BRB No. 02-0162

WILLIE R. PARKS	)	
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Claimant-Petitioner	)	
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NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Nov. 7, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Jennifer G. Tatum (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-0585, 00-LHC-0586) of Administrative Law Judge 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).

Claimant suffered two injuries during the course of his employment with employer. Claimant injured his cervical spine on October 5, 1984, when he fell from a ladder while working as a welder. Claimant was out of work from November 29, 1984, to March 11, 1985, when he returned to work as a welder with restrictions limiting his ability to lift heavy objects, bend and twist, and the time he could continuously sit or stand without taking a rest. CX 2. Subsequent to this injury, claimant sought compensation for permanent partial disability. Administrative Law Judge Daniel L. Leland determined that although claimant

failed to demonstrate a loss in wage-earning capacity at that time, there was a significant possibility of future economic loss arising from his work-related physical disability; accordingly, he awarded claimant a *de minimis* award of $3.03 per week from October 5, 1984, and continuing except for those periods when claimant was receiving temporary total disability benefits. Judge Leland Decision and Order of May 24, 1990 at 7-8.

On February 6, 1991, claimant reported pain in both wrists which was subsequently diagnosed as carpal tunnel syndrome. As a result of his work-related carpal tunnel syndrome, claimant received various periods of temporary total disability compensation, as well as permanent partial disability benefits based on a 60 percent loss of use of his right arm and a 37 percent loss of use of his left arm. 33 U.S.C. '908(c)(1); EX 9. When he returned to work, employer placed claimant in a light duty position as a tool room attendant. In the fall of 1995, employer offered its eligible employees an early retirement package; claimant took advantage of this opportunity and ceased work as of September 1, 1995. Claimant subsequently filed a motion for modification, pursuant to Section 22 of the Act, 33 U.S.C. '922, seeking permanent total disability benefits.

In his decision, the administrative law judge found that claimant did not have a change in his cervical condition. He further found that claimant was employed in suitable work in employer=s tool room at the time of his retirement and that claimant voluntarily retired in 1995. As such, the administrative law judge found that claimant was not entitled to total disability compensation, and he denied further benefits.

On appeal, claimant contends the administrative law judge erred in finding that he is not entitled to compensation for permanent total disability. Claimant avers that the post-injury job he performed for employer was not suitable; specifically, claimant contends he worked in spite of his pain and at employer=s beneficence. Claimant contends that he stopped working due to his pain upon employer=s offer of early retirement. Employer responds, urging affirmance of the administrative law judge=s denial of total disability benefits.

Section 22 of the Act, 33 U.S.C.'922, provides the only means for changing otherwise final decisions. Modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant=s physical or economic condition. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT)(1995); *O=Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254 (1971), *reh=g denied*, 404 U.S. 1053 (1972); *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh=g denied,* 391 U.S. 929 (1968). Once, as here, claimant establishes his inability to perform his usual work, the burden of proof shifts to employer to establish the availability of suitable alternate employment which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *Newport News Shipbuilding & Dry Dock Co.*

[1]Claimant received his last payment in January 1998. EX 9

v. Tann, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Employer can meet its burden by offering claimant a suitable light duty job in its facility. *Darby v. Ingalls Shipbuilding, Inc*., 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Employer may tailor a job to claimant=s specific restrictions so long as the work is necessary to employer=s operation. *Darden*, 18 BRBS at 226. A claim for total disability benefits requires that claimant establish a loss of wage-earning capacity. *See* 33 U.S.C. '902(10); *Burson v. T. Smith & Son. Inc.,* 22 BRBS 124 (1989). When a claimant voluntarily leaves the work force after sustaining a traumatic injury, the administrative law judge may deny total disability benefits on the basis that claimant failed to establish a loss in wage-earning capacity due to his injury. *Hoffman v. Newport News Shipbuilding & Dry Dock, Co.*, 35 BRBS 148 (2001). If claimant retired due to his work injury, however, he may be found entitled to total disability benefits. *Harmon v. Sea-Land Serv. Inc.*, 31 BRBS 45 (1997).

In the instant case, claimant contends that the administrative law judge erred in finding that his job in employer=s tool room constituted suitable alternate employment, alleging that it was sheltered employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). The administrative law judge found that claimant=s light duty position in the tool room was suitable for, and would have continued to be available to, claimant if he had not retired. The administrative law judge relied on the physical restrictions placed on claimant by Drs. Garner and Freund limiting the amount of weight claimant could lift and/or grip. CX 1; CX 3. Dr. Freund opined in 1993 that claimant was restricted from lifting over ten pounds and from fine manipulation with his hands. CX 5. In 2000, Dr. Freund stated that the initial restrictions were still valid and that claimant would be able to work full time in a position requiring limited manual activity. CX 3; EX 32. Dr. Garner stated that claimant=s restrictions with regard to his cervical condition were the same in 2000 as when he originally placed them on claimant in 1993, *i.e.,* lifting limited to the 30 pound range and no continuous overhead work; additionally, claimant was restricted from climbing ladders and working at heights. EX 27. Douglas Wiggins, claimant=s supervisor, testified that claimant=s job did not require that he lift tools weighing more than five pounds. Tr. at 125. Mr. Wiggins testified that claimant would issue tools to other employees and fill out paperwork, and that such work is necessary. *Id.* at 125-127. Other than on one occasion, Mr. Wiggins did not recall claimant

[2]Sheltered employment is a job for which claimant is paid even if he cannot do the work and which is unnecessary. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

complaining that he was unable to perform his duties. Tr. at 128-129. He also stated that if claimant had not retired, the job would have been available to him and that, when claimant retired, someone filled the position. *Id.* at 132. Based on this evidence, the administrative law judge rejected claimant=s testimony that he was unable to perform his job duties and that he retired due to his pain. *See, e.g.,* Tr. at 18, 22.

We reject claimant=s contention that the administrative law judge erred in finding that the position in the tool room was suitable. Substantial evidence supports the administrative law judge=s finding that the work was available and was within claimant=s restrictions, and therefore, we affirm this finding. *See, e.g., Tann*, 841 F.2d 540, 21 BRBS 10(CRT). Moreover, as the work was necessary to employer=s operation, as evidenced by the fact that someone filled the position upon claimant=s retirement, we reject claimant=s contention that the work was sheltered. *Darby*, 99 F.3d at 689, 30 BRBS at 95(CRT); *Darden*, 18 BRBS at 226-227. Furthermore, in light of the other evidence of record, the administrative law judge rationally rejected claimant=s contention that he retired due to his pain. *See Hoffman*, 35 BRBS at 149; *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). Inasmuch as we affirm the administrative law judge=s finding that claimant was a voluntary retiree, we affirm the denial of total disability benefits. *Hoffman,* 35 BRBS at 150; *Burson,* 22 BRBS at 127.

[3]On this occasion, claimant was asked to clean out boxes in the tool room. Claimant stated that the items were too heavy, and someone in the personnel department agreed with claimant=s assessment. Tr. at 18-19, 129.

[4]Thus, we reject claimant=s contention that employer was required to demonstrate the availability of suitable alternate employment on the open market. *Darden*, 18 BRBS at 227.

Accordingly, the administrative law judge=s Decision and Order denying further compensation is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge