

BRB No. 93-1950

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

Appeal of the Decision and Order - Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Rickey Hemba, Ocean Springs, Mississippi, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (92-LHC-475, 476) of Administrative Law Judge A. A. Simpson, 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).

Claimant injured his neck and lower back on June 27, 1989, during the course of his employment, when a board fell from a crane and struck his left arm and thigh. Claimant returned to light-duty employment as a burner on March 22, 1990. On August 16, 1990, claimant injured his ankle and aggravated his back condition when an I-beam fell and struck claimant's knee. Claimant has not returned to work since the date of this second incident.

Employer voluntarily paid benefits for temporary total disability, 33 U.S.C. §908(b), during the periods claimant was unable to work due to his injuries until December 20, 1990. Thereafter, claimant requested a formal hearing to resolve, *inter alia*, the extent of his work-related disability. After the April 20, 1992, hearing, employer offered claimant light-duty employment in a modified burner position on May 13, 1992. Claimant refused this job offer.

In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation for the period employer voluntarily paid compensation to claimant. Additionally, claimant was awarded benefits for permanent total disability, 33 U.S.C. §908(a), from December 20, 1990, until April 1, 1991, when the administrative law judge found that employer established the availability of suitable alternate employment as a security guard. Thereafter, claimant was awarded benefits for permanent partial disability based on his loss in wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (h). Finally, the administrative law judge terminated claimant's compensation as of May 13, 1992, when employer offered claimant light-duty employment as a burner, which employment claimant refused.¹

On appeal, claimant challenges the administrative law judge's findings that he is able to return to his usual employment, and that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

Contrary to claimant's initial contention, the administrative law judge explicitly found that claimant is incapable of returning to his former employment duties with employer. *See* Decision and Order at 16-17. Claimant has thus established a *prima facie* case of total disability. Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1991); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience, and physical restrictions, which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In the instant case, the administrative law judge credited the testimony of Joe Walker, employer's vocational expert, in concluding that employer met its burden of establishing the availability of suitable alternate employment. After evaluating claimant and considering claimant's work restrictions, Mr. Walker opined that claimant was capable of performing semi-skilled work of a light, less than heavy nature. Based on a labor market survey conducted in March 1992 and his contacting prospective employers, Mr. Walker identified specific available jobs as a security guard, cab and bus driver, newspaper carrier, and assembly line worker which he opined were suitable for

¹The administrative law judge also resolved the contested issues of jurisdiction, average weekly wage, medical benefits, and penalties. These issues are not appealed.

claimant. EX 28. The administrative law judge found that claimant could only perform the two identified positions as a security guard and credited Mr. Walker's testimony in determining that claimant could have obtained a security guard position by April 1, 1991, after he was medically released to return to work by Dr. Hall on December 19, 1990. Claimant was thus awarded permanent total disability compensation from December 20, 1990 to March 31, 1991, and permanent partial disability compensation commencing on April 1, 1991, based on a loss of wage-earning capacity.

We agree with claimant that the administrative law judge erred in finding that the specific security guard positions credited by administrative law judge constitute suitable alternate employment, as these positions are not within the work restrictions placed on claimant by Dr. Saiter, claimant's treating physician. The administrative law judge credited the initial work restrictions imposed by Dr. Saiter in November 1989, in which Dr. Enger concurred on June 25, 1990. Decision and Order at 16-17. Additionally, the administrative law judge incorporated the additional work restrictions imposed by Dr. Saiter on July 17, 1990, of no ladder or stair climbing. Decision and Order at 18-19, *see* EX 20. Specifically, the work release form signed by Dr. Saiter on July 17, 1990, authorizes claimant's return to light-duty work with restrictions of "no ladder climbing" and "no stair climbing." EX 20. Although Mr. Walker noted these additional restrictions in his labor market survey, he assumed that "this would be stair climbing on a repetitive, continuous or frequent basis." *See* EX 28. The specific security guard positions identified by Mr. Walker clearly require stair climbing. *Id.* Contrary to Mr. Walker's assumption, Dr. Saiter's unequivocal restrictions, which were credited by the administrative law judge, contain no exceptions. Accordingly, as Mr. Walker's opinion that the security guard positions were suitable was premised upon an erroneous assumption regarding claimant's ability to climb, we reverse the administrative law judge's finding that employer established the availability of suitable alternate employment as of April 1, 1991 based upon those security guard positions, *see, e.g., White v. Petersen Boatbuilding Co.*, 29 BRBS 1, 13-14 (1995), and we modify the administrative law judge's award to reflect claimant's entitlement to permanent total disability benefits as of that date and continuing until May 12, 1992.

Finally, the administrative law judge found that employer's compensation liability under the Act terminated on May 13, 1992, when employer offered claimant light-duty employment as a burner at its facility. The administrative law judge credited Mr. Walker's evaluation of this position, *see* EX 33, and evidence that claimant successfully performed this type of work prior to his second injury on August 16, 1990. *See* Tr. at 54-56, 59. The administrative law judge also found that this job paid the same wage scale as claimant's pre-injury job. It is well-established that a job at employer's facility may meet employer's burden of demonstrating the availability of suitable alternate employment. *See, e.g., Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). In the instant case, an analysis by Mr. Walker of the proffered job as a burner at employer's facility specifically states: "[T]here would be no climbing," and, "[T]his work activity would be on ground level." *See* EX 33. Claimant testified that he had performed this type of work after he returned to work in March 1990 from his first injury. As the administrative law judge's finding that employer established the availability of suitable alternate employment as of May 12, 1992, based on Mr. Walker's reports and claimant's testimony, is rational, supported by substantial evidence and in

accordance with applicable law, we affirm his determination that claimant is not entitled to further benefits under the Act after May 12, 1992. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is reversed in part and modified to reflect claimant's entitlement to permanent total disability compensation for the period of April 1, 1991, to May 12, 1992. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge