

BRB No. 99-0699

QUEEN E. WIGGINS)
)
Claimant-Respondent)
)
)
)
NEWPORT NEWS SHIPBUILDING) DATE ISSUED: <u>April 5, 2000</u>
AND DRY DOCK COMPANY)
)
Self-Insured)
Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order and Order on Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order on Reconsideration (97-LHC-553, 2467) of Administrative Law Judge Fletcher E. Campbell, 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 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).

On May 9, 1995, claimant was diagnosed with bilateral carpal tunnel syndrome, and on May 16, 1995, she injured her left knee. Both of these injuries arose out of her employment for employer as a welder. After surgery on each hand, her treating physician, Dr. Stiles, rated claimant's wrists as sustaining an impairment of two percent each and he imposed work restrictions. Dr. Stiles subsequently operated on claimant's left knee for a meniscus tear and loose bodies. He rated claimant's knee as having an impairment of 15 percent. Employer voluntarily provided medical benefits and compensation for permanent partial disability pursuant to the schedule, see 33 U.S.C. §908(c)(2), (3), as well as compensation for temporary total disability, 33 U.S.C. §908(b). JX 1. In April 1996, the Department of Labor referred claimant to Charles DeMark for vocational rehabilitation. Vocational testing showed an IQ of 78, and claimant was found to have elementary school level proficiency at reading, spelling and math. Tr. at 15-18; CX 10 at 40. Preparatory courses for a high school general equivalency degree were attempted and subsequently abandoned. Tr. at 32-33. Mr. DeMark obtained part-time employment for claimant as a newspaper carrier on July 1, 1997. She delivers newspapers four to five hours per day, three days per week, and collects money from customers one day a week. She provides her own car and is required to pay for its gas, insurance and maintenance. Claimant testified she earns \$103 per week minus expenses. Tr. at 92. Claimant sought benefits under the Act for permanent total disability. 33 U.S.C. §908(a). Employer controverted the claim, contending that claimant's newspaper delivery job established the availability of suitable alternate employment, thus limiting claimant to her recovery under the schedule.

In his Decision and Order, the administrative law judge initially credited the opinion of Dr. Stiles that claimant is unable to return to her usual employment due to her work injuries. He next addressed employer's evidence of suitable alternate employment. The administrative law judge found that none of the positions identified in employer's first labor market survey was suitable, based on claimant's physical and/or educational limitations. He also found that employer did not meet its burden of establishing suitable alternate employment with its identification of jobs in its second survey. He found the security guard positions unsuitable because claimant cannot meet the certification requirements. He also rejected the jobs employer located in Norfolk, Hampton, Newport News and Yorktown, on the basis that they are too far from claimant's home in Ahoskie, North Carolina, and would cost her more to drive to the positions than she would earn at these jobs. Lastly, the administrative law judge found that claimant's newspaper delivery job does not constitute suitable alternate employment. The administrative law judge found that claimant requires undue help from family members in order to re-roll 200 papers for delivery three times a week. Thus, he concluded that the wages claimant earns from this job does not establish a wage-earning capacity, and that claimant therefore is

entitled to total disability benefits.¹

On reconsideration, the administrative law judge rejected employer's contention that a claimant's receipt of "undue help" is not a recognized exception for awarding total disability benefits to a claimant who is working post-injury. Moreover, he found, as additional evidence in support of his finding, that neither Mr. DeMark nor Dr. Stiles approved the job as within claimant's work restrictions with full knowledge that claimant was required to re-roll 200 newspapers and that she requires her family's help to do so. Accordingly, employer's motion for reconsideration was denied.

On appeal, employer argues that the administrative law judge erred in awarding claimant total disability benefits. Specifically, employer alleges error in the administrative law judge's finding that claimant received undue help delivering newspapers and in concluding that this position does not establish the availability of suitable alternate employment. Moreover, employer contends that the administrative law judge erred by failing to consider claimant's refusal to meet with Mr. Karmolinski in evaluating its evidence of suitable alternate employment and by rejecting its evidence of suitable alternate employment on the basis that some of the jobs are too distant from claimant's home. Claimant responds, urging affirmance.

Where, as in the instant case, claimant is incapable of resuming her usual employment duties with her employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing given her

¹In the alternative, the administrative law judge stated that, if claimant is considered to be self-employed, the job does not constitute suitable alternate employment because claimant does not derive "substantial or significant income" from the position, citing *Sledge v. Sealand Terminal, Inc.*, 14 BRBS 334 (1981). This case, however, merely stands for the proposition that self-employment may constitute suitable alternate employment if the personal business pursuit yields earnings that realistically signify a continuing wage-earning capacity. 14 BRBS at 337.

age, education, vocational background and physical restrictions. See *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Where, as here, the claimant is actually working post-injury, she may nonetheless be found entitled to total disability benefits if she works through extraordinary effort and in spite of excruciating pain or is provided a position only through the employer's beneficence. See *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Haughton Elevator Co. v. Lewis*, 572 F.2d 477, 7 BRBS 838 (4th Cir. 1978); *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). An award of total disability while claimant is working, however, is the exception rather than the rule. See *Everett*, 23 BRBS at 319; *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981); *Carter v. General Elevator Co.*, 14 BRBS 90 (1981). For the reasons that follow, we affirm the administrative law judge's award of total disability benefits, on the facts of this case.

Employer's arguments concerning the administrative law judge's rejection of the positions identified in its two labor market surveys are rejected. We find no error in the administrative law judge's not addressing claimant's refusal to meet with Mr. Karmolinski, employer's vocational consultant. Upon employer's request, Mr. DeMark provided Mr. Karmolinski with his vocational reports, assessment and testing results, and Mr. Karmolinski was aware of Dr. Stiles's work restrictions. EX 18 at 5-6. Accordingly, claimant's refusal to meet with Mr. Karmolinski did not hinder employer's efforts at identifying suitable alternate employment, as employer was provided with sufficient vocational and medical information by which it could prepare its labor market surveys. See generally *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290, 292 (1990).

Moreover, we affirm the administrative law judge's rejection of the job opportunities employer identified that are over 75 miles from claimant's residence. The record establishes that claimant commuted over 70 miles while working for employer, and that she relied on a van pool for this transportation. Tr. at 79. As some of the jobs employer identified required claimant to have her own car, the van pool would be of no use to claimant. Furthermore, the administrative law judge rationally found that claimant's commuting costs would consume more than she would earn in the identified positions. Lastly, the administrative law judge noted that Dr. Stiles restricted claimant from positions with foot controls and repetitive leg movement, and the administrative law judge rationally concluded that driving such distances contravene these restrictions. His conclusion that the jobs identified are not suitable and are not in the appropriate geographic area therefore is rational, supported by substantial evidence and in accordance with law. See *v. Washington Metropolitan Transit Authority*, 36 F.3d 375, 383-384, 28 BRBS 96, 105 (CRT)(4th Cir. 1994). We therefore affirm the administrative law judge's finding that these

positions do not satisfy employer's burden of establishing the availability of suitable alternate employment.

Employer also contends that the administrative law judge erred by finding claimant totally disabled notwithstanding her job delivering newspapers on the basis that claimant receives "undue" help from her family re-rolling approximately 200 newspapers on delivery days. While we agree with employer that the administrative law judge's finding that claimant received "undue" help is not supported by the record,² it does establish that she received some help in performing the job, and the administrative law judge's finding that this job is not suitable for claimant and does not establish a continuing ability to earn wages is rational and supported by substantial evidence.

In this regard, the administrative law judge found that neither Dr. Stiles nor Mr. DeMark was aware of the re-rolling requirement at the time claimant obtained the position. See CX 10 at 18. Moreover, although claimant did not testify to pain that could be described as excruciating, she did testify that re-rolling the papers aggravates her hand condition and that she has to occasionally rest her knee after walking to deliver papers. Tr. at 83-84, 91, 94. Dr. Stiles reported on February 10, 1998, that the job was causing claimant "a lot" of knee pain, and he prescribed pain medication and a knee brace. CX 1 at 1. Moreover, Dr. Stiles had previously approved the job on the condition that there is no extensive walking. CX 10 at 17-19. He restricted her to two to three hours of walking a day and stated that her wrist impairment restricted claimant from pushing or pulling. See CX 8 at 2, 5. Mr. DeMark, who continued to monitor claimant's situation after placing her in the job, stated that the job appears to be outside of claimant's work restrictions, CX 9 at 16, noting her complaints to him that the repeated use of her hands, especially in cold weather, aggravated her hand pain, *id.* at 10-11. He further stated that, in his opinion, she was putting forth extra effort in order to work, *id.* at 16, and he testified that she took the job only because her compensation was terminated and she needed money. Tr. at 68. Mr. DeMark stated that claimant was basically unemployable otherwise, given her medical restrictions and limited education. CX 9 at 13-14. Mr. DeMark testified that "it's hard for me to accept the idea that a part-

²Claimant testified only that she occasionally receives help re-rolling the newspapers when a family member happens to be around to render such assistance. Tr. at 94; see also CX 9 at 9.

time newspaper delivery job would be considered regular employment . . . you've got to remember that . . . a 15-year-old boy with a driver's license could do the job, so ruling that out, I'd have to say that [claimant's] wage earning capacity would be zero." Tr. at 42.

Thus, there is ample evidence of record to support the administrative law judge's conclusion that employer has not established that the newspaper job is suitable for claimant given her medical restrictions and the pain she suffers while working. See *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Moreover, the administrative law judge's finding that this job does not establish claimant's ongoing ability to earn wages is supported by Mr. DeMark's testimony that this part-time job is the only position he could find for claimant despite her diligence, by his testimony that, in his opinion she works by virtue of extra effort, and by the administrative law judge's finding that claimant works in spite of pain. See generally *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41, 45 n.5 (1999). The Act does not require a finding that a job is suitable merely because a claimant perseveres, if she does so in pain. See, e.g., *Cooper v. Offshore Pipelines Int'l*, 33 BRBS 46 (1999). On the totality of the facts presented here, we affirm the administrative law judge's conclusion that an award of total disability benefits is warranted.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration awarding claimant total disability compensation are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge