BRB No. 00-0602

JAMES MICHAEL HOLDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TEXAS EASTERN PRODUCTS PIPELINE, INCORPORATED	)	DATE ISSUED: March 12, 2001
	)	
and	)	
	)	
NEW YORK UNDERWRITERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John D. McElroy (Law Office of Ed W. Barton), Orange, Texas, for claimant.

Christopher Lowrance (Royston, Rayzor, Vickery & Williams, L.L.P.), Corpus Christi, Texas, for employer/carrier.

Before: SMITH, McGRANERY and McATEER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-611) of Administrative Law Judge Lee J. Romero, 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).

Claimant sustained an injury to his right ankle on June 17, 1991, while working as a

dockman for employer at its terminal facility located near Beaumont, Texas. Claimant was ultimately diagnosed with tendinitis/bursitis of the achilles tendon, a right ankle sprain and an avulsion fracture of the right ankle which his physician, Dr. Thorpe, attributed to his work accident. Dr. Thorpe subsequently performed two arthroscopic surgeries on claimant's right ankle, and on May 17, 1993, opined that claimant reached maximum medical improvement with a 5 percent permanent partial impairment of the right lower extremity. Additionally, Dr. Thorpe opined that claimant was capable of returning to his full duties with high-top shoes and bracing. Claimant, however, was discharged on the date that he was to return to work for causes unrelated to his injury, including his failure to timely report his location and condition to his supervisor. Claimant did not seek work after his discharge in May 1993.

On April 20, 1994, Dr. Braly recommended, and subsequently performed, reconstructive surgery on claimant's right ankle. Dr. Braly opined on June 28, 1995, that claimant reached maximum medical improvement of his right ankle/foot, with a 37 percent impairment of the right lower extremity. Meanwhile, claimant began experiencing pain in his right knee and hip which Dr. Braly attributed, in part, to claimant's altered gait due to his work-related ankle injury. However, Drs. Woods and Bryan ultimately opined that claimant did not have any permanent impairment with regard to his right knee, and Dr. Kearns similarly opined that claimant did not have any problem with his hips.

In February 1996, claimant moved from Beaumont, Texas, to Hemphill, Texas for what he stated were economic and personal reasons.[1] Specifically, claimant had recently obtained custody of his sons and determined that Hemphill, Texas represented a cheaper and better environment in which to raise them.

[1]Claimant estimated that following his move to Hemphill, Texas, he lived about 90 miles from Beaumont, Texas, and about 110 miles from Groves, Texas, where he had been working at the time of his injury.

At a formal hearing on November 5, 1997, the parties entered into stipulations providing that claimant would receive temporary total disability benefits from November 1, 1997, and continuing thereafter, until or unless the agreed order was modified.[2] Additionally, employer agreed to authorize and pay all reasonable and necessary medical treatment for claimant's right knee, provided by or at the direction of Dr. Woods. On November 26, 1997, the administrative law judge approved the stipulations, and on November 17, 1998, the matter was back before him on modification.

In his decision, the administrative law judge initially determined that employer's request for modification was appropriate as claimant's physical condition had stabilized. The administrative law judge next found that claimant had been capable of returning to his usual employment between May 17, 1993, and April 19, 1994, but has been unable to perform this employment from June 29, 1995, to the present.[3] The administrative law judge then determined that employer did not establish the availability of suitable alternate employment in claimant's local community of Hemphill, Texas. Accordingly, the administrative law judge concluded that claimant is entitled to temporary total disability benefits from October 3, 1992, through May 17, 1993, and from April 20, 1994 to June 28, 1995, and permanent total disability benefits from June 29, 1995, through March 24, 1997, and continuing from October 1, 1997.[4] The administrative law judge also ordered employer to pay claimant a

[2]As a condition of the agreed order the parties explicitly reserved for future consideration the issues of claimant's entitlement to unpaid periods of temporary total disability benefits prior to November 1, 1997, and employer's entitlement to an offset or credit for permanent partial disability benefits it had previously paid to claimant as a result of his right ankle injury.

[3]The administrative law judge also determined that claimant's right knee and hip problems did not interfere with his work capacities.

[4]The administrative law judge determined that claimant reached maximum medical

scheduled award for a 37 percent permanent partial impairment of his right lower extremity pursuant to Sections 8(c)(4) and (19) of the Act, 33 U.S.C. §908(c)(4), (19), and all reasonable and necessary medical treatment for claimant's ankle, knee and hip conditions arising from the June 17, 1991, work injury.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment and, thus, the award of total disability benefits. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred by applying *Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997), and *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994), to find that claimant's present residence, in Hemphill, Texas, is the relevant community for purposes of showing the availability of suitable alternate employment. Employer maintains that as the instant case arises within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit, and neither that court nor the United States Supreme Court has specifically addressed the relocation issue, the administrative law judge was required to apply the Board's decisions in *Nguyen v. Ebbtide Fabricators, Inc.*, 19 BRBS 142 (1986), and *Dixon v. John J. McMullen & Associates, Inc.*, 19 BRBS 243 (1986), to find that Beaumont, Texas, is the relevant labor market. Alternatively, employer argues that the administrative law judge erred in applying the law of *Wood* and *See* to the facts in this case, as the record establishes that claimant's relocation to Hemphill, Texas, was motivated entirely for personal, as opposed to economic, reasons. Employer also argues that the administrative law judge failed to address the fact that it was unduly prejudiced by having to show the existence of suitable alternate employment in the Hemphill, Texas area.

In *Nguyen* and *Dixon*, the Board held that employer need only show that suitable alternate employment was available to claimant within the area where the injury occurred, even if he has since moved for personal reasons. *Nguyen*, 19 BRBS 142; *Dixon*, 19 BRBS 243; *see also Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). However, in *Nguyen*, the Board specifically declined to address the issue of whether employer must establish suitable alternate employment in the community in which a claimant relocates for economic reasons, as claimant failed to present evidence supporting his allegation that his move was related to economics concerns. *Nguyen*, 19 BRBS at 145 n.3. Subsequent to the issuance of these decisions, the United States Courts of Appeals for the First and Fourth Circuits issued

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improvement with regard to his right ankle injury on June 28, 1995, based upon the medical opinion of Dr. Braly.

decisions in *Wood* and *See*, respectively, holding that a number of significant factors regarding claimant's relocation should be considered before determining the relevant labor market for purposes of establishing the availability of suitable alternate employment.

In *See*, the United States Court of Appeals for the Fourth Circuit explicitly rejected the employer's contention that the relevant labor market is always the location where the claimant was injured,[5] and instead held that in instances where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. *See*, 36 F.3d 375, 28 BRBS 96(CRT). The Fourth Circuit observed that a move predicated on a legitimate intent to reduce an injured claimant's cost of living is consistent with the Act's perception of disability as a physical and economic concept, in that such relocation can mitigate the economic consequences of the claimant's impairment. *Id.* The Fourth Circuit, however, also noted that it is conceivable that an injured claimant could move to a locale so economically depressed or geographically distant that an employer is unable, without extreme hardship, to obtain a reliable labor market survey for purposes of establishing the availability of suitable alternate employment. *Id.*

In *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996), a case arising within the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit, the Board affirmed the administrative law judge's determination as to the relevant labor market for purposes of establishing suitable alternate employment, as it was supported by the evidence of record and consideration of the relevant factors enunciated in *See*.[6] Thus, the Board in

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[5]In doing so, the Fourth Circuit acknowledged that its conclusion was contrary to such Board decisions as *Nguyen*. *See*, 36 F.3d at 383, 28 BRBS at 105(CRT).

[6]In *Wilson*, the administrative law judge determined that the relevant labor market was ultimately where claimant's injury occurred and where claimant, after briefly relocating elsewhere, returned to live in 1993. Specifically, Wilson's injury occurred in the Portland/Vancouver, Oregon area but he relocated to Seattle, Washington. The administrative law judge determined that although Wilson moved to Seattle for a legitimate personal reason, to marry and reside with his wife, who had found employment there, his stay in Seattle was brief, *i.e.,* approximately sixteen months. As such, the administrative law judge found that his ties to that community were limited, particularly when contrasted with Vancouver where Wilson was born and raised. Moreover, Wilson testified that he returned to Portland/Vancouver due to the

Wilson applied the analysis of *See* to a case arising outside the Fourth Circuit.

In *Wood*, the United States Court of Appeals for the First Circuit similarly followed *See* and held that claimant's chosen community is presumptively the best place for measuring claimant's wage-earning capacity. *Wood*, 112 F.3d 592, 31 BRBS 43(CRT). In addition, the First Circuit held that the employer bears the burden of showing that the original move, or a refusal to move again, is unjustified, or that (reasonableness aside), the prejudice to the employer is just too severe. *Id.* As to what constitutes justification, the court stated that economic judgments ought generally to control. *Id.* However, the court cautioned that even if the employee's reasons are economically sound, in some cases the employer may still suffer undue "prejudice" if the disparity in wages between the new and old locations is extreme.

In *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit declared its standard that an employer must meet to prove the existence of suitable alternate employment:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available *in the community* for which the claimant is able

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dissolution of his marriage, his failure to obtain employment, and his financial hardship. The administrative law judge therefore concluded that the relevant labor market for establishing suitable alternate employment was the Portland/Vancouver area. Employer argued, on appeal, that the administrative law judge improperly precluded several positions identified by employer's vocational expert in the Seattle/Tacoma area and that the administrative law judge failed to explicitly consider all of the relevant factors enumerated in *See*. As noted above, the Board rejected these contentions and affirmed the administrative law judge's relevant market determination.

to compete and which he could realistically and likely secure?

Id., 661 F.2d at 1042-1043, 14 BRBS at 165 (emphasis added). The court stated that the second question requires a determination of whether there exists a reasonable likelihood, given claimant's age, education, and vocational background that he would be hired if he diligently sought the job. In *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991), the Fifth Circuit recognized that *Turner* dictates that in order for jobs to qualify as suitable alternate employment they need to be reasonably available "in the local or surrounding community."[7] While, as employer asserts, the Fifth Circuit has not yet addressed the issue of the appropriate community in a case where claimant relocates, the language "in the local or surrounding community" does not hold that the relevant labor market must be the area in which the injury occurred.[8] Thus, the court's language does not preclude a consideration of the factors enumerated by the courts in *See* and *Wood*.

In addition, while both *See* and *Wood* contain a full analysis of the economic issue

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[7]In *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), the court mentioned in its summary of the facts that claimant, who had a seventh grade education and was raised in Natchez, relocated to Natchez to live with his grandmother following his injury in New Orleans. In discussing employer's burden of establishing suitable alternate employment, the court used the phrase "relevant community." *Id.*, 784 F.2d at 691,18 BRBS at 83(CRT). However, the court did not address this issue as employer submitted no evidence of suitable alternate employment in any community.

[8]We note that while only the First and Fourth Circuits have specifically addressed the relocation issue, other courts have used language which is not inconsistent. The Eighth Circuit has stated that employer's burden is "'to prove the existence of a suitable job presently available to the claimant in the community in which he lives.'" *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 1169, 31 BRBS 114, 118-119(CRT) (8th Cir. 1997), quoting *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 451 (4th Cir. 1978). Similarly, the D.C. Circuit requires a showing by employer of suitable alternate employment "within the geographic area where the claimant resides." *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 799, 21 BRBS 45, 50(CRT) (D.C. Cir. 1988). The Seventh Circuit's use of the phrase "the relevant labor market" in the context of employer's burden to show the availability of suitable alternate employment implies that an administrative law judge may be required to make a determination as to the issue of the relevant community. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Moreover, the United States Court of Appeals for the Second Circuit's reference to job openings "within claimant's community" may also imply the community in which he lives. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991).

presented where a claimant relocates, allowing the factfinder to consider relevant factors and evidence, the Board's decisions upon which employer relies have their genesis in a one sentence holding. In *Elliott,* 16 BRBS at 92, the first decision to address this issue, the Board held that an available job at the site of injury would suffice as suitable alternate employment, stating only that "[e]mployer need not establish a job opportunity for claimant in Ohio where she relocated for personal reasons." The decision in *Dixon,* 19 BRBS at 247, cites *Elliott* for the proposition that employer must demonstrate suitable alternate employment "in the vicinity where the employee was injured."[9] The Board upheld the rule of *Dixon* and *Elliott* in *Nguyen,* 19 BRBS at 145, rejecting claimant's argument that the reference to the "relevant community" in *Rogers Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 691, 18 BRBS 79, 83(CRT) (5th Cir.1986), referred to the area where claimant relocated prior to the hearing. The Board explained that a contrary ruling could result in employer's liability for permanent total disability "due not to the limitations of claimant's injury, but to claimant's personal choice to relocate to an area with fewer available jobs." *Nguyen,* 19 BRBS at 145. This concern was addressed in *See* and *Wood* by the courts' determinations that prejudice to employer is a relevant factor. Moreover, as discussed, the Board in *Nguyen* did not address claimant's argument regarding an economic motivation for moving due to claimant's failure to submit supporting evidence.

In light of the holdings and rationales stated in *See* and *Wood*, we reject employer's contention that the decisions in *Nguyen* and *Dixon* must be applied in the instant case. The holding in the latter cases, that employer need show only that suitable alternate employment was available to claimant within the area where the injury occurred, even if he has since moved, is overruled in light of the more recent circuit court opinions. We therefore hold that the administrative law judge properly looked to the criteria set out in *See* and *Wood* to discern the relevant labor market for purposes of establishing suitable alternate employment in this case.

[9]In *Dixon*, employer did not attempt to show suitable alternate employment in either the place of injury (Maine) or the site of claimant's permanent residence (Mississippi) where he returned post-injury. The Board's statement was made in rejecting employer's assertion that because claimant relocated, he bore the burden of showing a reasonable job search.

In addressing claimant's relocation, utilizing the factors set out in *See* and *Wood*, the administrative law judge determined, based on the relevant evidence of record, that Hemphill, Texas and its local environs are the presumptive community within which employer should attempt to establish the existence of suitable alternate employment. Specifically, the administrative law judge first determined that claimant's residence at the time he filed his claim was in the vicinity of Beaumont, Texas, and that claimant subsequently moved, on or before February 21, 1996, to Hemphill, Texas. He then found that claimant's motives for moving to Hemphill, *i.e.*, a lower cost of living[10] and a better environment in which to raise his children, are legitimate, and that claimant's actions evince his intent to remain in Hemphill indefinitely.[11] Lastly, the administrative law judge found that there is no basis for a finding of undue prejudice to employer in preparing a labor market survey for the Hemphill, as opposed to the Beaumont, Texas area. With regard to this last factor, the administrative law judge considered and compared the types and wages of jobs available in Beaumont versus Hemphill,[12] and concluded that the evidence does not support employer's assertion of undue prejudice. In this regard, the administrative law judge fully

[10]The administrative law judge found that after July 7, 1995, claimant was no longer receiving compensation and that an economic compulsion to relocate may have very well existed. In addition, the administrative law judge noted claimant's testimony that he pays $150 to $200 less a month in housing expense in Hemphill, and that his mother provides assistance to him and his children, presumably at no cost.

[11]The administrative law judge observed that since claimant is purchasing a home in the Hemphill area, and his parents intend to retire in the same locale, it stands to reason that claimant intends to remain in the Hemphill, Texas area.

[12] The record reflects that the wages of the jobs identified by employer's labor market surveys were between $5.15 to $7.50 per hour in Beaumont, and $5.15 to $7.00 per hour in Hemphill.

considered employer's contentions regarding undue prejudice and the testimony of its vocational expert, Mr. Quintanilla, regarding the difficulties in finding suitable alternate employment for claimant in the Hemphill, Texas area because of the rural and modest nature of that location. As the administrative law judge extensively considered and thoroughly discussed the vocational evidence in light of all of the *See* factors, we affirm his conclusion that Hemphill, Texas is the relevant labor market. Moreover, as employer does not challenge the administrative law judge's determination that no suitable alternate employment is available in Hemphill, Texas, his Decision and Order awarding benefits is affirmed.

Finally, we hold that even if Beaumont were the correct area, employer did not establish the availability of suitable alternate employment in that community. The administrative law judge's rejection of all of the positions identified in Mr. Quintanilla's labor market surveys, because they did not fall within claimant's physical restrictions, they lacked specificity, and/or because they would not be economically feasible or reasonable, given a comparison between the cost of the commute from Hemphill and the prospective pay for these jobs, is rational, supported by substantial evidence and in accordance with law.[13] Moreover, we note that in addressing the vocational evidence, the administrative law judge accorded greatest weight to Mr. Kramberg's testimony that given claimant's medical status, continuing medical treatment, sedentary work limitations, and lack of certain requisite skills, claimant would not have been a reasonable and viable candidate for any of the employment identified in employer's labor market surveys.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[13]These findings are not directly challenged by employer. However, since some of the jobs were rejected based on the commuting distance between Hemphill and Beaumont, if claimant's relocation was not appropriate then these jobs could well be suitable. Whether the Board would raise this issue in view of employer's silence on brief on the suitability of the Beaumont jobs is not a question we must address in view of our resolution of this case.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge