BRB No. 03-0221

WILLIAM PEARMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	DATE ISSUED: 09/29/2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Patrick A. Roberson (Cornblatt, Bennett, Penhallegon & Roberson, P.A.), Baltimore, Maryland, for claimant.

William H. Kable and Anthony J. D'Alessandro (Semmes, Bowen & Semmes), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2002-LHC-0512, 2002-LHC-0513) 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.* (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).

Claimant worked as a pipefitter for employer, and he was injured on May 14, 1992, when a 30-inch valve fell onto his left wrist and hand. Due to continued pain and swelling, claimant was referred to Dr. Halikman. In September 1992, claimant underwent surgery to decompress his median and ulnar nerves. After successful

recovery, claimant returned to work.[1] In May 1994, claimant began noticing tingling and numbing sensations in his left arm and hand while pulling hoses and climbing during work, and he returned to Dr. Halikman, who performed ulnar nerve transposition surgery on claimant's left arm. Emp. Ex. 3. Repeated surgeries were unsuccessful and Dr. Halikman determined claimant had no function in his left ulnar nerve, causing a clawing of claimant's left hand and a lack of any defensive or protective sensations in three of the fingers. Consequently, in February 1996, Dr. Halikman referred claimant to Dr. Dellon, a specialist in nerve pathology and repair. Dr. Dellon agreed with the diagnosis, and he performed several additional surgeries during the next two years. Cl. Ex. 4. Ultimately, claimant was diagnosed with severe and permanent left ulnar nerve paralysis, abduction deformity, and loss of sensitivity. The only useful fingers on claimant's left hand are his left thumb and index finger. Cl. Ex. 4. Drs. Halikman and Dellon, as well as the experts who examined claimant on behalf of employer, Drs. Meshulam and Friedman, agreed that claimant is unable to return to his usual work as a result of the impairment to his left upper extremity. Cl. Ex. 4; Emp. Ex. 3. Claimant filed a claim for permanent total disability benefits.

The administrative law judge determined that claimant was a credible witness, and she found that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption. Because employer did not present rebuttal evidence, the administrative law judge determined that claimant's left upper extremity disability is related to his employment. Decision and Order at 19. Relying on the medical opinions assessing specific percentages to the loss of the use of claimant's left arm, and specifically giving greater weight to Dr. Dellon's opinion, the administrative law judge concluded that claimant has a 60 percent permanent partial disability to his left upper extremity. Also based on Dr. Dellon's opinion, the administrative law judge determined that claimant's condition reached maximum medical improvement as of August 25, 1998. *Id.* at 20-21. Thus, the administrative law judge awarded claimant temporary total disability benefits from May 5, 1994, through August 25, 1998, permanent partial disability benefits for disability to the left upper extremity thereafter pursuant to the schedule, 33 U.S.C. §908(c)(1), and medical benefits. The administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief. Decision and Order at 23. Claimant appeals the administrative law judge's award of permanent partial disability benefits, asserting his entitlement to permanent total disability benefits, and employer responds, urging affirmance.

[1]Claimant underwent ulnar nerve transposition surgery on his right elbow in December 1992, but Dr. Halikman stated that the surgery to claimant's right upper extremity was not related to the 1992 injury to the left hand. Emp. Ex. 3. In a Decision and Order issued on November 21, 1994, Administrative Law Judge Amery concluded that the injuries to the two arms were not causally related.

Claimant contends the administrative law judge erred both in failing to address the issue of permanent total disability and in failing to award permanent total disability benefits. The parties agree that claimant's disability is permanent and that he cannot return to his usual work. Thus, claimant has met his burden of establishing a *prima facie* case of permanent total disability. *Green v. I.T.O. Corp. of Baltimore*, 32 BRBS 67, 70 n.5 (1998), *modified on other grounds*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). However, once a claimant establishes a *prima facie* case of total disability, the burden shifts to the employer to demonstrate the availability of jobs within the community that the claimant is capable of performing based upon his age, education, work experience, and physical restrictions. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). If the employer establishes the availability of suitable alternate employment, then a claimant with an injury to a scheduled member, as here, is limited to an award under the schedule. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000). However, the fact that the injury is to a scheduled member does not preclude an award of permanent total disability benefits. *PEPCO*, 449 U.S. at 277 n.17, 14 BRBS at 366 n.17; *Carter v. Merritt Ship Repair,* 19 BRBS 94 (1986).

In this case, the administrative law judge concluded that claimant's injury resulted in permanent partial disability based upon the medical opinions indicating a specific percentage of loss of use of the left upper extremity. Decision and Order at 20. In a footnote, the administrative law judge determined that claimant could no longer perform the duties of his usual work as a longshoreman. With regard to total disability, she stated:

> [T]here is no evidence that this injury was totally disabling in terms of the Claimant's ability to work in some suitable alternative employment. In fact, the three physicians who evaluated the extent of the Claimant's disability attached a specific percentage to the loss of use of the left arm.

Id. at 20 n.3. In a previous footnote, the administrative law judge acknowledged that employer presented evidence of alternate employment, but she stated only that claimant is limited to the "statutorily specified compensation . . . regardless of wage earning capacity." *Id.* at n.2. Because the administrative law judge did not determine whether the evidence of alternate employment submitted by employer, Emp. Ex. 8,[2] satisfies its burden of demonstrating suitable alternate employment for claimant based on his

[2]The identified jobs are: security guard, customer service representative, parking lot attendant, front desk clerk, cashier, and sales clerk. Emp. Ex. 8.

particularities, we agree with claimant's contention that the award of permanent partial disability benefits cannot stand. A finding that claimant is employable is insufficient to mitigate employer's liability to partial disability. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Rather, there must be a specific determination that the identified jobs are suitable for claimant. *Id.* Therefore, we must remand this case for the administrative law judge for further findings of fact. If, on remand, the administrative law judge finds that employer established the availability of suitable alternate employment, claimant is limited to the permanent partial disability benefits awarded by the administrative law judge.[3] *PEPCO*, 449 U.S. 268, 14 BRBS 363. If, however, the administrative law judge finds that employer has not met its burden of demonstrating the availability of suitable alternate employment, claimant is entitled to permanent total disability benefits, notwithstanding the fact that he has suffered an injury to a scheduled member. *Id.*, 449 U.S. at 277 n.17, 14 BRBS at 366-367 n.17.

[3]At the hearing, claimant conceded he had not worked or looked for work since his last day at employer's facility in 1995. Tr. at 11, 34. The labor market survey noted the consultant's inability to contact claimant despite numerous attempts. Emp. Ex. 8. Thus, if the identified positions are found to be suitable for claimant, he did not demonstrate a diligent job search, and he is limited to partial disability benefits. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). As the administrative law judge acted within her discretion in weighing and crediting the medical evidence, the finding that claimant has a 60 percent impairment to the left upper extremity is affirmed as rational and supported by substantial evidence. Cl. Ex. 4 at 113; *see Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

Accordingly, the administrative law judge's Decision and Order limiting claimant to a permanent partial disability award under Section 8(c)(1) is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
PETER A. GABAUER, Jr.
Administrative Appeals Judge