BRB No. 09-0441

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| STEVEN PHILLIPS | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| OVERSEAS ADMINISTRATION SERVICES, LTD. | ) | DATE ISSUED: 11/17/2009 |
| | ) | |
| and | ) | |
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| INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA c/o AIG WORLDSOURCE | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits and Order Denying Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Barry R. Lerner (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Grover E. Asmus (Asmus & Gaddy, LLC), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Request for Reconsideration (2007-LDA-00203) of Administrative Law Judge Linda S. Chapman 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

On November 16, 2005, claimant was employed as a "service plumber" in Afghanistan when he injured his neck while attempting to move an old water heater. He sought medical attention at the military clinic in Afghanistan, where he was prescribed anti-inflammatory medicine. Emp. Ex. 5. He requested further treatment as the pain continued, and was seen by a physician at Bagram Air Force Base. Claimant's term of service ended soon thereafter, and he continued to seek treatment for his work-related injury with his primary care physician, Dr. Daniels, once he returned home. Emp. Ex. 6. Dr. Daniels referred claimant to an orthopedic surgeon, Dr. Broadstone, who prescribed anti-inflammatory medicine and physical therapy. Claimant underwent a functional capacity evaluation which showed that he had limited ability to lift over his head. Claimant sought benefits under the Act.

In her decision, the administrative law judge found that claimant is unable to return to his former duties because of his work-related neck injury. In addition, the administrative law judge found that employer failed to establish the availability of suitable alternate employment after consideration of claimant's current physical condition as a whole; she therefore awarded permanent total disability benefits. Subsequently, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that claimant's inability to perform his former work is a result of his work-related injury. Moreover, employer contends that the administrative law judge erred in rejecting the labor market survey of Ms. Thompson and in considering claimant's non-work-related conditions in assessing employer's evidence of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision. Employer filed a reply brief.

Employer initially contends that the administrative law judge erred in finding that claimant's inability to perform his former duties resulted from his work-related injury. To be entitled to total disability benefits, the claimant bears the initial burden of establishing his inability to perform his usual work as a result of his work injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In order to determine whether a claimant can return to his usual work, the administrative law judge must compare the claimant's medical restrictions with the physical requirements of his usual employment. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985).

The administrative law judge addressed the lifting limitations imposed by Dr. Broadstone as a result of the neck injury claimant suffered in November 2005. A functional capacity evaluation was performed in June 2006 at Dr. Broadstone's request. The evaluator who conducted the examination concluded that claimant could meet the positional requirements of his job as a plumber, but that he does not meet the strength or lifting demands of that job. Emp. Ex. 9. He recommended restrictions against lifting more than 40 pounds occasionally and 20 pounds frequently. *Id*. Dr. Broadstone adopted these conclusions and released claimant to work with the restrictions recommended in the functional capacity evaluation. Emp. Exs 7, 15. The administrative law judge credited these restrictions and noted, moreover, that claimant testified he attempted to return to work with employer, but was told he could not be rehired with the lifting restrictions. Tr. at 30. Substantial evidence supports the administrative law judge's finding that claimant cannot perform his usual employment due to his work injury, and thus we affirm the finding that claimant established a *prima facie* case of total disability. *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc*., 31 BRBS 70 (1997).

Once claimant has established that he is unable to return to his usual employment duties due to his work injury, the burden shifts to employer to establish the availability of realistic 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 and which he could realistically secure if he diligently tried. *See Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Meehan Seaway Serv., Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's medical restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that jobs are realistically available to claimant and suitable for him given his age, education, medical restrictions, and vocational history. *Id.*; *see also Ledet v. Phillips Petroleum Co*., 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

Employer contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment which claimant could perform considering the work-related injury alone. The administrative law judge stated that she must consider all of the vocational factors relevant to claimant's ability to obtain alternate employment, including medical conditions other than his work-related injury. The Board has held that medical limitations due to pre-existing conditions must be considered in the

same manner as pre-existing vocational, educational, or other limitations in evaluating the suitability of alternate employment, as an employer takes its employee as it finds him.[1] *J.T. [Tracy] v. Global Int'l Offshore*, __ BRBS ___, BRB Nos. 08-0119/A (July 29, 2009); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). In this case, the administrative law judge found that claimant's incontinence precludes his employment, and thus, that employer did not establish the availability of suitable alternate employment. Employer avers that consideration of this condition was in error, as it is not related to claimant's work injury.

In 2002, claimant was diagnosed with prostate cancer; he underwent surgery for removal of the prostate and radiation treatments. Subsequently, he applied for a job in Iraq and was stationed there for three months. He returned to the United States when he developed a problem with bleeding from the rectum. The record contains the medical records of Dr. Scidmore, who treated claimant for prostate cancer and the residual complications. On March 23, 2004, Dr. Scidmore reported that claimant reported minimal incontinence and rectal bleeding for three months. He recommended treatment for likely neovascularity of the rectum caused by radiotherapy. Emp. Ex. 12. On March 24, 2004, Dr. Scidmore reported that claimant was suffering from rectal bleeding and seepage which was likely secondary to mild radiation proctitis in combination with enlarged internal hemorrhoids and prolapsing mucosa. *Id*. On March 26, 2004, Dr. Scidmore sent a letter to claimant's employer notifying it that claimant developed rectal bleeding as a consequence of his radiotherapy and recommended that he be provided with direct access to a bathroom during working hours. *Id*.

Claimant requested to be returned to work overseas and was offered a job as a truck driver, which he turned down because of his condition. He ultimately was offered the job as a plumber in Afghanistan where he suffered the subject injury. While he was in Afghanistan, claimant began having problems with bowel control. After his return to the United States following the neck injury, claimant continued to be treated for radiation proctitis and the resulting incontinence.

The record contains the vocational report and labor market survey of Ms. Thompson, who identified ten positions in the Chattanooga, Tennessee area which were purported to be available to claimant, given his current restrictions and limitations. Emp.

[1] Moreover, pursuant to the aggravation rule, if the work injury aggravates, accelerates, or combines in an additive way with a previous infirmity, the entire resulting disability is compensable. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

Ex. 10. In addition, the record contains the vocational report of Mr. Robinson, who concluded that claimant is precluded from participation in competitive employment, considering claimant's medical condition as a whole. Cl. Ex. 2. The administrative law judge found the report of Mr. Robinson to be detailed and comprehensive and based on a more accurate reflection of claimant's overall condition. Decision and Order at 16.

We reject employer's contention that the administrative law judge erred in considering claimant's whole current physical condition, including his radiation proctitis and incontinence, in determining whether employer established suitable alternate employment. The administrative law judge found that employer was aware of claimant's condition resulting from radiation proctitis while in its employment, and that the condition has subsequently progressed. The uncontradicted medical reports of Dr. Scidmore establish that claimant's incontinence and radiation proctitis pre-existed his employment in Afghanistan, and thus the administrative law judge properly considered this condition in determining claimant's ability to perform alternate jobs. *J.T.*, slip op. at 19. The administrative law judge found that Ms. Thompson did not take this condition into consideration in evaluating alternate work, noting that Mr. Robinson stated that this factor would preclude claimant's ability to obtain any gainful work. Decision and Order at 17.

Moreover, the administrative law judge found that Ms. Thompson did not indicate the actual job duties or provide any information about the exertional or postural requirements of the plumber and truck driver jobs she identified. Although Ms. Thompson listed the *Dictionary of Occupational Titles* requirements of several different plumbing occupations, and, moreover, provided an affidavit as to her personal belief that the claimant could perform the jobs she identified, the administrative law judge rationally found that without specific information about the actual duties of the identified positions she could not determine whether claimant could perform the jobs with his lifting restrictions. *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT); Decision and Order at 15; Order on Recon. at 2. In addition, the administrative law judge found Mr. Robinson's report to be "detailed and comprehensive, and well-tailored to this particular Claimant." Decision and Order at 16. Mr. Robinson stated that claimant could not work as a plumber because of the restrictions noted in the FCE. He also stated that claimant's incontinence makes him effectively unemployable. Cl. Ex. 2.

The administrative law judge rationally found the evidence insufficient to determine the suitability of the positions identified in the labor market survey from the perspective of claimant's neck restrictions and that Ms. Thompson did not consider the effect of claimant's incontinence on his employability. *Armfield v. Shell Offshore*, 25 BRBS 303 (1992) (Smith, dissenting). Thus, the administrative law judge's finding that employer did not establish the availability of suitable alternate employment is supported

by substantial evidence. *Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT). Moreover, Mr. Robinson's opinion, which the administrative law judge found was well-reasoned, supports the administrative law judge's conclusion that claimant is totally disabled. *J.R. [Rodriguez] Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008). Therefore, we affirm the award of total disability benefits.[2] *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[2] As we affirm the administrative law judge's finding that the jobs identified in the labor market survey do not establish the availability of suitable alternate employment because Ms. Thompson did not consider the effects of claimant's radiation proctitis or provide the jobs' physical requirements, we need not address employer's contentions regarding the administrative law judge's finding of other deficiencies in Ms. Thompson's report.