BRB No. 04-0842

STEVEN YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/30/2005
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for self-insured employer.

Peter B. Silvain, Jr. (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Second Decision and Order on Remand (1999-LHC-3081, 2000-LHC-1692) of Administrative Law Judge Daniel A. Sarno, 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 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).

This case is before the Board for the third time. To briefly reiterate the facts and procedural history, claimant worked as a welder for employer from June 1977 until May 1989. On February 25, 1988, he injured his right hand while moving a piece of equipment at work, and subsequently had a ganglion cyst surgically removed from his right wrist. Claimant returned to work after this surgery, but sustained a left elbow injury on March 25, 1988. He returned to work in May 1988, but continued to complain of bilateral arm, shoulder and neck pain. He stopped working in May 1989, and has not worked since that time. Claimant was diagnosed with thoracic outlet syndrome (TOS) in 1988, and a disc herniation and bone spurs at C6-7 in 1999. Claimant underwent four additional surgeries between 1990 and 2000. Claimant sought benefits under the Act.[1]

In his original Decision and Order, the administrative law judge found that claimant established that his TOS and cervical spine problems are causally related to his employment pursuant to Section 20(a), 33 U.S.C. §920(a), and that employer established the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant permanent partial disability benefits commencing July 27, 2000. 33 U.S.C. §908(c)(21). In addition, the administrative law judge denied employer's claim for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

This decision was appealed to the Board. The Board affirmed the administrative law judge's finding that claimant's TOS and cervical condition are work-related. *Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 01-0543/A (Mar. 18, 2002). In addition, the Board held that claimant is entitled to temporary total disability benefits from the date of his surgery, January 18, 2000, until the date suitable alternate employment was established, July 27, 2000. However, the Board vacated the conclusion that employer did not establish suitable alternate employment prior to the January 18, 2000, surgery, and remanded the case to the administrative law judge for consideration of employer's evidence of suitable alternate employment allegedly available beginning in 1992. The Board held that the rejection of the proffered labor market survey identifying these jobs on the basis that no doctor approved the identified positions was improper, as such approval is not required. Lastly, the Board affirmed the administrative law judge's finding that employer is not entitled to Section 8(f) relief.

[1] Employer voluntarily paid benefits for periods of temporary total and partial disability, as well as for scheduled permanent partial disability for a 10 percent impairment to claimant's left arm.

On remand, the administrative law judge found that the positions identified by employer do not establish suitable alternate employment. Therefore, the administrative law judge found that employer did not overcompensate claimant prior to January 18, 2000, and is not entitled to a credit against its liability for ongoing partial disability benefits.

Employer appealed this decision. The Board vacated the administrative law judge's finding that three of the specific positions identified in employer's labor market survey of July 26, 2000, and two of the positions identified in employer's survey of July 14, 2000, were not suitable, and remanded the case for the administrative law judge to reconsider the suitability of these positions. *Young v. Newport News Shipbuilding & Dry Dock Co. (Young II)*, BRB No. 03-0199 (Oct. 31, 2003). The Board held that the administrative law judge did not address two positions available in 1999 as a cashier at the College of William & Mary Dining Services, and as a parking attendant at the Colonial Williamsburg Foundation. The Board also held that, contrary to the administrative law judge's finding, employer's July 26, 2000, survey included the precise nature and terms of a cashier position at Old Hampton Seafood Kitchen. Finally, the Board held that the administrative law judge erroneously rejected positions as a delivery driver at Photo Associates, and as a cashier at Dean and Don's Farm Market on the basis that they do not state the wages paid during the relevant period because the testimony by employer's vocational consultant, Ms. Whitfield, established that these positions paid the minimum wage. The Board affirmed the administrative law judge's rejection of the remaining positions identified in employer's labor market surveys.

In his decision on second remand, the administrative law judge found that none of the five positions constitutes suitable alternate employment. The administrative law judge found that claimant does not have the educational and vocational aptitude to work as a cashier, and that employer failed to show that claimant's driving record would qualify him to work as a delivery driver. Accordingly, the administrative law judge again concluded that employer did not overcompensate claimant prior to January 18, 2000, and that it is not entitled to a credit against its liability for ongoing partial disability benefits. Employer appeals, contending that the administrative law judge's rejection of its evidence of suitable alternate employment is not supported by substantial evidence or in accordance with law.[2] Claimant responds, urging affirmance.

[2] Employer also reiterates all the contentions it raised in its prior appeals to the Board. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reaffirm the administrative law judge's finding in his initial decision that employer is not entitled to relief under Section 8(f). For the reasons stated in our second decision, we again decline to address employer's contentions regarding these issues based on the law of the case doctrine. *See Young II*, slip op. at 3 n.1.

This case was remanded to the administrative law judge to consider the suitability of five specific positions employer identified as evidence of suitable alternate employment prior to claimant's spinal fusion on January 18, 2000. *See Young II*, slip op. at 6. Where, as here, it is undisputed that claimant is physically unable to return to his pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. In order to meet its burden, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical capacity and restrictions, is capable of performing. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984).

On remand, the administrative law judge addressed the three cashier positions and the parking attendant position, which he found, based on Ms. Whitfield's testimony, also is a cashier position. *See* Tr. at 101. The administrative law judge credited evidence that claimant spells at a fourth grade level, reads at a fifth grade level, and computes at a sixth grade level. Tr. at 73; EX 53 at 6-7. The administrative law judge also credited Ms. Whitfield's testimony that claimant has no experience as a cashier, and that claimant has no job skills transferable to the duties of a cashier. Tr. at 95-96; *see also* EX 53 at 7, 10. The administrative law judge found that the cashier positions identified by employer would require claimant to handle money, make change, operate a computer and/or a cash register, and process credit card transactions. Decision and Order at 2. The administrative law judge concluded that claimant could not perform these job duties given his limited education and the absence of any transferable skills. *Id*. As the administrative law judge's finding that these positions are not suitable for claimant given his educational and vocational limitations is supported by substantial evidence, and employer has not raised any reversible error in his reasoning, we affirm the administrative law judge's finding that these four positions are not suitable for claimant. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *see also Mendez v. National Steel & Shipbuilding Corp*., 21 BRBS 22 (1988).

The administrative law judge also found that the delivery driver position at Photo Associates is not suitable because employer failed to show that claimant is qualified for the position. The job description includes the requirement of a "clean DMV record." EX 58 at 2. The administrative law judge found no evidence establishing what constitutes a clean driving record, or that claimant has such a record. Decision and Order at 2. The administrative law judge's finding that employer failed to meet its burden of showing that claimant is qualified to work as a delivery driver for Photo Associates is affirmed, as it is supported by substantial evidence. *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*,

227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

As employer did not establish the availability of suitable alternate employment prior to January 18, 2000, we affirm the award of total disability benefits. *Id.* Consequently, we affirm the administrative law judge's denial of a credit against permanent partial disability benefits for which employer has been liable since July 27, 2000.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge