BRB No. 91-469

JAMES H. STANLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin and Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Traci M. Castille and Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration (88-LHC-2794) of Administrative Law Judge C. Richard Avery 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 slipped and fell several feet off of a deck railing while working as a test engineer for employer on August 22, 1983. Claimant initially complained of only twisting his left knee at the time of the accident, Emp. Exs. 1, 2, 14, but later testified that he had also fallen on his buttocks, back, and head. Tr. at 43. On September 9, 1983, claimant was treated by Dr. Park for complaints referable to his left knee. Emp. Ex. 15 at 54. At a subsequent visit in January 1984, however, claimant complained of right knee pain and informed Dr. Park that he had also bumped his right knee at the time of the accident. Dr. Park diagnosed the right knee condition as tripartite patella, which he felt was insignificant, old, and probably congenital in origin. Emp. Ex. 15 at 11-12. Although Dr. Park indicated that claimant's right knee condition represented normal wear and tear which was aggravated by claimant's obesity and the physical requirements of his job, he opined that claimant had no permanent impairment. *Id.* at 12, 30. On October 23, 1985, Dr. Park performed arthroscopic surgery on claimant's left knee. Dr Park opined that claimant reached maximum medical improvement on December 17, 1985, and rated claimant as having a 30 percent permanent physical impairment of his left knee.

In addition to Dr. Park, claimant was seen by several other physicians. Dr. Enger, who first examined claimant on September 13, 1983, testified that at that time claimant described only an injury to his left knee. Dr. Enger, who last treated claimant in December 1983, opined that claimant suffers from a 25-30 permanent impairment to his left leg, and that he has no permanent impairment of the right knee associated with the August 1983 injury. Emp. Ex. 17 at 30-44. Claimant also consulted Dr. McCloskey on October 17, 1988, complaining of loss of strength in the left hand, pain in his left shoulder and left side, and numbness in his foot. Dr. McCloskey diagnosed degenerative disease of the low back or chronic lumbosacral strain syndrome, asymptomatic or mildly symptomatic herniated cervical disc 5/6, suspected left ulnar neuritis, diabetes, obesity and left knee injury. Dr. McCloskey deposed that there is nothing in claimant's history that would suggest that the 1983 work injury contributed to the symptoms for which he evaluated claimant with the exception of those relating to the left knee, and that claimant's back and neck problems were consistent with the normal process of aging. Emp. Ex. 18 at 11, 14.

Claimant has not worked since October 27, 1988, and sought permanent total disability compensation under the Act, for his right and left leg, lower back, and neck conditions, or alternatively, an unscheduled award for a loss of wage-earning capacity pursuant to 33 U.S.C. §908(c)(21). In the event that claimant was found limited to compensation under the schedule, claimant argued that he was entitled to compensation for both his right and left legs, or in the alternative, to compensation for a 100 percent impairment of the left leg. Finally, claimant argued that at the very least he was entitled to compensation for a 30 percent loss of use of the left leg consistent with the parties' stipulation prior to the hearing. *See* Jt. Ex. 2.

In his Decision and Order, the administrative law judge found that inasmuch as claimant's back and neck complaints were unrelated to the work accident and his right leg condition had not resulted in permanent physical impairment, claimant was only entitled to compensation for his left knee injury. The administrative law judge then determined that employer established the availability of suitable alternate employment and claimant did not establish that he diligently sought such

employment; thus, claimant was not entitled to permanent total disability compensation. Since claimant's only permanent impairment was that to his leg, claimant was limited to an award under Section 8(c)(2) and (19), 33 U.S.C. §908(c)(2), (19), for a 30 percent permanent physical impairment. On reconsideration, the administrative law judge summarily reaffirmed his decision.

On appeal, claimant contends that the administrative law judge erred in failing to award him permanent total disability or, in the alternative, an unscheduled award under Section 8(c)(21) for a 70 percent loss of wage-earning capacity. Claimant also asserts that if he is limited to benefits under the schedule, he should receive an award for a 100 percent loss of use of the left leg, rather than the 30 percent found by the administrative law judge, as well as an award of benefits for an impairment of his right leg. Employer responds, urging that the administrative law judge's decision be affirmed.

After review of the Decision and Order in light of the record evidence, we affirm the administrative law judge's finding that claimant is limited to an award under the schedule for a 30 percent loss of use of the left leg. Claimant argues on appeal that the administrative law judge should have found him permanently totally disabled based on his knee, back and neck conditions. The administrative law judge, however, rationally concluded that claimant's back and neck conditions were not compensable as they were not causally related to the work injury, based on the medical opinions of Drs. McCloskey and Park in conjunction with the 5 year lapse in time between claimant's work accident and the first development of these complaints.[1] Moreover, he also rationally concluded based on the medical opinions of Drs. Park and Enger, that while claimant's right knee condition was due to a work-related aggravation of a pre-existing condition, it was not compensable because it had not resulted in permanent physical impairment. Inasmuch as the administrative law judge's findings that claimant's back and neck conditions are not work-related and that claimant's right knee condition is not compensable are rational and supported by substantial evidence, we affirm these findings. *See O'Keeffe*, 380 U.S. at 359; *see also Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992).

Thus, claimant's only work-related impairment is that of his left knee. As the leg is covered by the schedule of Section 8(c)(1)-(19), the administrative law judge also properly applied *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 278 (1980), to find that claimant cannot recover for a loss of wage-earning capacity under Section 8(c)(21). Claimant is thus limited to an award of permanent partial disability under the schedule unless he establishes that his injury resulted in

[1]In the present case, the administrative law judge erred in concluding that claimant failed to establish a *prima facie* case of causation under Section 20(a) with regard to his back and neck conditions. Inasmuch as claimant has a chronic lumbosacral strain and an asymptomatic or mildly symptomatic herniated disc, and the administrative law judge found, based on the parties' stipulations, that a work-related accident occurred, Section 20(a) is invoked. *See generally Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Any error is harmless on the facts presented because the administrative law judge weighed the relevant evidence, and the evidence he credited is sufficient to establish rebuttal and to support the administrative law judge's finding that claimant's neck and back conditions are not work-related. *See generally Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988).

permanent total disability. *See, e.g., Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212, 222 (1994)(Smith, J., dissenting on other grounds). As it is uncontested that claimant is unable to return to his usual longshoring position, claimant established a *prima facie* case of total disability and the burden shifted to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical areas where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). The United States Court of Appeals for the Fifth Circuit has held that if the employer makes such a showing, the claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *Id.; Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

In concluding that employer met its burden of establishing the availability of suitable alternate employment, the administrative law judge credited the opinion of employer's vocational expert, Mr. Day. After meeting with claimant and reviewing his education, work history, and the medical reports of Drs. McCloskey, Enger and Park, Mr. Day, relying primarily on the restrictions imposed by Dr. Park,[2] concluded that claimant is capable of performing light sedentary work. Through various labor market surveys, Mr. Day identified the existence of a number of suitable employment opportunities which were available to claimant for which he believed that claimant could compete and realistically secure. The jobs identified included positions for cashiers, security guards, a parts counter attendant, a snack bar attendant, bowling alley and motel desk clerks, and work as a lens grinder and tool crib attendant. Inasmuch as the administrative law judge's finding that employer established the availability of suitable alternate employment based on the testimony of Mr. Day is rational, supported by substantial evidence, and in accordance with applicable law, and claimant does not challenge the administrative law judge's finding that he did not make a diligent attempt to find alternate work, we affirm his determination that claimant is only partially disabled and thus limited to an award under the schedule. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Although claimant argues on appeal that the administrative law judge should have awarded him compensation for a 100 percent loss of use of his left leg, we affirm the administrative law judge's 30 percent award based on the stipulation[3] of the parties; the administrative law judge acted within his discretion in relying upon this stipulation. *See Thompson*, 26 BRBS at 58-59.

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[2]Dr. Park indicated that claimant is capable of performing light sedentary work with intermittent sitting, standing and walking for short distances but should avoid squatting, deep knee bends, and going up and down stairs. *See* Emp. Ex. 15 at 31, 47-48; Emp. Ex. 16 at 5.

[3]The parties' stipulation was consistent with the medical evidence. Dr. Park opined that claimant suffers from a 30 percent impairment to the left knee, 25 percent of which was attributable to prior injuries and an additional 5 percent due to the subject work injury and Dr. Enger felt claimant had a 25-30 percent impairment to the left leg, with 5 percent due to the employment injury.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge