BRB No. 04-0648

MICHAEL D. WEATHERINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:APR 29, 2005
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-2228) of Administrative Law Judge Richard K. Malamphy 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 if they 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 June 13, 1994, claimant experienced back pain and discomfort during the course of his employment with employer as a welder. Claimant has treated with a number of physicians since the day of this incident and, although claimant's condition initially improved with conservative treatment, he has subsequently undergone four surgical procedures and presently takes various medications for muscle relaxation,

hypertension and pain.[1] Employer voluntarily paid claimant temporary total disability compensation for various periods of time between July 11, 1994 and June 19, 2002. 33 U.S.C. §908(b).

In his Decision and Order, the administrative law judge weighed the medical evidence, claimant's testimony and video surveillance evidence and determined claimant's physical restrictions. Applying these restrictions to the vocational evidence submitted by employer, he concluded that employer failed to establish the availability of suitable alternate employment. Accordingly, as neither party averred that claimant's condition was permanent, the administrative law judge awarded claimant temporary total disability compensation from June 20, 2002, and continuing.

On appeal, employer contends that the administrative law judge erred in determining claimant's physical restrictions and in concluding that it did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Employer initially challenges the administrative law judge's findings regarding claimant's physical restrictions, asserting that the administrative law judge erred by rendering his own medical assessment of claimant's physical capabilities rather than accepting one of the two medical alternatives presented by the physicians of record. We reject this contention and affirm the administrative law judge, as his decision was based on an evaluation of both the medical and lay evidence of record.

Where, as in the instant case, claimant establishes that he is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *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*, 731 F.2d 1999, 16 BRBS 74(CRT) (4th Cir. 1984). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d

[1] Specifically, on August 3, 1994, claimant underwent a lumbar microdiskectomy at the L4-5 level, EX 12; on September 1, 1995, claimant underwent total laminectomies at the L4-5, L5-S1 levels, as well as a fusion from L4 to his sacrum, EX 17; on April 28, 1997, claimant underwent a lumbar decompression at the L3-5 levels, and the installation of Dynaloc hardware to stabilize that area of his back, EX 21; and, lastly, on July 6, 1998, claimant underwent an anterior lumbar diskectomy and fusion at the L3-4, and L4-5 levels. EX 26.

129, 21 BRBS 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In determining whether employer demonstrated the availability of suitable jobs, the administrative law judge in this case appropriately began by reviewing the relevant evidence in order to assess claimant's physical capabilities.

Regarding his present physical condition, claimant testified that he cannot work due to his ongoing back pain and that his pain prohibits him from sleeping a full night. Tr. at 29-30, 46-47. Additionally, claimant stated that he has trouble concentrating due to his taking the prescription medication Percocet for his ongoing back pain. Tr. at 47. Claimant acknowledged driving post-injury, but stated that he tries not to drive anywhere and that his wife will drive when they go out. Tr. at 45. Additionally, claimant testified that he accompanies his wife on shopping trips so that he can both walk and exercise; claimant noted, for example, that Wal-Mart provides both baskets to lean on as a walker and benches throughout its store so that he can rest as needed. Tr. at 37, 53-55. In May 2002, claimant enrolled in a vocational training program located approximately one and one-half hours from his home. Claimant attended three of the first four sessions of this program, but stopped attending due to the onset of pain associated with sitting in class and driving to and from the program. EX 63 at 20-23. On April 11, 16 and 17, 2003, employer conducted video surveillance of claimant. The videotape taken of claimant on those dates shows claimant, *inter alia*, driving, lifting 2 x 4 pieces of lumber, walking and shopping with his wife. *See* Tr. at 50-71; EX 71.

Dr. Mathews, a neurosurgeon and claimant's treating physician, first saw claimant on August 2, 1995, and he performed claimant's April 28, 1997, and July 6, 1998, surgeries. Claimant continued to treat with Dr. Mathews, complaining of pain, discomfort, numbness and tingling with activity.[2] In February 2002, Dr. Mathews reported that claimant's disease was worsening. EX 36 at 23. Following claimant's attempt to attend the vocational training program in May 2002, Dr. Mathews sent a note to the program stating that claimant's driving and prolonged sitting aggravated his condition and that, accordingly, claimant would not be completing the program. EX 55. In a report after a follow-up examination on June 13, 2002, the physician stated that claimant's job activities led to his total dysfunction and that he is unable to work four hours a day. He concluded that claimant was incapable of functioning at a minimal sedentary activity and that, therefore, claimant remained permanently totally disabled. EXs 36 at 24; 55. In August 2003, after reviewing employer's surveillance videotape of claimant, Dr. Mathews stated that those tapes represented a "best case scenerio of

[2] In November 1999, Dr. Mathews referred claimant to Dr. Gajjar for pain management treatment; Dr. Gajjar's subsequent treatment included, *inter alia*, caudal steroid injections, a Duragesic Patch, Flexeril, Dilaudid, Elavil, Vicodin, Neurontin, Percocet, Oxycontin, and Methadone. EX 42.

[claimant] at his best functioning capability," and that this intermittent look does not represent an 8 hour day or a 40 hour work week. EX 77. He stated that claimant's capability is very limited and specifically noted his ability to sit, commute and perform daily activities for an 8 hour day is unpredictable due to his pain, medication and lack of endurance. *Id.* Dr. Mathews reiterated his prior opinion that claimant is 100 percent disabled and stated that his multiple spinal surgeries make him unable to work in anything other than a modified sedentary position, which is possible if his lumbar condition resolves somewhat. However, he concluded that the "combination of medicines, physical disability and the overall psychological effect of his current disease process [make] him an ineffective employee and not capable of performing light to sedentary activities." *Id.*

Dr. Carlson, an orthopedic surgeon, examined claimant on July 30, 2002 and thereafter opined that while claimant's back is not well enough for him to be performing anything strenuous, it would be a reasonable expectation for claimant to be able to perform sedentary light duty work. EX 58. On October 29, 2002, Dr. Carlson opined that it would not be unreasonable for claimant to drive one and one-half hours, or as long as he needed to drive if he was able to take rest breaks while driving. EX 60. On June 13, 2003, after reviewing employer's surveillance videotape of claimant, Dr. Carlson revised his opinion as to claimant's ability to perform sedentary work, stating that claimant should now be able to perform at least moderate duty concerning lifting, carrying and bending. EX 74.

Claimant was also referred by the Department of Labor to Dr. Goss, an orthopaedic surgeon, for an evaluation. In a report dated November 25, 2002, Dr. Goss opined that, based on claimant's pain, claimant was not a candidate to return to work at that time. CX 11. On September 25, 2003, following a review of employer's surveillance videotape of claimant, Dr. Goss recommended that claimant be placed in at least a moderate duty category, with the ability to lift between 10 and 30 pounds multiple times each day, and that no restrictions be placed on claimant's driving. EX 78.

Having reviewed the administrative law judge's decision and the record, we reject employer's assertion that the administrative law judge erred in determining claimant's physical capabilities. In addressing this issue, the administrative law judge set forth at length claimant's testimony, the reports of Drs. Mathews, Carlson and Goss, and a description of the surveillance videotape taken of claimant on April 11, 16, and 17, 2003. Decision and Order at 3 – 11. Acknowledging Dr. Matthews' belief that claimant cannot work, the administrative law judge found it clear from employer's surveillance videotape of claimant that claimant exhibits a limited ability to walk, sit and lift very small items; additionally, as claimant takes pain medications, he has a limited ability to drive. *Id.* at 20. Reviewing the assessments of Drs. Goss and Carlson that claimant is capable of sedentary or moderate work, the administrative law judge then rejected the opinion that

claimant was capable of moderate duty work, finding that such work would be far too strenuous for claimant to perform in view of his testimony and Dr. Mathews' medical reports. *Id.* Next, despite Dr. Mathews' opinion that claimant remained totally disabled, after consideration of the opinions of Drs. Carlson and Goss that claimant could perform sedentary work, the administrative law judge determined that claimant is capable of performing "a part time sedentary position that consists of 15 to 20 hours a week, lifting no more [than] ten pounds, and where he would be accommodated to sit, stand and walk as needed." *Id.* In addition, he found that any position identified for claimant would have to take into consideration claimant's use of pain medication; since this medication causes loss of concentration, positions requiring concentration or mathematical calculations would be inappropriate. He finally concluded that given his physical condition, claimant does have restrictions on his ability to drive and should limit his driving to no more than 30 minutes a trip. *Id.*

Employer challenges these findings, asserting that the administrative law judge was required to choose between the competing medical opinions, accepting either the view of Drs. Goss and Carlson that claimant can perform moderate work or that of Dr. Mathews that he cannot work at all. We reject this assertion. It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). "The administrative law judge's findings may not be disregarded on the basis that other inferences might have been more reasonable. Deference must be given the fact-finder's inferences and credibility assessments…." *Tann*, 841 F.2d at 543, 21 BRBS at 16(CRT). *See also Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968) (fact finder may credit part of the witness's testimony without accepting it all); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge entitled to weigh the evidence and choose the inferences he deems most reasonable considering the evidence as a whole and the common sense of the situation). In this case, the administrative law judge committed no error in choosing the inferences to draw from the competing medical opinions as well as his assessment of claimant's credibility and employer's surveillance videotape.

Initially, contrary to employer's contention, the above precedent makes clear that the administrative law judge was not required to choose either the totality of the opinion of Dr. Mathews or that of Drs. Goss and Carlson. Moreover, it was within his province to assess claimant's credibility regarding his pain and limitations and credit claimant's credible testimony regarding his disability as well as to independently review the videotape evidence. *See Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). On this record, the administrative law judge could rationally reject Dr. Mathews' conclusion that claimant cannot work at all based on a review of the videotape and other

medical evidence, but rely on the doctor's descriptions of claimant's pain and limitations in his reports to discern claimant's capabilities. Thus, after reviewing Drs. Goss and Carlson's assessment that claimant could do sedentary to moderate work, the administrative law judge reasonably concluded that moderate work was too strenuous based on claimant's testimony and Dr. Mathew's reports. Moreover, the opinions of Drs. Goss and Carlson, as well as employer's surveillance videotape of claimant, support the conclusion that claimant is capable of performing sedentary employment with a ten pound lifting restriction, EXs 74, 78, and it is consistent with Dr. Mathew's statement that claimant had difficulty working more than 4 hours a day, EX 36 at 22, to conclude that he is limited to part-time employment of 20 hours per week. Dr. Mathew's reports as a whole as well as claimant's testimony contains ample support for the conclusion that claimant should be able to change his position and thus sit, stand and walk as needed. Similarly, the administrative law judge's finding that claimant is able to drive is supported by Dr. Carlson's opinion that claimant has no driving limitations so long as he takes rest breaks, EX 60, Dr. Goss's opinion that claimant has no restrictions regarding his driving, EX 78, and the videotape showing claimant driving, but his conclusion that claimant should be limited to 30 minutes per trip is reasonable given claimant's testimony that while he is capable of driving, he tries not to do so and that his trips to the vocational training program in May 2002, which entailed driving for over one hour, resulted in the onset of back pain, Tr. at 45, and Dr. Mathew's reports.

In this case, employer's arguments regarding claimant's physical capabilities challenge the administrative law judge's weighing of the evidence. We decline employer's invitation to reweigh the evidence on this issue, as the Board is not empowered to do so. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge addressed the totality of the lay and medical evidence of record and rationally found that claimant is capable of part-time sedentary employment. Decision and Order at 20. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge). Employer has not demonstrated error in the administrative law judge's crediting of this testimony or in the inferences that he drew from the evidence of record. Thus, as it is supported by substantial evidence, the administrative law judge's finding that claimant is presently capable of part-time sedentary employment is affirmed.

Employer next challenges the administrative law judge's determination that it did not establish the availability of suitable alternate employment. Initially, employer asserts that claimant can perform all of the listed jobs based on Drs. Goss and Carlson's restriction to moderate duty work as well as its interpretation of the videotape. Since we have affirmed the administrative law judge's conclusions regarding claimant's physical restrictions, these arguments must be rejected. Employer also argues that since its

vocational expert identified jobs which are approximately an hour's drive for claimant, claimant is capable of commuting to the jobs. This contention is also rejected based on our previous affirmance of the administrative law judge's conclusion that claimant's driving is limited to less than one hour.[3] Employer further contends that the administrative law judge erred in rejecting the employment positions identified by its vocational expert, Mr. Kay, and these jobs must be reviewed for suitability given the restrictions found by the administrative law judge.

In attempting to satisfy its burden, employer need not contact prospective employers to inform them of the qualifications and limitations of the claimant and to determine if they would in fact consider hiring the candidate for their positions. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT). Moreover, employer need not contact the prospective employers in its labor market survey to obtain their specific requirements before determining whether the claimant would be qualified for such work. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Rather, the Fourth Circuit in *Moore* stated that although such a specific description of an alternate employment opportunity might increase the precision of vocational surveys, such precision is not necessary since the claimant is able to correct any overbreadth in a survey by demonstrating the failure of his good faith effort to secure employment. *Id.*, 126 F.3d at 264-265, 31 BRBS at 125(CRT); *see also Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In addressing this issue, the administrative law judge initially described in detail each of the positions identified by Mr. Kay in his August 2002 and September 2003 labor market surveys, Decision and Order at 11-16, and then analyzed each position in view of claimant's capabilities. *Id.* at 21-22. Employer asserts that Mr. Kay identified eight full and part-time positions involving sedentary work which are suitable for claimant.[4] Initially, the administrative law judge determined that customer service work with Goodwill Industries did not fit within claimant's physical restrictions since the lifting requirement was stated as up to 20 pounds and Mr. Kay was uncertain that a lower requirement could be accommodated. Moreover, he found that Mr. Kay stated the

[3] Since none of the jobs is closer than one hour, we need not address the specific 30 minute limitation stated by the administrative law judge. We note that employer's argument rests on the theory that claimant's driving is unrestricted, an argument which the administrative law judge rationally rejected.

[4] Employer does not challenge the administrative law judge's rejection of a position with Expediter Corp., which is apparently a placement company with jobs which are subsidized by employer. This position therefore will not be addressed.

position typically evolves into full-time work, which is not suitable for claimant, and Mr. Kay did not know whether these jobs were full-time or part-time. Thus, the administrative law judge concluded that this position did not meet claimant's physical restrictions. Next, the administrative law judge addressed two security guard positions which were seasonal in nature. Mr. Kay stated that the job would be dependent on tourism and thus he did not know how many hours or weeks in a year that claimant would be able to work. Given its seasonal nature, the administrative law judge could rationally reject this job as there is insufficient information to calculate claimant's earning capacity.[5]

The administrative law judge next addressed two positions as a dispatcher. The administrative law judge rejected one of these jobs because it did not allow working less than 30 hours per week, which he found was too much for claimant. The second position, the administrative law judge concluded, would be suitable for claimant as it allows for part-time work and enables claimant to stand and walk as needed, except that it was located more than an hour away from claimant's home. Thus, it was not within his driving restriction. Mr. Kay also listed two positions as a cashier. The administrative law judge found that claimant's ongoing use of pain medication and his testimony that he had trouble concentrating made these positions inappropriate.

Having addressed the jobs in the 2002 survey, the administrative law judge considered Mr. Kay's updates to his labor market survey, concluding that these positions also did not establish the availability of suitable alternate employment. The administrative law judge specifically found the availability of the position with the Williamsburg Lodge was tenuous and unknown given its seasonal nature, similar to his finding with regard to the previously identified security guard jobs. He concluded that the remaining identified positions were not within claimant's restrictions, as they entailed either standing in excess of 4 hours per day or working 35 to 40 hours per week. Thus, the administrative law judge concluded that the positions identified in Mr. Kay's July

[5] Employer notes that Mr. Kay provided the classification number of the job in the Dictionary of Occupational Titles (DOT) for each position and that this reference is sufficient to establish the qualifications of each of those positions. *See* EX 70. While an employer may rely on standard occupational descriptions to establish the general duties and exertional requirements of a job, *see Moore,* 126 F.3d at 265, 31 BRBS at 125(CRT), a lack of information in this regard is not the reason the administrative law judge found the positions insufficient. Moreover, the DOT reference for both the Goodwill and security jobs classifies the jobs as "light" duty work, which is a higher strength level than the sedentary work the administrative law judge found claimant capable of performing.

2003 labor market survey were unsuitable for claimant. EX 75; Decision and Order at 22.

The administrative law judge in this case fully considered each of the positions identified by employer in light of claimant's restrictions, and employer has failed to establish reversible error in his determinations. Accordingly, as the administrative law judge's findings are rational and supported by substantial evidence, we affirm the administrative law judge's determination that the positions identified by employer are insufficient to establish the availability of suitable alternate employment. *O'Keefe*, 380 U.S. 359.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge