U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 21-0118
and 21-0118A

LISA E. STRICKLIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	
	)	
and	)	
	)	DATE ISSUED: 08/27/2021
ARMY CENTRAL INSURANCE FUND c/o	)	
CONTRACT CLAIMS SERVICES,	)	
INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Order Denying Claimant's Motion for Reconsideration Except for Correction of Date of Commencement of Temporary Partial Disability in Paragraph 3 of Order, and the Order Denying Employer's Motion for Reconsideration of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for Claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured Employer.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and Employer cross-appeals Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Benefits, Order Denying Claimant's Motion for Reconsideration Except for Correction of Date of Commencement of Temporary Partial Disability in Paragraph 3 of Order, and Order Denying Employer's Motion for Reconsideration (2018-LHC-00788) rendered on a claim filed pursuant to 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.* (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked at the Fort McCoy Club, in Wisconsin, as an assistant business manager. She injured her left side on April 8, 2014, when she was struck by a cart carrying frozen food.[1] Tr. at 51-52, 56. Employer voluntarily paid Claimant compensation for temporary total disability, 33 U.S.C. §908(b), from June 23, 2014, when she stopped working, to August 17, 2014, and medical benefits, 33 U.S.C. §907, through September 2014. Decision and Order at 3, 3 n.4, 71 n.176; Tr. at 66. Claimant returned to modified work for Employer on August 18, 2014, until she was terminated on September 23, 2015. Decision and Order at 54, 54 n.90; Tr. at 15, 66-68. Claimant filed a claim for injuries to her left side and left lower extremity on June 2, 2016. CX 16 at 2. She filed an amended claim for a psychological injury on November 8, 2017. CX 17 at 2. Employer contested the claims.

In his decision, the ALJ first determined Claimant satisfied the requirements of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and found her notice of injury and claim for compensation for her physical and psychological injuries were timely filed. Decision and Order at 32-39. After finding Claimant invoked and Employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption, he found, based on the record evidence as a whole, Claimant established work-related complex regional pain syndrome (CRPS). *Id.* at 42-51. He also found Employer presented no evidence that Claimant's work injury did

[1] Claimant described the cart as six or seven feet tall, weighing between 300 and 500 pounds. A co-worker pushing the cart could not see around it and accidentally ran into her. Tr. at 57-58.

not result in an emotional injury, and that the preponderance of the evidence establishes the April 8, 2014 work injury resulted in both physical and emotional injuries.[2] *Id*. at 51.

The ALJ determined Claimant was unable to physically perform her usual employment after her termination on September 23, 2015, but is capable of performing sedentary employment as defined in the Dictionary of Occupational Titles (DOT). Decision and Order at 54-57. He found Claimant's modified position for Employer constituted suitable alternate employment from August 18, 2014 to September 23, 2015. *Id*. at 58-59. He rejected Employer's assertion that Claimant was terminated for good cause and found her termination was, at least in part, due to her work injuries. *Id*. at 59-61. The ALJ determined two of the jobs identified in Employer's December 19, 2019 labor market survey, a customer service representative and an administrative assistant, established the availability of suitable alternate employment, and Claimant did not diligently seek alternative work. *Id*. at 61-65. He found Claimant entitled to compensation for temporary total disability from September 24, 2015, to December 19, 2019, because Employer's evidence is insufficient to show suitable jobs were available prior to the date of the labor market survey. *Id*. at 63-64. The ALJ accepted the parties' stipulations as to Claimant's average weekly wage and compensation rate, and determined, based on the jobs constituting suitable alternate employment, Claimant is entitled to compensation for temporary partial disability, 33 U.S.C. §908(e), of $168.28 per week as of December 20, 2019. *Id*. at 67-70; *see also* Order Denying Claimant's Motion for Reconsideration Except for Correction of Date of Commencement of Temporary Partial Disability in Paragraph 3 of Order (Order Denying Claimant's Motion for Reconsideration) at 2.

On appeal, Claimant challenges the ALJ's finding that Employer established the availability of suitable alternate employment.[3] Employer responds, urging affirmance.

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[2] Based on the absence of medical evidence addressing permanency, or a claim for permanent disability compensation, the ALJ determined Claimant's work injuries are not at maximum medical improvement. Decision and Order at 54.

[3] Claimant also avers her award of temporary partial disability compensation commencing on December 20, 2019, should automatically convert to a permanent partial disability award if she remains partially disabled after receiving five years of temporary partial disability compensation, as her work injuries by then would have continued for a lengthy period. In his Order Denying Claimant's Motion for Reconsideration, the ALJ rejected this contention. He found "the record contains no medical opinion that Claimant's injuries have reached maximum medical improvement (MMI) or opining as to when she might reach MMI. Further, the Claimant has sought in this proceeding only temporary disability." Order Denying Claimant's Motion for Reconsideration at 2. These findings are unchallenged on appeal.

BRB No. 21-0118. Employer cross-appeals the ALJ's finding of work-related CRPS. Employer also challenges the ALJ's determination that the modified position it provided Claimant did not establish suitable alternate employment after she was terminated on September 25, 2015. Alternatively, Employer cross-appeals the ALJ's finding the testimony of its vocational consultant, Deborah Frost, did not establish the jobs identified as suitable alternate employment were available before the December 19, 2019 labor market survey. Employer also avers the ALJ erred in finding Claimant had no income after September 25, 2015, because she has been self-employed as an internet entrepreneur and real estate agent. BRB No. 21-0118A. Claimant did not respond to Employer's cross-appeal.

CRPS

Employer alleges the ALJ erred in weighing Claimant's subjective complaints, her medical history, and the medical evidence to conclude she established work-related CRPS, based on the record as a whole.[4]

The ALJ properly declined to address Claimant's assertion of permanency because Claimant had not previously raised this issue. *Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009): *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Moreover, Claimant's request for a finding of permanency at a future date is not ripe for consideration. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Moody]*, 474 F.3d 109, 40 BRBS 69(CRT) (4th Cir. 2006); *Parker v. Ingalls Shipbuilding, Inc.*, 28 BRBS 339 (1994). Accordingly, we affirm the ALJ's rejection of Claimant's contention.

[4] Specifically, Employer avers: 1) the ALJ failed to consider no foot, ankle, leg, calf, knee, neck, or back injury occurred when Claimant was struck on the buttock by the food cart; 2) he did not cite a basis for connecting Claimant's injury to the above body parts to a buttocks contusion; 3) he failed to explain his conclusion of CRPS when no physician diagnosed this condition; 4) he erred in giving weight to Dr. Mary Zaky and Nurse Practitioner Patricia Wickert's identical responses given in a questionnaire from Claimant's counsel; 5) he erred in placing greater scrutiny on Dr. Richard Lemon's opinion than on an unidentified author's answers to a questionnaire; 6) he failed to reconcile how the broad scope of Claimant's subjective complaints supports a finding of CRPS and in giving weight to these complaints; 7) he erred by relying on Claimant's lengthy course of treatment as evidence of impairment due to CRPS; and, 8) he failed to adequately consider Claimant's pre-injury medical history, which mirrored her course of treatment in this case. Emp. Pet. For Rev at 44-58.

After finding Claimant entitled to the Section 20(a) presumption of compensability and finding Employer rebutted the presumption, the ALJ weighed the relevant evidence of work-related CRPS. Decision and Order at 40-43. He summarized the medical evidence addressing CRPS from Claimant's initial office visit to Dr. Joseph Binegar on April 10, 2014, to her office visit with Patricia Wickert, an advanced practice nurse practitioner (APNP), on May 30, 2018. *Id*. at 44-48. He found "[t]he medical evidence shows generally consistent complaints of left leg and foot discomfort and examinations reveal temperature, sensory and color changes in the left lower extremity." *Id*. at 44. The ALJ rejected Employer's contention that Claimant's left leg/foot pain after the April 8, 2014 injury is a continuation of pain she has had since 2013. *Id*. at 48. He stated, prior to the injury, Claimant was treated for lower back pain that radiated into her left hip, which she reported was improving on April 1, 2014, and then she reported to Dr. Binegar on April 10, 2014, that her pain worsened after the work injury. *Id*. at 48; *see* EXs 11 at 3, 12, 25, 35; 12 at 1. The ALJ gave weight to the opinion of Dr. Jason Waddell, a neurosurgeon, that Claimant's post-work injury left leg/foot pain is not radicular. Although some of Claimant's pain may be attributable to her lumbar spine condition, he found her post-injury treatment was primarily due to CRPS. *Id*. at 48-49; CX 5 at 1-2. He gave weight to the CRPS diagnoses of Dr. Mary Zaky and Ms. Wickert based on their qualifications,[5] their treatment of Claimant since 2014, and their reliance on Claimant's symptoms, which are consistent with a diagnosis of CRPS. *Id*. at 49; *see* CXs 6 at 1-4, 12 at 1-4, 17 at 4-6, 18 at 1-2, 19 at 39-42. He found the contrary opinion of Dr. Richard Lemon, an orthopedist, not creditable.[6] Decision and Order at 49-50.

The ALJ found Claimant credible with regard to the existence of pain. Decision and Order at 32. He rejected the argument that her symptoms are entirely manufactured, finding it inconsistent with the medical record, which shows treatment for subjective symptoms of pain and sensitivity to touch as well as objective symptoms of temperature change and discoloration, all of which are consistent with a diagnosis of CRPS. *Id.* at 50.

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[5] Dr. Zaky is board-certified in Internal Medicine and specializes in pain management. CX 6 at 4, 18. Ms. Wickert, in addition to being an APNP, also specializes in pain management. CX 6 at 1-2.

[6] The ALJ determined Dr. Lemon's reports do not indicate whether he has treated patients with CRPS and his reliance on finding symptom magnification does not mean Claimant does not have pain. He found Claimant's medical record shows she has also reported little or no pain at times, Claimant's symptoms of discoloration and decreased skin temperature are not subjective, and Dr. Lemon did not explain why these symptoms could not represent CRPS. Finally, the ALJ found Dr. Lemon's opinion not creditable because he summarily stated Claimant does not have CRPS.

He found it "difficult to believe" Claimant would undergo extensive treatment simply to pursue her claim. *Id*. at 50-51. The ALJ also relied on Claimant's extensive work history, which he found inconsistent with an unwillingness to work. *Id*. at 51.

As Claimant invoked, and Employer rebutted, the Section 20(a) presumption, the case must be decided on the record as a whole with Claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this case arises, has stated the function of the reviewing body "is simply to consider whether the ALJ looked at all relevant medical evidence, substituted his or her judgment for that of a qualified expert, or disregarded the opinion of a qualified expert absent evidence to the contrary or a legal basis for doing so." *Bunge Corp. v. Carlisle*, 227 F.3d 934, 938, 34 BRBS 79, 81(CRT) (7th Cir. 2000).

We reject Employer's contentions of error on appeal.[7] The ALJ in this case permissibly relied on the CRPS diagnoses of Claimant's treating pain management specialists, the subjective and objective symptoms Claimant exhibited supporting their diagnoses, the difference in these symptoms from Claimant's symptoms related to her pre-existing lower back condition, and her extensive treatment and work histories. *Carlisle*, 227 F.3d at 938, 34 BRBS at 81(CRT); *Meehan Serv. Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *see also Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011). It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record and that the Board cannot reweigh the evidence. *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Accordingly, we affirm the ALJ's finding Claimant established by a preponderance of the evidence that she has CRPS as a result of her April 8, 2014 work injury.

Suitable Alternate Employment

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[7] Regarding Employer's contention that Claimant's lower leg and foot injuries are inconsistent with her work injury involving a food cart striking her buttock, Claimant reported to Dr. Binegar on April 10, 2014, that she was unsure whether the cart also struck her left foot and ankle. EX 12 at 1. Moreover, the ALJ noted the journal article Employer submitted into evidence, which acknowledged a minor event like a light tap can cause CRPS. Decision and Order at 50 n.82; EX 20 at 7.

Employer next contends the ALJ erred in finding it terminated Claimant on September 25, 2015, in part, due to her work injuries after it provided her a sedentary job since August 18, 2014. Employer contends her termination was due to her malfeasance on the job, relieving it of any further obligation to establish the availability of suitable alternate employment, and the ALJ erred by requiring it prove her termination was wholly due to her misconduct.

The ALJ found the sedentary job Employer provided Claimant doing office work was within her restrictions and constituted suitable alternate employment at her former wages from August 18, 2014 to September 23, 2015.[8] Decision and Order at 58-59; EX 4 at 31. No party challenges that finding. Employer contends Claimant was discharged for sending an email informing other personnel that her supervisor yelled at her and their facility was serving outdated food. *Id*. at 60; *see* EX 19 at 50-52.

The ALJ reviewed Claimant's personnel record, which he found showed some performance issues from January 2013 to January 26, 2015, but none thereafter, including the incident Employer relied upon to support her termination. *Id*. He noted Claimant's deposition testimony where she asserts she was not told she was discharged for insubordination, and the medical record which establishes Claimant's CRPS worsened in the months prior to her termination. *Id*.; EX 19 at 13, p.52; CX 6 at 32-46. The ALJ concluded Claimant's termination was due, at least in part, to her work-related injury. Decision and Order at 61. On reconsideration, he rejected Employer's reliance on *Brooks v. Newport News Shipbuilding and Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993), a case denying the claimant's allegation of retaliatory discharge under Section 49 of the Act, 33 U.S.C. §948(a), because the employer in that case showed the discharge was wholly due to the claimant's misconduct, which the ALJ found has not been established in this case. Order Denying Employer's Motion for Reconsideration at 2.

Where, as here, no party contests Claimant's inability to perform her usual work because of her work injuries, the burden shifts to Employer to establish jobs exist that are reasonably available and Claimant could realistically secure and perform given her age, education and restrictions. *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). An employer may satisfy its burden by making suitable alternate employment available to the injured employee. *Carlisle*, 227 F.3d at 941, 34 BRBS at 84(CRT); *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)

[8] The ALJ rejected Claimant's contention that she worked only through extraordinary effort and taking pain medication. Decision and Order at 59.

(5th Cir. 1996). The Board has held an employer establishes suitable alternate employment where the claimant successfully performs light-duty work at the employer's facility, but is discharged for breaching company rules and not for reasons related to her disability. *Brooks*, 26 BRBS at 5.[9]

At her deposition, Claimant testified she sent the email on a Friday and was terminated the following Monday, but she was not informed her termination was related to the email. EX 19 at 50-52. Instead, Claimant testified she was told she was fired for ". . . little things. I forgot to date something. I forgot to sign something." *Id*. at 52. She also stated Employer's reasons for her termination were provided to her in a writing she no longer possesses. *Id*. at 53. The administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Based on this record, which contains no documentation or testimony that Claimant was terminated solely based on her email, but rather evidence to the contrary in Claimant's deposition testimony, and medical records showing the deterioration of her CRPS in the months prior to her termination, the ALJ permissibly found Employer failed to establish Claimant's discharge was wholly due to the email incident. As Claimant's discharge from employment was not related solely to a personnel incident, the ALJ properly found Employer's obligation to establish suitable alternate employment is not extinguished because the termination is attributable, at least in part, to the work injury. *Brooks*, 26 BRBS at 5; *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), *rev'd on other grounds sub nom. Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Consequently, Employer's reliance on *Brooks* is misplaced.

Alternatively, Employer avers the ALJ erred by denying its motion to depose post-hearing Claimant's supervisor, Lynn Glen, as she would have provided evidence addressing the reason for Claimant's termination. Employer avers Ms. Glen would have been a rebuttal witness to Claimant's hearing testimony and would have addressed the circumstances leading to Claimant's termination and the absence of any other recent disciplinary actions.

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[9] In *Brooks*, the claimant was terminated solely for failing to disclose a prior injury on his employment application, notwithstanding that this violation may not have been discovered but for his work injury. *Brooks*, 26 BRBS at 5.

In its motion, Employer stated Ms. Glen is no longer its employee, but currently works for another employer on a ship in the Azores. Employer averred it sought to take her deposition via Skype post-hearing "in order to preserve the orderly presentation of witnesses, and to allow counsel to ask Ms. Glen to respond to any allegations that may arise during the orderly presentation of testimony." Employer's counsel noted Claimant's counsel objected to the timing of the deposition but not the deposition itself. In his Order Denying Motion to Take Post-Hearing Deposition, the ALJ found Employer did not present good cause for conducting the deposition post-hearing.

An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In his January 14, 2020 Order, the ALJ stated Employer's motion was filed on January 10, 2020, and the hearing was scheduled for January 29, 2020. Employer had ample opportunity to depose Ms. Glen prior to the hearing even after the ALJ denied its motion. Moreover, Claimant's testimony was not a necessary predicate for Ms. Glen to testify as to her understanding of the circumstances leading to Claimant's termination and to Claimant's employment history under her supervision. Under these circumstances, the ALJ acted within his discretion to deny Employer's motion. *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Accordingly, we affirm the ALJ's conclusions that Claimant was terminated due, at least in part, to her work-related disability, and Employer's burden to show the availability of suitable alternate employment was renewed upon its discharging Claimant on September 25, 2015.

Employer next contends the ALJ erred by rejecting Ms. Frost's testimony that the jobs she identified in her December 2019 labor market survey were available after Claimant was terminated in September 2015. Employer contends the ALJ erred by not crediting this testimony in the absence of any contrary evidence.

The ALJ determined Employer's labor market survey identified two suitable positions: a customer service representative at Discount Trophy & Company, Inc. (Discount Trophy) and an Extension - Administrative Assistant for Monroe County, Wisconsin. Decision and Order at 61-62; *see* EX 6 at 42. The ALJ found these jobs were reasonably available from the day after the December 19, 2019 labor market survey. *Id*. at 63; *see* EX 6 at 41. He noted Ms. Frost's affirmative answer to Employer's counsel's question whether the jobs in the labor market survey were "routinely available back in time," Tr. at 158-159, but she did not state how long the jobs in the survey had been open nor did her labor market survey. Tr. at 150, EX 6. The ALJ determined Ms. Frost's testimony was "too vague to support an assumption that these jobs were regularly open prior to the date of her labor market survey." Decision and Order at 64. On

reconsideration, the ALJ reiterated that neither Ms. Frost's testimony nor her labor market survey provided "any specifics about the earlier availability of the jobs she cited, and her testimony was unsupported by any labor market survey." Order Denying Employer's Motion for Reconsideration at 2.

The Seventh Circuit has held an employer need not identify specific employers ready and willing to hire the claimant; however, it must supply evidence sufficient for the administrative law judge to determine whether jobs are realistically available and suitable for the claimant. *Carlisle*, 227 F.3d at 941, 34 BRBS at 84(CRT); *see also Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Mere allegations of available jobs are insufficient proof of suitable alternate employment. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer's burden in this case is to show the availability of the positions as an administrative assistant and customer service representative during the period from September 2015 to December 2019. Employer relies on Ms. Frost's testimony to establish the positions identified in her labor market survey were routinely available in Claimant's geographic area prior to December 2019. Tr. at 157-158. She specifically testified the customer service position she identified had been filled and the person she spoke with was hired nine months previously; the administrative assistant position was a replacement for someone retiring, so that job is not regularly open, but the type of position is a common occupation. Tr. at 158-159.

It is well established the administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and the Board cannot reweigh the evidence. *See Burns*, 41 F.3d 1555, 29 BRBS 28(CRT); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982); *Donovan*, 300 F.2d 741. Moreover, the Seventh Circuit in *Carlisle* gave "great deference" to the administrative law judge's decision not to credit vocational testimony. *Carlisle*, 227 F.3d at 942, 34 BRBS at 84(CRT). The Board may not disturb the administrative law judge's findings merely because the record could support other inferences and conclusions. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). Based on this record, we hold the ALJ's finding that Ms. Frost's testimony is too vague to establish the availability of suitable jobs as a customer service representative and administrative assistant prior to the date of her labor market survey is not "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *Gindo v. Aecon Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018). Accordingly, we affirm the ALJ's conclusion that Employer did not establish the availability of suitable alternate employment prior to the

December 2019 labor market survey. *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009); *Seguro v. Universal Mar. Serv. Corp.*, 36 BRBS 28 (2002).

Claimant challenges the ALJ's finding that Employer established the availability of suitable alternate employment as of December 20, 2019. Claimant avers the customer service representative position that the ALJ found suitable was not realistically available, and he erred by relying on Ms. Frost's opinion.[10]

The ALJ relied on Ms. Frost's report that the nine sedentary jobs she identified on December 19, 2019, are common occupations where openings are routinely available. Decision and Order at 61-62; Tr. at 157-159; EX 6 at 39. He determined five of the nine jobs do not contain sufficient information as to the wages or number of hours worked per week or identify the name of the employer. *Id*. at 62-63. The ALJ noted Claimant's testimony that two of the jobs were filled when she inquired about them in January 2020, but that does not disqualify them from constituting suitable alternate employment because they were available at the time of the labor market survey. *Id*. at 63 n.138. He found the customer service representative at Discount Trophy, and the administrative assistant position for Monroe County, Wisconsin, are suitable because they are sedentary, they match with Claimant's transferrable skills, they are located within a half-hour drive of Claimant's residence, and their descriptions contain the necessary wage information. *Id*. at 63. He rejected Claimant's assertion that her need for narcotic medication must be considered because none of her medical providers imposed any work restrictions on this basis, and the suitable positions do not involve operating machinery, using dangerous objects, climbing, or working at heights. *Id*. Similarly, the ALJ found no medical provider imposed any restrictions for Claimant's emotional injury nor did they opine she needed treatment for this condition, and Claimant has not shown she was rejected for any job because of her emotional condition or use of narcotic medication. *Id*.

On reconsideration, the ALJ rejected Claimant's assertion that Ms. Frost's testimony was evasive and non-responsive, as Claimant's counsel had an unrestricted opportunity to cross-examine her. Order Denying Claimant's Motion for Reconsideration at 2. He also rejected Claimant's contention that the Discount Trophy position is not suitable because she applied for the job and did not receive a response. *Id*. The ALJ found

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[10] Claimant avers she applied for the position at Discount Trophy and never received a response. She also contends Ms. Frost's answers on cross-examination at the hearing were evasive and non-responsive, and she did not document any direct contact with the employers identified in her survey. Claimant also avers Ms. Frost's labor market survey does not contain critical information to support her conclusions, and her report does not state she verified the nature and requirements of the positions she identified.

Claimant did not testify she received a rejection from Discount Trophy or attempted to follow-up to confirm her application had been received and her job log does not indicate the prospective employer was unresponsive. *See* CX 13. Accordingly, he concluded Employer established the availability of suitable alternate employment after December 19, 2019.

As stated, *supra*, an employer must supply evidence sufficient for the administrative law judge to determine whether jobs are realistically available and suitable for the claimant. *Carlisle*, 227 F.3d at 941, 34 BRBS at 84(CRT). In this regard, the administrative law judge must compare the claimant's work restrictions with the requirements of the positions the employer identified in order to determine whether it met its burden of proof. *Id.*; *see also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). An administrative law judge may rely on standard job descriptions, including the DOT designation of a job as "sedentary," to flesh out the general physical requirements of a job an employer relies upon to establish suitable alternate employment. *See Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

In this case, Ms. Frost surveyed positions designated in the DOT as sedentary work to identify job openings in the categories of customer service representative and administrative assistant that are compatible with Claimant's transferable skills and within the geographic area where she resides. *See* EX 6 at 39-42. The ALJ permissibly relied on Ms. Frost's labor market survey and testimony to find these jobs suitable for Claimant. *See Carlisle*, 227 F.3d at 942, 34 BRBS at 84(CRT). Moreover, the ALJ properly rejected Claimant's contention that the customer service positon was not suitable because the specific job at Discount Trophy was unavailable when Claimant applied for it in January 2020. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 14-15(CRT) (4th Cir. 1988). An administrative law judge is entitled to weigh the evidence and to draw rational inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As his decision to credit Ms. Frost's testimony and report is rational and supported by substantial evidence, we affirm it. *Cordero*, 580 F.2d 1331, 8 BRBS 744. Thus, we affirm the ALJ's findings that Employer established the availability of suitable alternate employment and Claimant's entitlement to temporary total disability benefits ceased as of December 19, 2019.[11] *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT); *Mendoza* 46 F.3d 498, 29 BRBS 79(CRT); *Seguro*, 36 BRBS 28.

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[11] We reject Claimant's assertion that identifying two specific job openings in the general categories of administrative assistant and customer service representative is insufficient evidence of suitable alternate employment. *See generally P & M Crane Co. v.*

Wage-Earning Capacity

Employer challenges the ALJ's decision to exclude Claimant's self-employment income after her termination to find she was entitled to total disability compensation from September 24, 2015, to December 19, 2019. To support its assertion that she is not entitled to temporary total disability benefits during that period, Employer relies on Claimant's trial and deposition testimony to establish she is a licensed real estate broker who sold houses to her mother and sister, for which she received commissions of $3,000, and she has income from selling items on various internet platforms. *See* Tr. at 81-86, 115-116.

The ALJ found "the record does not document the amount of earnings, if any, the Claimant had from self-employment" after September 2015. Decision and Order at 69. On reconsideration, he determined Claimant's testimony about her internet sales was "vague and she stated at one point that she generally lost money."[12] Order Denying Employer's Motion for Reconsideration at 2. The ALJ noted Employer asked Claimant's counsel to provide information about her income, but he was unaware what, if any, information was provided, and Employer never moved to compel Claimant to disclose such information. Accordingly, he found no merit in Employer's contention that Claimant refused to disclose her income from internet sales and as a real estate agent. *Id*. We agree. Based on this record, and the lack of documentation regarding Claimant's income from September 24, 2015, to December 19, 2019, such as her income tax returns, the ALJ permissibly rejected Employer's contention that Claimant had a wage-earning capacity from self-employment during this period. *Carlisle*, 227 F.3d at 938, 34 BRBS at 81(CRT); *see also Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT).

Hayes, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991); *Berezin v. Cascade Gen., Inc*., 34 BRBS 163 (2000).

[12] Claimant also testified she relied on occasional help from her four sons, sold stocks, relied on home equity, and incurred credit card debt to maintain her finances since September 2015. Tr. at 39-40, 81.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits, Order Denying Claimant's Motion for Reconsideration, and Order Denying Employer's Motion for Reconsideration.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge