BRB No. 00-0744

JULIAN MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 6, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Inman & Strickler, P.L.C.), Virginia Beach, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & 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:

Claimant appeals the Decision and Order on Remand (96-LHC-1854) of Administrative Law Judge Daniel A. Sarno, 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).

This is the second time this case is before the Board. To recapitulate, claimant's injured his right hand while working as an inside welder for employer on November 30, 1994. Employer voluntarily paid claimant temporary total disability

benefits on February 4, and 5, 1995. Claimant returned to light duty outdoor work as a flat welder on February 6, 1995, and worked February 6 and 7, 1995, on the first shift. He was scheduled to work in this same position until February 10, 1995, but asserted that he could not do so due to pain. After February 10, 1995, claimant was scheduled to work light duty as a flat welder on the second shift, but he never returned to work. Claimant was notified on July 30, 1996, that he was terminated from employment effective February 7, 1996, for violation of the five-day call-in rule. Claimant sought temporary total disability benefits from December 1, 1994, and continuing. The parties stipulated that claimant is unable to return to his full duty pre-injury employment.

In his Decision and Order, the administrative law judge denied disability benefits after finding that employer established the availability of suitable alternate employment at claimant's pre-injury wages. The administrative law judge also denied medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907, for Dr. Morales's treatment rendered prior to June 4, 1996.

Claimant appealed, challenging the administrative law judge's denial of additional disability and medical benefits. Employer responded, urging affirmance.

In its decision, the Board initially reversed the administrative law judge's finding that employer established the availability of suitable alternate employment prior to February 6, 1995, and modified the decision to reflect claimant's entitlement to total disability benefits prior to this date. *See Mitchell v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 98-1035 (Apr. 26, 1999)(unpub.). The Board then vacated the administrative law judge's finding that employer established the availability of suitable alternate employment from February 6, 1995, and continuing by way of offering claimant a light duty job at its facility, and remanded for a reevaluation of that light duty position in light of claimant's restrictions. *Id.* Lastly, the Board vacated the administrative law judge's denial of medical benefits for Dr. Morales's treatment prior to June 4, 1996, and remanded for a determination of whether claimant requested and was refused authorization to treat with Dr. Morales, and if so, whether Dr. Morales's treatment from April 19, 1995, was reasonable and necessary. *Id.*

In his Decision and Order on Remand, the administrative law judge initially determined that Dr. Gwathmey was claimant's first choice of physician, and as such, the administrative law judge concluded that Dr. Gwathmey's cold weather restrictions from February 13, 1995, could not be imputed to employer. The administrative law judge therefore found that the light duty job provided to claimant on February 6, 1995, constituted suitable alternate employment. The administrative

law judge next determined that the light duty job provided to claimant on February 6, 1995, remained suitable alternate employment even after employer received Dr. Morales's cold weather restrictions on April 27, 1995. Specifically, the administrative law judge found that the credible evidence of record, *i.e.*, the testimony provided by three of employer's supervisors, established that this light duty welding position was within claimant's physical restrictions and that there was a willingness, on employer's part, to accommodate claimant's cold weather restrictions. Accordingly, the administrative law judge concluded that claimant was not entitled to temporary total disability benefits. Lastly, the administrative law judge determined that claimant was entitled to medical benefits for his treatment with Dr. Morales from November 21, 1995, as claimant requested and was refused authorization, and the administrative law judge found that these medical expenses were reasonable and necessary.

On appeal, claimant challenges the administrative law judge's denial of temporary total disability benefits. Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred in denying temporary total disability benefits from April 27, 1995, and continuing, as the light duty position at employer's facility is insufficient to meet its burden of establishing suitable alternate employment.[1] Claimant first asserts that this light duty welding position is not suitable alternate employment as claimant was laid off from that job for reasons unrelated to any misconduct on his part. Claimant also argues that employer did not affirmatively establish that the light duty welding position was ever actually offered to him or for that matter continued to be available to him, and that it was within his post-injury physical capacity and restrictions. Specifically, claimant asserts that the administrative law judge erred in that he did not follow the Board's instructions to consider the two positions offered by employer at its facility, *i.e.*, the flat welding position provided on February 6 and 7, 1995, and a subsequent position on the second shift to which claimant was to be transferred as of February 10, 1995, and instead relied only on the first position which the record shows was no longer

[1]While the bulk of claimant's assertions pertain to the administrative law judge's denial of benefits from April 27, 1995, claimant nevertheless also asserts that the administrative law judge erred in finding that employer established suitable alternate employment as of February 6, 1995, by providing claimant a light duty job within its facility.

available after February 10, 1995. Lastly, claimant avers that employer never conclusively established that the light duty positions offered by employer were, in fact, indoor positions within claimant's restriction from working outdoors.

Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner],* 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may meet this burden by offering claimant a suitable position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Where claimant is laid off from a suitable post-injury light duty job within employer's control for reasons unrelated to any actions on his part, and demonstrates that he remains physically unable to perform his pre-injury job, the burden remains with employer to show the availability of other suitable alternate employment, if employer wishes to avoid liability for total disability. *Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). If, however, claimant has been discharged from a light duty job within employer's own facility for violation of a company rule, and not for reasons related to his disability, employer may use that position to satisfy its burden of showing suitable alternate employment if it has established that claimant is, in fact, capable of performing the duties of that position. Thus, if employer has demonstrated that claimant is able to perform the job within its facility, the fact that the position is no longer available to claimant, due to his discharge for reasons unrelated to his disability, does not impose upon employer the additional requirement to show different suitable alternate employment outside its facility. *See Brooks v. Newport News Shipbuilding & 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); *see also Manship v. Norfolk & Western Ry. Co.*, 30 BRBS 175 (1996). In order to defeat employer's showing of the availability of suitable alternate employment, claimant must establish that he diligently pursued alternate employment opportunities but was unable to secure a position. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

Complying with the Board's remand instructions, the administrative law judge initially determined, based on claimant's own admission, that Dr. Gwathmey was claimant's choice of physician. In so finding, the administrative law judge explicitly considered, as

instructed by the Board, Dr. Reid's letter dated January 18, 1995, acknowledging referral of claimant to Dr. Gwathmey, and Dr. Gwathmey's letter dated February 1, 1995, thanking Dr. Reid for said referral. He however determined that these letters were insufficient to rebut his finding that claimant chose Dr. Gwathmey, particularly in light of claimant's admission. The administrative law judge therefore found that Dr. Gwathmey's cold weather restrictions from February 13, 1995, could not be imputed to employer[2] and thus concluded that the light duty job offered on February 6, 1995, constituted suitable alternate employment.

[2]Neither claimant nor Dr. Gwathmey informed employer of the additional restriction to avoid cold weather.

The administrative law judge then considered, again pursuant to the Board's remand instructions, whether the light duty job of February 6, 1995, remained suitable alternate employment after employer received Dr. Morales's cold weather restrictions on April 27, 1995. In this regard, the administrative law judge looked to the testimony provided by three of employer's supervisors, George Cash, Billy Fowler and Fred Moore, regarding the light duty work made available to claimant and the contrary statements by claimant that he worked outside of his restrictions. The administrative law judge credited the testimony of employer's three supervisors that nothing about the flat welding job required claimant to go outside of his restrictions,[3] and that they would, if asked, accommodate claimant's cold weather restrictions,[4] over claimant's testimony, that upon his return to light duty work on February 6, 1995, he was required to perform work beyond his restrictions. Inasmuch as the administrative law judge's credibility determinations are rational and supported by substantial evidence, they are affirmed.[5] Moreover, we affirm the administrative law judge's finding that employer established suitable alternate employment via the light duty position which it provided claimant as of February 6, 1995, as the administrative law judge, following a complete consideration of the Board's instructions on remand, rationally determined that this position was within claimant's physical restrictions, including the cold weather

[3]On February 6, 1995, Dr. Gwathmey placed the following work restrictions on claimant: no lifting greater than 25 pounds, and no vertical climbing or heavy sustained gripping. Claimant's Exhibit (CX) 9. On February 13, 1995, Dr. Gwathmey added that claimant should avoid working in cold weather. CX 9. On April 27, 1995, Dr. Morales indicated that claimant could only perform lifting up to 10 pounds one hour a day, climbing for one hour a day, pushing and pulling for one hour a day, no strenuous repetitive use of the hand, and advised claimant to avoid exposure to extreme temperatures. CX 6.

[4]At the time that claimant actually worked in the light duty position, he performed a majority of his work in an outdoor environment. However, as the administrative law judge noted, there was no cold weather restriction placed upon claimant's employment at this time. Moreover, as claimant was ultimately terminated for cause prior to the imposition of the cold weather restriction on April 27, 1995, the administrative law judge rationally relied on the testimony provided by the three supervisors, that, if asked, they would accommodate claimant's cold weather restriction, to find that this position was within the entirety of claimant's restrictions as set out by Dr. Morales on April 27, 1995. As such, the administrative law judge did consider, and in fact, found that the light duty position provided to claimant within employer's facility would have involved indoor work so as to accommodate claimant's cold weather restriction.

[5]In its prior decision, the Board held that the administrative law judge acted within his discretion in finding that claimant's testimony that the light duty work provided by employer exceeded his physical restrictions was not credible. We therefore decline to address claimant's specific contentions regarding the administrative law judge's finding as to claimant's lack of credibility based on the law of the case doctrine. *See generally Alexander v. Triple A Machine Shop*, 34 BRBS 34 (2000).

restriction, and the record establishes that employer offered, and claimant, in fact, briefly worked in this position. *See generally Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Furthermore, as claimant's termination from his position with employer occurred as a result of claimant's violation of the five-day rule, and thus was not related to his work injury, employer was not required to show different suitable alternate employment outside its facility. *Brooks*, 26 BRBS 1. The administrative law judge's denial of temporary total disability benefits is therefore affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge