BRB No. 08-0338

D.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 09/29/2008
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration of Daniel A. Sarno, Jr., United States Department of Labor.

James P. Berryman (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Peter D. Quay, Taftville, Connecticut, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration (2005-LHC-1252, 1254, 1255) 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).

The case is before the Board for the second time. To briefly summarize, claimant worked as a welder for employer. Employer assigned claimant to work as an attendant in its tool room after claimant sustained a work-related injury to his left knee in late 1979 or early 1980. The parties stipulated: that claimant subsequently sustained work-related injuries on June 28, 1988, September 10, 1992, and October 1, 1995; that claimant's average weekly wage at the time of his 1995 injury was $1,029; and that employer

voluntarily paid claimant temporary total, temporary partial, permanent partial and medical benefits for various periods of time from July 18, 1988, through April 14, 2004. After employer terminated its voluntary payments of benefits, claimant filed a claim under the Act.

In his initial Decision and Order, the administrative law judge found that claimant is unable to return to his usual employment as a tool attendant with employer, that employer established the availability of suitable alternate employment as of April 15, 1999, and that claimant did not show that he diligently tried and was unable to secure such employment. The administrative law judge awarded claimant temporary partial disability compensation from April 15, 1999, through April 14, 2004, as well as medical benefits. 33 U.S.C. §§908(e), 907.

Claimant appealed to the Board, challenging the administrative law judge's finding that employer established the availability of suitable alternate employment. Alternatively, claimant challenged the administrative law judge's finding of April 15, 1999, as the onset date for his partial disability award. The Board affirmed the administrative law judge's findings that employer established the availability of suitable alternate employment based on a 2004 labor market survey and that claimant did not seek alternate employment in a diligent manner. Thus, the Board affirmed the award of partial disability benefits. *D.B. v. Electric Boat Corp.*, BRB No. 06-0989 (Jun. 28, 2007) (unpublished). The Board vacated the administrative law judge's commencement of this award on April 15, 1999, however, as the administrative law judge had not addressed the merits of employer's 1999 labor market survey. The Board remanded the case for the administrative law judge to do so, as the date on which claimant's disability became partial is the date the availability of suitable alternate employment was shown.

On remand, the administrative law judge found that employer established the availability of suitable alternate employment based on its March 16, 1999, labor market survey. Employer's vocational counselor, Kent Moshier, identified 23 non-skilled sedentary to light-duty jobs based on claimant's medical restrictions. The administrative law judge found that the positions identified were consistent with the July 9, 2004, labor market survey conducted by Ms. Black based on Dr. Willetts's updated restrictions. Therefore, the administrative law judge found claimant entitled to temporary partial disability benefits from March 16, 1999, through April 14, 2004.

Claimant filed a motion for reconsideration. The administrative law judge rejected claimant's argument that he had not been afforded an opportunity to object to Mr. Moshier's 1999 labor market survey, or to cross-examine Mr. Moshier, noting that claimant had agreed to the admission of this report as a deposition exhibit without objection at the formal hearing. *See* Decision and Order at 1 n. 2. (Aug. 25, 2006). The

administrative law judge also rejected claimant's contention that the 1999 labor market survey was invalid in light of Dr. Willetts's 2005 restrictions, which were more stringent than those in effect in 1999 and 2002. The administrative law judge found that the jobs identified in the 1999 survey were consistent with those identified in the 2004 survey and with Dr. Willetts's updated medical restrictions. Accordingly, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that March 16, 1999, is the onset date of claimant's partial disability. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in relying on the 1999 labor market survey because the identified jobs were not suitable for him under the restrictions imposed by Dr. Willetts. Claimant therefore contends that the onset of his partial disability occurred as of the July 29, 2004, labor market survey.

Once, as here, claimant establishes his inability to perform his usual work, the burden shifts to employer to establish the availability of realistically available job opportunities that claimant can perform given his age, education, physical restrictions, and vocational capabilities. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). A claimant's partial disability commences on the date employer establishes the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991). Employer may establish that suitable alternate employment was available retroactively. *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

We affirm the administrative law judge's findings that employer established suitable alternate employment through the 1999 labor market survey and that claimant's disability thus became partial as of the date of this survey. In the 1999 labor market survey, Mr. Moshier identified four types of jobs as suitable for claimant: restaurant host, cashier, hotel clerk, and telemarketer. EX 16A. Mr. Moshier based his survey on the restrictions given to claimant by Dr. Browning and Dr. Willetts in 1999. *Id.*; *see* EXs 4, 6. The administrative law judge found that Dr. Willetts opined that claimant was capable of light-duty work at this time. In 2005, Dr. Willetts updated his restrictions, reducing claimant's lifting capability from 20 to 10 pounds. Claimant asserts that the jobs in the 1999 survey were not suitable in view of Dr. Willett's increased restrictions. The administrative law judge found that the 1999 survey identified jobs similar to those found suitable in the 2004 survey, and suitable alternate employment was thus available in 1999.

This finding is supported by substantial evidence and in accordance with law. Employer may establish that a claimant is partially disabled by demonstrating the availability of suitable alternate employment at any time after claimant is medically capable of working. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The administrative law judge rationally found that the jobs available in 1999 were suitable based on their similarity to the suitable jobs in the 2004 survey. The administrative law judge stated that Ms. Black considered Dr. Willett's updated restrictions in finding claimant was capable of performing sedentary to light non-skilled work such as cashier, clerk and customer service jobs, which are the same types of jobs Mr. Moshier located in 1999. Mr. Moshier and Ms. Black used the same Dictionary of Occupational Titles codes to identify the exertional requirements of cashier and clerk jobs. EXs 9, 10, 16A; *see Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Cashier jobs are described as sedentary and require lifting of 10 pounds or less. As Mr. Moshier identified eight cashier jobs as being available in March 1999, and as these types of jobs remained suitable and available in 2004, the administrative law judge rationally found that claimant's disability became partial in 1999 when employer first identified suitable alternate work. Claimant has not demonstrated error in this finding, and it is affirmed as it is rational and supported by substantial evidence. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

Accordingly, the administrative law judge's Decision and Order on Remand and the Decision and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge