



BRB No. 16-0143

JOYCE M. FLOYD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NAVY EXCHANGE SERVICE)	
COMMAND)	DATE ISSUED: <u>Sept. 21, 2016</u>
)	
and)	
)	
ABERCROMBIE, SIMMONS AND)	
GILLETTE)	
)	
Employer/Administrator-)	
Petitioners)	
)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum and Eric R. Gotwalt (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-LHC-00015) of Administrative Law Judge Paul C. Johnson, 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* (the Act). We must affirm the administrative law judge's

findings of fact and conclusions of law if they are rational, supported by substantial evidence, and 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 September 9, 2010, claimant fell while working for employer in the food service department at the Kings Bay submarine base in St. Marys, Georgia.¹ Claimant has not returned to work since her accident. The administrative law judge found that claimant suffered compensable injuries involving her neck/cervical spine, shoulders, and upper-extremity neuropathic pain.² The administrative law judge also found that claimant’s work-related conditions had not reached maximum medical improvement, that claimant cannot return to her usual work, that employer did not establish the availability of suitable alternate employment, and that, therefore, claimant is entitled to continuing temporary total disability benefits. On appeal, employer challenges the administrative law judge’s finding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Where, as in this case, a claimant is unable to return to her usual employment due to her work injury, the burden shifts to the employer to establish the existence of suitable alternate employment. To meet this burden, an employer must demonstrate reasonably available job opportunities in the relevant community, which a claimant is capable of performing considering her age, education, work experience, and physical restrictions, and which she is reasonably likely to secure if she diligently tried.³ See *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Roger’s Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

¹ Claimant worked 30 years for the Navy in the food service department. She testified that her job required her to plan the menu and prepare the food. Tr. at 22-24. On the date of injury, claimant tripped over a box of corn that was on the floor, fell face-first into a sink, and landed on the floor with her whole body. She testified that she hurt her eyes, cheekbones, shoulders, arms and back. *Id.* at 24-26.

² He found that claimant’s lumbar condition, carpal tunnel syndrome, and Diffuse Idiopathic Skeletal Hypertosis (DISH) Syndrome are not compensable injuries. Decision and Order at 33.

³ Employer concedes claimant cannot return to her pre-injury employment. Employer offered three labor market surveys, dated May 14, 2011, June 29, 2012, and June 27, 2014. EX 6.

Based on claimant's testimony that, since 2000, she has had a phobia of driving on roads where there are large trucks,⁴ and the administrative law judge's finding that she would have to drive on such roads in order to reach non-local jobs, the administrative law judge found that the relevant community for suitable alternate employment is limited to Camden County, Georgia, where claimant resides. Decision and Order at 6, 39; Tr. at 20, 44-46. Because four of the six positions identified in employer's 2011 labor market survey, four of the seven positions identified in its 2012 labor market survey, and three of the ten positions identified in its 2014 labor market survey, were located outside of Camden County, the administrative law judge found these 11 positions are not suitable for claimant. Decision and Order at 39-41.

With respect to the remaining two positions identified in the 2011 labor market survey, the administrative law judge found that although Dr. Jones, who treated claimant for her work injuries at the Camden Urgent Care Clinic, approved the positions as within claimant's physical restrictions,⁵ both positions required the employee to enter customer information into a computer. As claimant credibly testified that she possesses little to no computer skills, and as the position descriptions do not indicate that the positions were entry-level and that the employer would train the employee to perform the basic job duties, the administrative law judge found the positions required an applicant to possess computer skills prior to being hired and were, therefore, unsuitable for claimant. Decision and Order at 39-40. Thus, the administrative law judge concluded that employer did not establish suitable alternate employment with its 2011 labor market survey.

With regard to the three positions located in the relevant community in employer's 2012 labor market survey, the administrative law judge found only the customer service position with Speedy Cash to be suitable for claimant because claimant's then-treating physician, Dr. Nagula, disapproved the other two positions as exceeding claimant's restrictions. Decision and Order at 40. Despite finding claimant physically capable of performing the position with Speedy Cash, the administrative law judge found the job

⁴ The administrative law judge found that "[c]laimant credibly testified, and I therefore find, that she is unable to drive on the interstate highway system because of a previous accident involving an 18-wheeler. She has developed a phobia about driving on the interstate, and has to pull over to the shoulder whenever a tractor-trailer is nearby to wait for it to pass." Decision and Order at 39.

⁵ On December 11, 2010, Dr. Jones issued work restrictions, limiting claimant to intermittent sitting, walking and standing, with a 10-pound lifting limit and no bending, squatting, climbing, kneeling, twisting, pulling, pushing, or reaching above the shoulder. CX 8. Dr. Jones additionally limited claimant to working four-to-six hours a day. *Id.*

insufficient to establish the availability of suitable alternate employment because employer failed to show a reasonable likelihood that claimant could obtain the single job identified where claimant is not highly skilled, the position is not specialized, and “any number of workers in the local community possess suitable qualifications for the job.” *Id.*

With regard to the seven positions located in the relevant community in employer’s 2014 labor market survey, the administrative law judge found the four hotel positions unsuitable because they require lifting in excess of claimant’s capabilities. The administrative law judge found that the remaining three customer service positions, with Title Max, Speedy Cash, and Advance America, are within claimant’s physical restrictions but require the employee to use a computer. Decision and Order at 42. The positions at Speedy Cash and Advance America additionally require the employee to have cash handling and collection skills. As claimant credibly testified that she possesses little to no computer or accounting skills, the administrative law judge found these positions unsuitable for claimant. In so finding, the administrative law judge rejected the testimony of Mr. Hinders, the vocational case manager who conducted the survey, that the positions are categorized as “entry-level” which meant the employers expected to train the employee, Tr. at 76-77, because Mr. Hinders’s testimony was “hesitant and dealt with generalities rather than with the specific positions.” Decision and Order at 43. By contrast, as the position description for the position with Title Max indicated that the employer would train the employee in the use of a computer and fax machine and as it was also within claimant’s physical restrictions, the administrative law judge found the position suitable for claimant. However, as claimant is not highly skilled, the job at Title Max is not specialized, and any number of workers in the local community possess suitable qualifications for the job, the administrative law judge found employer did not establish that claimant was reasonably likely to obtain the single job identified and that employer, therefore, did not establish the availability of suitable alternate employment with its 2014 labor market survey. *Id.*

Employer challenges the administrative law judge’s finding that it failed to establish suitable alternate employment in any period. Specifically, employer asserts the administrative law judge erred in: 1) limiting the relevant community to Camden County, Georgia, based on claimant’s uncorroborated testimony concerning her fear of highway driving; 2) concluding claimant had to take Interstate 95 to reach non-local jobs; 3) finding physically suitable jobs to be unsuitable for claimant on the ground that claimant lacks necessary vocational skills because employer’s vocational expert testified the employers would provide training; and, 4) failing to find that its proffer of one suitable position in each of its 2012 and 2014 labor market surveys established the availability of suitable alternate employment. For the reasons that follow, we reject employer’s challenges to the administrative law judge’s findings.

We reject employer's assertion that the administrative law judge erred in crediting claimant's testimony regarding her fear of driving on roads with large trucks because this phobia is not documented in any medical record or otherwise corroborated. It is well established that the administrative law judge has discretion in weighing the evidence and to draw inferences from the record. *Gates*, 563 F.3d 1216, 43 BRBS 21(CRT); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, it is the administrative law judge's prerogative, as the finder of fact, to credit a witness's testimony, and his credibility determinations must be affirmed unless they are "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's finding that claimant's testimony is credible concerning her fear of driving near large trucks is within his discretion and employer has not demonstrated error in this regard.⁶ *See, e.g., Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Although employer argues there are alternative, non-highway routes to locations outside Camden County, employer consented to the administrative law judge's review of online mapping services which he found revealed no non-highway routes in or out of the county.⁷ Based on the foregoing, the administrative law judge rationally limited the relevant community to Camden County.⁸ *See generally Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v.*

⁶ Employer asserts that claimant looked for work outside of Camden County, belying her fear of driving on highways. Emp. Br. at 9-10. However, claimant testified that her boyfriend drove her to places outside Camden County and that she would not have been able to accept a job outside the county had one been offered to her. Tr. at 44-50; CXs 20-23, 34-38; *see* Decision and Order at 6.

⁷ We reject employer's assertion that the administrative law judge found claimant is precluded only from driving on "I-95" or the "Interstate Highway System." Although the administrative law judge referenced "I-95," "the interstate," and the "interstate highway system" in discussing the routes available to claimant to reach jobs outside of Camden County, the administrative law judge premised his finding as to the relevant community on an absence of "non-highway routes" in or out of the county, and claimant's testimony that she has a phobia of driving on "roads where there are large trucks," which she would have to traverse to reach non-local jobs. Decision and Order at 39; Tr. at 39.

⁸ The administrative law judge also rationally found that it was unreasonable, on the facts of this case, to expect claimant's boyfriend to drive her to a regular job outside the county because he has his own business to run. Tr. at 47, 68

Washington Metropolitan Area Transit Authority, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994).

We also reject employer's assertion that the administrative law judge erred in finding unsuitable two positions in the 2011 labor market survey as well as the positions with Speedy Cash and Advance America in the 2014 labor market survey because claimant does not have the necessary computer and cash handling skills. Employer does not challenge the administrative law judge's finding that the jobs required computer and cash handling and balancing skills or his crediting claimant's testimony that she lacks such skills. Decision and Order at 39, 42; Tr. at 19. Therefore, those findings are affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Rather, employer asserts the positions are suitable for claimant because the prospective employers would have offered training. The administrative law judge, however, rejected Mr. Hinders's testimony that these are entry-level positions and that training would have been provided because his testimony was based on generalities and not on the knowledge of whether the specific positions offered computer and accounting training. Decision and Order at 43. In this respect, the administrative law judge noted that the Title Max job specifically stated that training was provided, whereas the Speedy Cash and Advance America positions did not have such notations. *Id.* The administrative law judge thus rationally found the positions unsuitable given claimant's lack of skills and lack of credible information concerning training opportunities. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Lastly, we reject employer's assertion that the combination of the suitable position with Speedy Cash in the 2012 labor market survey and the suitable position with Title Max in the 2014 labor market survey establishes the availability of suitable alternate employment. A single job opportunity may be sufficient to establish the availability of suitable alternate employment if the administrative law judge determines that the claimant has a "reasonable likelihood" of obtaining the single job, such as by a showing that the claimant is highly skilled, the job identified by the employer is specialized, and the number of workers with suitable qualifications in the local community is small. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431, 24 BRBS 116, 121(CRT) (5th Cir. 1991); *Ryan v. Navy Exch. Serv. Command*, 41 BRBS 17 (2007); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998); *Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246 (1990); *see also Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988) (employer must present evidence that a range of jobs exists; single job opening is insufficient).

In this case, the administrative law judge rationally found that employer established the availability of a single entry-level job in each of the 2012 and 2014 labor market surveys. He also found that employer did not show that claimant was reasonably likely to obtain either job because the jobs are not specialized, claimant is not highly skilled, and any number of workers in the local community would be suitably qualified for those positions. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121-122(CRT); *Ryan*, 41 BRBS 17; *Holland*, 32 BRBS 179. This finding is rational, based on the record before the administrative law judge concerning claimant’s vocational history and her residual pain from the injury. *See* Decision and Order at 43. We, therefore, affirm the administrative law judge’s finding that the lone suitable position contained in each of the 2012 and 2014 labor market surveys does not establish the availability of suitable alternate employment.⁹ As the administrative law judge’s finding that employer failed to establish the availability of suitable alternate employment is rational, supported by substantial evidence and in accordance with law, we affirm the award of temporary total disability benefits. *Ryan*, 41 BRBS 17; *Holland*, 32 BRBS 179.

⁹ To the extent employer asserts in the alternative that two jobs have been found suitable, thereby eliminating the “single-job” issue, we reject the assertion. The 2012 and 2014 surveys were generated two years apart, and there is no evidence that both jobs were available at the same time. *See Ryan v. Navy Exch. Serv. Command*, 41 BRBS 17 (2007).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge