BRB No. 99-0148

LYNETTE J. RILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/19/99
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1147) of Administrative Law Judge Fletcher E. Campbell, 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 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, an apprentice pipefitter, suffered an injury to her right hand on August 26,

1996, during the course of her employment with employer. Despite being placed on medical restrictions,[1] claimant continued to perform her usual job until she was terminated from her apprentice position on September 24, 1996. Claimant thereafter sought temporary total disability compensation for the period between the date of her termination and October 28, 1996, when she began work as a telemarketer.

In his decision, the administrative law judge determined that claimant's hand injury arose out of her employment, that employer failed to modify claimant's job to conform to her medical restrictions, and that employer failed to establish the availability of suitable alternate employment within her physical restrictions. The administrative law judge concluded, however, that claimant was terminated due to poor job performance which was unrelated to either her injury or the resultant restrictions.[2] Accordingly, the administrative law judge denied the compensation sought by claimant.

Claimant appeals, arguing that the administrative law judge erred in denying her compensation. Employer responds, urging affirmance.

To establish her *prima facie* case of total disability, claimant must establish that she is unable to perform her usual employment due to her work-related injury. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Thereafter, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant

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[1]Claimant was placed on restricted duty with no heavy gripping, no repetitive motion of the wrist, and no use of vibrating equipment or impact tools. EX 7a. She also was instructed to exercise her hand for four minutes and to soak it in cool water twice each shift. HT at 38.

[2]The record reflects that claimant entered the apprentice program on March 5, 1995, and earned satisfactory grades except for unsatisfactory performance ratings given in May 1995, May 1996, and August 1996; claimant was released on September 24, 1996. *See* EX 6a-60; HT at 156.

resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988).

In reaching his decision, the administrative law judge placed the burden on claimant to establish that, but for her injury, she would not have been terminated from her position with employer. Contrary to the administrative law judge's finding, however, claimant's discharge from work on September 24, 1996, for unsatisfactory performance in the apprentice program does not prevent her from receiving benefits for total disability. In this regard, the administrative law judge's reliance on the holdings in *Marino v. Navy Exchange,* 20 BRBS 166 (1988), and *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1990), is misplaced.[3] The administrative law judge specifically found, based upon the restrictions placed on claimant by her treating physician, *see* EX 7a, and the testimony of claimant's supervisor, HT at 146, that claimant's usual employment duties, which required grinding as well as pulling and lifting, were beyond her physical capabilities and she required significant help from her fellow workers to perform her regular job. *See* Decision and Order at 10. Unlike the situation in *Marino,* claimant's disability pre-existed the decision to

[3]In *Marino,* the Board held that a legitimate personnel action such as a reduction in force is not the type of activity intended to give rise to compensation and thus cannot, in and of itself, give rise to compensable injury. In *Harrod*, the Board held that an employer can meet its burden of showing suitable alternate employment by continuing to employ claimant in light duty work; claimant's discharge from such a position due to a company policy infraction does not entitle her to additional compensation, as it reasonable to assume claimant is capable of performing comparable work elsewhere. Under such circumstances, the employer does not have a renewed duty to establish suitable alternate employment; claimant, however, remains entitled to any partial disability award she was receiving absent evidence of a higher wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

terminate employment; it is not alleged that claimant's disability is due to her termination. Moreover, *Harrod* is inapposite as claimant is not seeking increased disability benefits after discharge from suitable alternate employment. Rather, the evidence as credited by the administrative law judge establishes claimant's physical inability to perform her *usual* work. As the administrative law judge's rational finding that claimant established a *prima facie* case of total disability is not appealed, it is affirmed.

The evidence, as rationally credited by the administrative law judge, thus establishes that claimant is unable to perform her usual work due to her work-related injury; claimant's discharge has no effect on this determination, which rests on claimant's physical capabilities alone. The burden, therefore, shifts to employer to establish suitable alternate employment; it is not claimant's burden to establish that but for her injury, she would not have been terminated. The administrative law judge's finding that employer did not demonstrate the availability of suitable alternate employment during the period in question is not contested by employer. Decision and Order at 11; EX 6m. Claimant's entitlement to total disability benefits in this case thus rests solely on her physical inability to perform her ususal work irrespective of the discharge, and the lack of identified suitable alternate employment. Accordingly, the administrative law judge's denial of compensation is reversed, and we hold that claimant is entitled to benefits for temporary total disability, 33 U.S.C. §908(b), for the period in question in accordance with the parties' stipulations as to claimant's average weekly wage and resulting compensation rate.

Accordingly, the administrative law judge's Decision and Order denying disability compensation is reversed. The Decision and Order is modified to reflect claimant's entitlement to temporary total disability benefits from September 25, 1996 to October 27, 1996.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge