BRB No. 10-0244

RICO T. MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED	)	DATE ISSUED: 07/23/2010
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Employer's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rico T. Mitchell, Pascagoula, Mississippi, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2008-LHC-1191) of Administrative Law Judge C. Richard Avery 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). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for employer on June 19, 2007, sustained an injury to his back while lifting a piece of angle iron with a co-worker. Claimant was diagnosed with a back strain and released to light-duty work. Thereafter, claimant attempted to return to work on two occasions, but was unable to do so due to his continuing symptoms.

Employer voluntarily paid claimant temporary total disability compensation on June 20, 2007, and June 26 through August 13, 2007, and terminated claimant's employment in October 2008.

In his Decision and Order, the administrative law judge found that claimant's back condition reached maximum medical improvement on October 17, 2007, that claimant was unable to return to his pre-injury employment with employer, and that employer established the availability of suitable alternate employment when claimant received an offer of employment from a local Wendy's restaurant. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 20 through October 16, 2007, permanent total disability benefits from October 17, 2007 through October 1, 2008, and permanent partial disability benefits, based upon two-thirds of the difference between claimant's average weekly wage of $586.53 and the wages paid by the proffered Wendy's position, from October 2, 2008, and continuing. 33 U.S.C. §908(a), (b), (c)(21), (h). The administrative law judge thereafter denied employer's motion for reconsideration.

On appeal, claimant, representing himself, challenges the administrative law judge's decision. Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence and is in accordance with law.

Where, as in the instant case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc*., 31 BRBS 70 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *Turner*, 661 F.2d 1031, 14 BRBS 156. The Board has affirmed a finding that suitable alternate employment was established where an actual job offer was made to claimant. *Shiver v. United States Marine Corp, Marine Base Exchange*, 23 BRBS 246, 252-253 (1990).

In determining the extent of claimant's current disability, the administrative law judge in this case appropriately began by reviewing the relevant evidence in order to

assess claimant's present physical capabilities. In this regard, the administrative law judge relied upon the opinion of Dr. Fontana, as supported by claimant's testimony and a functional capacity evaluation performed on August 29, 2008, in determining that claimant was capable of light-duty employment as of October 2, 2008. Decision and Order at 10. Dr. Fontana commenced treating claimant on July 21, 2008; on October 2, October 16, and October 31, 2008, Dr. Fontana opined that claimant was capable of light duty work with restrictions of, *inter alia*, no lifting over 30 pounds, occasional sitting, squatting, stooping and bending, and frequent overhead and side-to-side reaching. CX 10. On August 29, 2008, claimant underwent a functional capacity evaluation which resulted in a recommendation that claimant was capable of lifting 30 pounds. CX 11. At the formal hearing, claimant testified that he believed he was capable of performing certain light-duty jobs. Tr. at 9, 59.

It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Todd Shipyards Corp. v.* Donovan, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v.* Hughes, 289 F.2d 403 (2d Cir. 1961). In this case, the administrative law judge's decision that claimant is capable of working with light-duty restrictions is supported by the credited medical evidence and claimant's testimony. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, as it is supported by substantial evidence, the administrative law judge's finding that claimant is capable of employment with restrictions is affirmed.

We cannot affirm, however, the administrative law judge's conclusion that the janitorial position offered to claimant by a local Wendy's restaurant established the availability of suitable alternate employment consistent with his restrictions. In ascertaining the suitability of an identified job, the administrative law judge must compare the duties of the position with the claimant's physical restrictions. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1988). In his decision, the administrative law judge did not make this comparison but simply relied upon claimant's testimony that he was capable of light-duty employment and that he had been offered employment to perform janitorial work by Wendy's, Decision and Order at 10, and concluded that

> . . .suitable alternate employment was established in 2008, when Claimant secured an employment offer from a local Wendy's. . . . Although Claimant declined to take the job, it fit within the light duty restrictions placed on Claimant by Dr. Fontana and the functional capacity evaluation given earlier that year.

Id. There is no evidence in the record, however, of the nature, terms or requirements of the janitorial job offered to claimant by a local Wendy's. Rather, the sole discussion of this position is contained in claimant's deposition and hearing testimony, wherein claimant stated that after filing an application for employment, he received a call from Wendy's regarding janitorial work.[1] *See* EX 20 at 62 – 63; Tr. at 67 – 68. Without sufficient information regarding the duties of this job or its required activity level, the administrative law judge's summary statement that this position "fit within the light duty restrictions placed on Claimant" lacks support in the record. As we have discussed, the physical restrictions placed on claimant's return to work include limits on lifting over 30 pounds, occasional sitting, squatting, stooping and bending, and frequent overhead and side-to-side reaching. Accordingly, as the record contains no evidence regarding the nature, terms or requirements of the janitorial position offered to claimant, it is impossible to determine if claimant is capable of performing this work; therefore the job cannot meet employer's burden of showing a suitable job for claimant. The administrative law judge's finding that this specific job offer established the availability of suitable alternate employment that claimant was capable of performing given his present physical restrictions is thus vacated, as there is no evidence to support that determination.

However, employer submitted other evidence which may meet its burden of showing that suitable jobs were available. The administrative law judge acknowledged in his "Statement of the Evidence" that employer submitted into evidence a January 14, 2009, labor market survey prepared by Tommy Sanders, *see* EX 19, but he did not discuss this evidence when addressing the extent of claimant's disability.[2] *See* Decision and Order at 7, 9 – 10. This evidence, if credited, could establish the availability of suitable alternate employment. Accordingly, the case is remanded for further findings regarding the extent of claimant's work-related disability.

If employer does not demonstrate the availability of suitable alternate employment, claimant is permanently totally disabled. If there are available jobs which claimant can perform, he is entitled, at most, to permanent partial disability benefits based on the difference between his pre-injury average weekly wage and his post-injury

[1] While employer correctly states in its brief that claimant deposed that he believed that he could perform janitorial work, *see* EX 20 at 63, claimant subsequently testified at the formal hearing that he believed that this position was not within his restrictions. Tr. at 68.

[2] Employer's Exhibit 19 additionally contains a follow-up labor market survey dated August 7, 2009, which was not acknowledged by the administrative law judge. *See* EX 19 at 11 – 12.

wage-earning capacity.[3] 33 U.S.C. §908(c)(21), (h); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Cook v. Seattle Stevedoring Co.*¸ 21 BRBS 4 (1988). Under Sections 8(c)(21) and 8(h), earnings representing a claimant's post-injury wage-earning capacity must be adjusted to represent the wages that the post-injury job paid at the time of claimant's injury in order to neutralize the effects of inflation. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Thus, should the administrative law judge on remand determine that employer has met its burden of establishing the availability of suitable alternate employment, and that claimant consequently has a post-injury wage-earning capacity, he must calculate the appropriate compensation rate to be paid to claimant consistent with the Act and this case precedent. As employer concedes that claimant has a loss in wage-earning capacity, the award of permanent partial disability benefits remains in effect pending the issuance of findings on remand.

Accordingly, the administrative law judge's determination that employer established the availability of suitable alternate employment as of October 2, 2008, is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[3] The parties stipulated that claimant's average weekly wage at the time of his work-injury was $586.53.