11, 2003 through September 2, 2004, and continuing permanent total disability benefits beginning September 3, 2004.

On appeal, employer contends the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment as of September 22, 2006. Employer also argues the administrative law judge erred in not finding that claimant failed to diligently seek alternate employment. Claimant responds, urging affirmance.

Once, as here, claimant establishes his inability to perform his usual employment he is totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that jobs are realistically available to claimant and suitable for him given his age, education, medical restrictions, and vocational history. *Id.*; see also *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998);

Employer contends the administrative law judge erred in rejecting its April and May 2006 labor market surveys, as supported by the testimony of its vocational specialist, Ms. Jones, and of claimant's treating physician, Dr. Eisenloh. Dr. Eisenloh approved the eleven identified jobs as being within claimant's physical restrictions.

The administrative law judge found that the eleven jobs identified by employer are within claimant's abilities in terms of his knowledge, education and training, but that the determinative issue was whether claimant could perform any job given his credible testimony regarding his pain. The administrative law judge acknowledged that Dr. Eisenloh did not restrict claimant from all work and in fact approved the jobs identified by employer. The administrative law judge found, however, that Dr. Eisenloh's opinion is not dispositive of claimant's disability status because the doctor also stated that claimant's complaints of pain are consistent with his credible reported symptoms, that claimant was not engaging in symptom magnification or malingering, and that claimant's condition was deteriorating over time. CX 1 at 14; CX 11. The administrative law judge found that Dr. Eisenloh's opinion was expressed generally, noting that many people have back pain and would be better served by learning to function with it instead of dwelling

on it. CX 1 at 17. The administrative law judge credited claimant's credible testimony that his pain, even though it is not constant, precludes him from working at all. Tr. at 28, 38. Consequently, the administrative law judge found that employer did not establish the availability of suitable alternate employment and that claimant is permanently totally disabled.

We affirm the award of total disability benefits as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge's decision to credit claimant's credible testimony that his back pain prevents him from working is not inherently incredible or patently unreasonable, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), and the administrative law judge found claimant's complaints corroborated by Dr. Eisenloh's opinion. In *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, stated that an award based on a claimant's credible complaints of pain must be affirmed notwithstanding other medical evidence indicating an ability to work. As the administrative law judge is entitled to weigh the evidence and the Board may not reweigh it, *id.*, the administrative law judge's finding that claimant cannot perform alternate work is affirmed. *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). Thus, as suitable alternate employment has not been established, the administrative law judge was not required to inquire as to the diligence of any job search conducted by claimant. *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).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

