

DEMETRICE D. ALLEN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim for Compensation Subsequent to Termination of Employment of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Melissa Robinson Link (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim for Compensation Subsequent to Termination of Employment (92-LHC-2889) of Administrative Law Judge Richard K. Malamphy 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 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 January 14, 1992, claimant, a sheet metal worker in employer's shipyard, injured her back while installing insulation. Employer voluntarily paid temporary total disability compensation to claimant for all periods she was unable to work until November 19, 1992, when it provided her with a light duty position in her former department at her pre-injury wage rate consistent with the restrictions imposed by her treating physician, Dr. Nichols. Claimant's new position involved going

on mail runs and dispensing materials in a nut and bolt shack on the main deck of a carrier within the shipyard. Claimant continued to perform the suitable light duty job provided by employer until December 7, 1993, when employer terminated her employment upon notification by the Department of Defense that claimant's security clearance had been revoked and that she was to be denied access to classified information. Claimant filed a grievance on December 8, 1993, which was denied on the ground that there was no violation of the labor agreement; claimant was to be reinstated in her position if she resolved the issue with the Department of Defense within 24 months of the revocation of clearance.

Claimant did not allege any loss in her wage-earning capacity between the date of injury and her dismissal, but sought continuing temporary disability compensation after the date of her termination. At the hearing, the parties stipulated that since the time of claimant's December 7, 1993, termination, claimant has been unable to perform her pre-injury employment. In addition, the parties stipulated that at all times since December 7, 1993, work has been available at the shipyard within claimant's restrictions which is unavailable to her due to her loss of a security clearance.

After accepting the parties' stipulations, the administrative law judge denied the claim. He found that employer established the availability of suitable alternate employment by providing claimant with a suitable light duty job within her restrictions at its facility. As claimant would still be able to perform this job but for the fact that she was terminated because she lost her security clearance for reasons unrelated to her work injury, the administrative law judge found claimant was not entitled to disability benefits.

Claimant appeals, contending that because she was not discharged due to affirmative misconduct on the job, but rather because of an administrative decision, the administrative law judge erred in relying on *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), and *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980), in denying her claim for disability benefits. In the alternative, claimant contends that assuming, *arguendo*, her loss of security clearance could be deemed sufficient to relieve employer of its burden of establishing other suitable alternate employment, an essential element in obtaining such relief would be proof proffered by employer that claimant's pre-termination position required a security clearance. Claimant further asserts that where, as here, no misconduct is alleged or proven, but claimant is precluded from a position at employer's facility due to a factor unrelated to claimant's job or injury, employer may not rely on this position to establish suitable alternate employment; claimant posits that employer must establish the absence of positions available at its shipyard that do not require a security clearance or provide evidence of other suitable light duty work available outside of its facility. Employer responds, urging affirmance.

Inasmuch as the parties in the present case stipulated that claimant is unable to perform her usual work, claimant established a *prima facie* case of total disability. The burden thus shifted to employer to demonstrate the availability of suitable alternate employment. *See generally* *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT) (4th Cir. 1994); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). One way that employer can meet this burden is by providing claimant with a suitable light duty job within its facility. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

We affirm the administrative law judge's denial of benefits subsequent to claimant's termination, as the administrative law judge's decision is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keefe*, 380 U.S. at 359. In the present case, claimant does not contest the suitability of the light duty job she performed for employer and concedes that she was terminated from this job based on the loss of her security clearance for reasons unrelated to her injury. We reject claimant's assertion that in the absence of a finding of affirmative misconduct, employer was required to establish either the absence of other positions available at its shipyard that did not require a security clearance or provide evidence of other suitable light duty work available outside of its facility to meet its suitable alternate employment burden. It is well-established that where employer provides claimant with a suitable job and claimant is terminated for reasons unrelated to her work-related disability, employer does not bear the renewed burden of showing other suitable alternate employment. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT) (5th Cir. 1996); *Brooks*, 2 F.3d at 64, 27 BRBS at 100 (CRT). In such a case, claimant is at most partially disabled, as her earnings in the suitable job may form the basis for the administrative law judge to determine claimant's wage-earning capacity. *See Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In the present case, the administrative law judge rationally found that claimant's light duty job for employer required a security clearance, based on the testimony of David Crook, supervisor of employer's department of employee relations, that all of employer's waterfront jobs required such a clearance because of the classified nature of work employer performed for the U.S. Navy. Tr. at 38-39, 53-57.¹ In addition, claimant provided corroborating testimony, stating that she was not personally aware of any jobs at employer's facility which did not require a security clearance, Tr. at 26, 30. Moreover, based on claimant's testimony, the administrative law judge rationally found that

¹Claimant's application for employment contained the following provision:

If employed by the company, I understand that such employment is subject to the security policies of the company. I further understand that if the position for which I am hired requires access to classified information and I am not able to obtain a security clearance, I will not be allowed to work in this position. My employment with the company in a position not requiring a security clearance depends upon the existence of such a position for which I am qualified.

EX 5b.

claimant's termination occurred because she lost her security clearance due to personal financial problems. Tr. at 19-21. Inasmuch as employer provided claimant with a suitable light duty job at its facility at her pre-injury wages which remained available to claimant but for the fact that she lost her security clearance for reasons unrelated to her work injury, the administrative law judge's denial of disability compensation subsequent to her termination is affirmed. *See Harrod*, 12 BRBS at 15-16.

Accordingly, the administrative law judge's Decision and Order Denying Claim for Compensation Subsequent to Termination of Employment is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge