

DENNIS D. EMERSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	
AND DRY DOCK COMPANY)	DATE ISSUED: <u>JUN 3, 2004</u>
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS=)	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Richard B. Donaldson, Jr. (Jones, Blechman, Woltz & Kelly, P.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (97-LHC-515) of Administrative Law 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).

This case is before the Board for the third time. To recapitulate, claimant, who had worked for employer as a firefighter since 1968, experienced an attack of angina at work on February 7, 1996, after climbing a 50-foot ladder in order to extinguish a fire on top of a ship shed. Claimant was treated with medication at employer=s infirmary, and the following day he was examined by his treating physician, Dr. Zullo. Claimant returned to work; however, on February 22, 1996, employer told claimant to stop working and placed claimant on retirement. Claimant underwent two angioplasty procedures on April 26, 1996. Claimant filed a claim for permanent total disability benefits under the Act, 33 U.S.C. §908(a), contending that his work environment, including the February 7, 1996, incident, aggravated and combined with his underlying heart condition to prevent his working as a firefighter.

In his initial decision, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. '920(a), linking his heart condition to his employment, and that employer did not establish rebuttal of that presumption. The administrative law judge awarded claimant ongoing permanent total disability benefits commencing on February 23, 1996. The administrative law judge further found employer entitled to relief under Section 8(f) of the Act, 33 U.S.C. '908(f).

Employer appealed the award of benefits, challenging the administrative law judge=s findings regarding causation. Specifically, while not challenging the fact that claimant experienced an angina attack at work on February 7, 1996, employer asserted that claimant=s underlying coronary disease was not caused or aggravated by his employment. The Board reversed the administrative law judge=s finding that the Section 20(a) presumption was not rebutted with regard to claimant=s underlying heart disease. *Emerson v. Newport News Shipbuilding & Dry Dock Co. (Emerson I)*, BRB No. 99-0978 (June 16, 2000) (unpublished). The Board held the opinion of Dr. Israel that claimant=s job as a firefighter played no role in claimant=s heart disease and that other factors wholly account for claimant=s illness satisfies employer=s burden of production on rebuttal. The Board vacated the administrative law judge=s finding that claimant=s underlying heart condition is causally related to his employment and remanded the case for the administrative law judge to weigh all the evidence regarding causation, with claimant bearing the burden of persuasion.

In his decision on remand, the administrative law judge credited the opinion of Dr. Israel and found that claimant failed to establish that his underlying coronary artery disease

was caused or aggravated by his employment. The administrative law judge therefore denied the claim.

Claimant appealed the denial of benefits, challenging the administrative law judge's findings that claimant's coronary artery disease is not related to his employment and that claimant is not entitled to compensation based on his work-related angina attack. The Board rejected claimant's contention that the opinion of Dr. Israel does not rebut the Section 20(a) presumption, as the Board's prior holding on this issue was the law of the case. The Board affirmed as supported by substantial evidence the administrative law judge's determination on remand, based on the record as a whole, that claimant's coronary artery disease was not caused or aggravated by his employment. *Emerson v. Newport News Shipbuilding & Dry Dock Co. (Emerson II)*, BRB No. 01-0556 (March 26, 2002) (unpublished).

The Board, however, agreed with claimant's contention that he sustained a work-related injury on February 7, 1996, as employer conceded claimant sustained an exertional angina attack. *Emerson II*, slip op at 4-5. The Board vacated the denial of benefits with regard to claimant's work-related angina, and remanded the case for the administrative law judge to address the nature and extent of claimant's disability resulting from his angina attack on February 7, 1996. The Board specifically directed the administrative law judge to determine whether claimant's symptoms preclude his return to his former work and, if so, whether employer's labor market survey established the availability of suitable alternate employment. *Id.* at 5-6. The Board also directed the administrative law judge to determine whether claimant's disability is permanent or temporary.

In his Decision and Order on Remand, which is the subject of the current appeal, the administrative law judge concluded that claimant is unable to return to his former employment as a fireman. Decision and Order on Remand at 4. The administrative law judge stated that claimant has not returned to this position and that employer concedes claimant cannot perform such work. The administrative law judge found that employer did not establish availability of suitable alternate employment and that claimant therefore is totally disabled. The administrative law judge next credited evidence that claimant's condition reached maximum medical improvement on February 13, 1996, and he awarded claimant compensation for permanent total disability from that date. Pursuant to the unchallenged finding in his initial decision, employer was granted Section 8(f) relief. The administrative law judge determined that claimant gave employer notice of his injury on February 7, 1996, and that employer controverted the claim on June 21, 1996. Claimant therefore was awarded a penalty on all amounts due from February 7 to June 20, 1996, pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, employer challenges the administrative law judge's findings that claimant is unable to return to his usual employment due to his angina and that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

In challenging the administrative law judge's finding that claimant is unable to return to his usual employment, employer specifically argues that the administrative law judge failed to address whether claimant's angina attack on February 7, 1996, caused any permanent impairment and contributes to his inability to work after February 22, 1996. In order to establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual work due to his work injury. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Harmon v. Sea-Land Service*, 31 BRBS 45 (1997). Contrary to employer's contention, when an injury consists of disabling symptoms, such as angina, claimant may nonetheless be entitled to benefits for permanent disability if the evidence establishes that the condition may continue indefinitely and recur if claimant returns to his work environment. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). Furthermore, if the recurrence of symptoms prevents claimant's return to his usual work, claimant has established his *prima facie* case. *Id.*; *Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988). Thus, whether claimant's angina attack on February 7, 1996, caused an increase in his underlying heart condition is not dispositive of the determination of disability and claimant's entitlement to compensation under the Act. See *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); see also *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

In its decision, the Board explicitly directed the administrative law judge on remand to address the extent of claimant's disability as a result of his angina attack on February 7, 1996, and to determine whether claimant's angina symptoms preclude his return to his former work. *Emerson II*, slip op. at 5-6. In his decision, the administrative law judge quoted these instructions and the evidence the Board summarized in its decision as relevant to this determination. Decision and Order on Remand at 2-3. The administrative law judge then stated: "[E]merson has not returned to his job as a fireman and the employer concedes that he cannot perform such work. Therefore, the burden is on the employer to show that suitable alternate employment is available." Decision and Order on Remand at 4. As employer correctly observes, the administrative law judge did not explicitly discuss whether claimant's angina prevents his return to his usual work as a fireman. Any error in this regard is harmless, however, as the evidence is uncontradicted that claimant should not return to work as a fireman to avoid recurrence of his angina.

The record establishes that angina is precipitated by an increase in myocardial oxygen demands, usually due to physical activity. EX 6 at 4, 9, 68. Employer's labor market survey includes the *Dictionary of Occupational Titles* (DOT) summary of the physical requirements for claimant's job duties with employer as a firefighter, which it characterizes as, "[V]ery Heavy Work. Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force consistently to move objects." EX 7 at 3. Claimant testified that his working conditions for employer entailed installing fire equipment, fighting fires, and rescue operations. Tr. at 18. He described the physical requirements of the job as: lifting at least 100 pounds; walking, running, climbing or crawling to extinguish fires; and lifting and carrying patients on stretchers. Tr. at 20-21.

Claimant further testified that, on the day of his injury, he carried an inch and a half water hose 40 to 50 feet up a vertical ladder to reach the top of the ship shed to extinguish a transformer fire. When he reached the top of the shed he was out of breath and his chest hurt to the extent that he could not extinguish the fire. A co-worker took the hose and put out the fire. Tr. at 36. Claimant treated himself with nitroglycerin. At employer's dispensary he was given two more nitroglycerin tablets. Tr. at 37. Claimant returned to work a few days later. Tr. at 42. Claimant testified that on February 22, 1996, an employee from the benefits department came to the fire department at 9 a.m. to demand that he quit working for employer. Claimant was taken to employer's clinic, where Dr. Reid informed him that he was retired. Tr. at 24. Claimant stated he was informed by the employee from the benefits department that, knowing claimant's condition, employer was concerned it may be sued by his estate should claimant die during the course of his employment. Tr. at 40-41. If employer makes claimant's usual work unavailable due to his work injury, claimant has established his *prima facie* case. *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988).

The medical evidence also supports the conclusion that claimant cannot work as a firefighter due to his angina. Claimant's primary care physician, Dr. Zullo, noted on April 22, 1996, that claimant had recently developed angina, and he opined that claimant is disabled due to the nature of his occupation as a firefighter. CX 4V. Dr. Zullo reiterated his opinion in his July 2, 1996, report, which states that claimant develops recurrent chest pain and shortness of breath if he exercises or lifts any significant amount of weight. Dr. Zullo opined that such activities would be detrimental to claimant's health, and he imposed permanent work restrictions. Dr. Zullo also opined that claimant's clinical condition was aggravated by his employment as a fireman due to the rigorous physical activity and exposure to smoke. CX 4X. Claimant's cardiologist, Dr. Micale, opined on September 30, 1996, that claimant should not return to work, and he noted on February 25, 1997, that claimant is asymptomatic but is living a sedentary lifestyle. CX 3 at H, I.

Dr. Israel generally opined that an angina attack is a benign event and that patients "are sometimes encouraged to walk-through their angina pectoris in order to achieve physical activity requirements in an attempt to delay the natural progression of coronary artery disease." EX 6 at 5. Dr. Israel specifically was referring to patients with "chronic stable angina." *Id.* In his reports, Dr. Israel did not characterize claimant's angina as such, nor did he specifically state that claimant could "walk through" an angina attack at work. Although Dr. Israel opined that claimant's angina is not due to his work activities as a firefighter, he described the specific attack as due to "preexistent worsening of his atherosclerotic coronary artery disease *brought-to-light by the strenuous physical activity.*" EX 5 at 4 (emphasis added). Thus, in Dr. Israel's opinion, claimant's working conditions contributed to his sustaining an angina attack on February 7, 1996. Moreover, Dr. Israel did not address whether claimant's angina symptomatology precludes returning to his former work. His opinion is limited to his determination of the cause of claimant's underlying coronary artery disease, and that the specific angina attack on February 7, 1997, did not increase the extent of claimant's permanent disability from the underlying coronary artery disease. EX 6 at 1, 4-5.

In its brief on remand to the administrative law judge, and on appeal to the Board, employer referred to no evidence nor did it present any argument that claimant's working conditions as a firefighter did not contribute to his being forced by employer to leave his usual employment on February 22, 1996. *McBride*, 844 F.2d 797, 21 BRBS 45(CRT). Employer contends solely that the evidence establishes claimant did not sustain any additional permanent disability from his angina attack on February 7, 1996, Employer Brief at 13-16; Employer Brief on Remand 1-10, which is insufficient to avoid liability. We have previously explained that claimant's symptoms are compensable regardless of whether his underlying heart condition was altered. Claimant's testimony, evidence of claimant's work duties for employer, and the medical opinions of Drs. Zullo and Micale constitute substantial evidence supporting the administrative law judge's conclusion that claimant is physically unable to return to work as a firefighter due, at least in part, to his working conditions, which precipitated an angina attack on February 7, 1996, and which would likely trigger future angina attacks had employer not demanded that claimant stop working at its facility. *See Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Padilla v San Pedro Boat Works*, 34 BRBS 49 (2000). Accordingly, the administrative law judge's finding that claimant is unable to return to his usual employment is affirmed.

Employer also challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Specifically, employer argues that the jobs identified in its labor market survey of desk attendant, dispatcher, bicycle attendant, parking lot attendant, golf cart attendant, sales clerk/cashier, store greeter, and substitute school bus driver would be categorized as sedentary by the DOT, and that no basis exists for the administrative law judge to find that these jobs are not within Dr. Zullo's sedentary work restriction.

Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). A labor market survey may be rationally discredited if it fails to take into consideration all relevant restrictions found by the administrative law judge. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

In his decision, the administrative law judge credited Dr. Zullo's opinion restricting claimant to sedentary work in February 1996. EX 2 at 10. The administrative law judge found that the job classifications in employer's July 1996 labor market survey require light or medium exertion. The administrative law judge also found that none of the specific jobs identified by employer appears to be sedentary. The administrative law judge therefore concluded that employer did not establish the availability of suitable alternate employment.¹

Employer's contention that there is no basis in the record to support the administrative law judge's finding that the specific jobs it identified are not sedentary work ignores the legal principle that it is employer's burden to establish that these jobs are within Dr. Zullo's sedentary work restriction. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Employer produced no evidence sufficient to establish its burden of proof. Employer's vocational consultant, Kathleen Walsh, stated in her June 24, 1996, report that she is awaiting confirmation of claimant's work restrictions from Dr. Zullo. EX 7 at 1. The report also lists specific job titles, which she classifies as light duty and not as sedentary duty. *Id.* at 4. These job titles include dispatcher and retail sales, areas in which Ms. Walsh identified specific jobs. The administrative law judge found that employer produced no evidence or testimony that the specific jobs identified by Ms. Walsh as desk, parking lot, bicycle, and golf cart attendant, and store greeter are classified by the DOT as sedentary work. Moreover, in a chart listing these jobs, it is noted that claimant does not possess the qualifications to drive a school bus. EX 7 at 17. Based on this record, the administrative law judge rationally found that the jobs in employer's labor market survey are not within claimant's restriction limiting him to sedentary labor. *See Carlisle*, 33 BRBS 133. Accordingly, the administrative law

judge's finding that employer failed to establish the availability of suitable alternate employment is affirmed.²

¹ The administrative law judge discussed, without crediting or discrediting, the September 1996 opinion of Dr. Micale that claimant should not return to work and the October 1996 opinion of Dr. Zullo that claimant should no longer work due to the risk of cardiac problems. CXs 3H, 4Y. On remand, the administrative law judge admitted into evidence updated reports from Drs Micale and Zullo. Dr. Micale opined on July 11, 2002, that claimant should avoid all strenuous activities and ought not work, and in his January 6, 2003, report that claimant should not return to any employment to avoid provoking his angina. CXs 6,7. Dr. Zullo opined on June 12, 2002, that due to the severity of his coronary artery disease claimant is "fully disabled," and he "is unemployable" due to his disabilities, which would be aggravated by either physical or emotional stressful situations. CX 5. In his decision, the administrative law judge quoted from these reports. Decision and Order on Remand at 6-7.

² As employer failed to 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,

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge