BRB No. 06-0722

JOSHUA MENDOZA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARCO SHIPYARDS	)	DATE ISSUED: 04/30/2007
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Amie C. Peters (Law Office of William D. Hochberg), Edmonds, Washington, for claimant.

Scott Holleman (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-00878) of Administrative Law Judge Gerald M. Etchingham 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 began working for employer as a welder in March 1997. On March 28, 2000, claimant sustained an injury to his right shoulder. Dr. Wertheimer performed right rotator cuff repair surgery on October 25, 2000. EX 6 at 24. Claimant performed light-duty work for employer for various periods after his 2000 work injury. He last worked for employer on June 18, 2004, after which he was laid off permanently, as employer went

out of business. Tr. at 26. Claimant remained unemployed at the time of his October 31, 2005, formal hearing.

The parties stipulated that claimant cannot return to his usual work and that claimant's shoulder injury reached maximum medical improvement on December 6, 2001. The administrative law judge found that employer did not establish the availability of suitable alternate employment. The administrative law judge found that the positions identified by employer are unsuitable because claimant would be unable to obtain and perform the work given his physical restrictions, education, language skills, work experience and abilities, and age. Therefore, the administrative law judge found that, except for those periods when claimant was working for employer, claimant has been totally disabled since the date of injury.

On appeal, employer contends that the administrative law judge erred in finding none of the identified jobs suitable for claimant. Claimant responds, urging affirmance of the administrative law judge's decision. Employer filed a reply brief arguing that the administrative law judge could not base his decision on the cumulative effect of claimant's physical restrictions, education, language skills and experience on the suitability of the positions, where each of the administrative law judge's separate findings regarding the components of the suitable alternate employment standard "is weak by itself." Emp. Reply Brief at 8.

As it is undisputed that claimant cannot return to his usual work due to his injury, the burden shifted to employer to establish the availability of suitable alternate employment. In order to meet this burden, employer must show the availability of specific job opportunities in the local community, which claimant by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Employer first contends the administrative law judge erred in relying on only the restrictions placed by Dr. Wertheimer. In his December 2001 report, Dr. Wertheimer listed claimant's permanent work restrictions as no lifting, pushing, pulling, or carrying greater than 30 pounds with his right arm and no use of his right hand at or above shoulder level. CX 5 at 60. Employer contends that the administrative law judge did not consider claimant's ability to lift with both arms and the May 2001 functional capacities evaluation which found claimant capable of lifting and carrying 50 pounds on an occasional basis. CX 5 at 68. Employer also relies on Dr. O'Bara's April 2004 report stating claimant could not lift more than 50 pounds and would have trouble working "overhead." EX 3 at 3. Employer thus avers that the administrative law judge erred in rejecting some of the identified jobs based on Dr. Wertheimer's stricter limitations.

We reject employer's contentions of error. Dr. Wertheimer operated on claimant's shoulder and the administrative law judge was entitled to rely on his assessment of claimant's condition upon his releasing claimant from his care several months after the capacities evaluation. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). We also note that upon discharge from the work conditioning program, on September 24, 2001, claimant was found able to lift a maximum of 30 pounds, except that he could lift 50 pounds in a 24 to 36 inch lift. CX 8 at 126. This report does not state whether the lifting ability was for one or both arms, and it supports Dr. Wertheimer's opinion regarding claimant's lifting ability at and above the shoulder level. Employer therefore has not raised a basis for rejection of Dr. Wertheimer's opinion. Moreover, Dr. O'Bara's opinion that claimant is "unable to lift 50" pounds does not preclude a finding that claimant should not lift more than 30 pounds. Thus, the administrative law judge rationally compared the jobs' duties with the restrictions placed by claimant's treating physician. *See, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

Employer next contends the administrative law judge erred in rejecting for one or more reasons all of the jobs it identified as suitable alternate employment. Employer introduced labor market surveys conducted by Ms. Cohen in 2002 and 2005. In 2002, Ms. Cohen identified ten positions which were available between March 16 and April 10, 2002.[1] Her 2005 labor market survey also identified ten positions as suitable for claimant.[2] In her September 30, 2005, report, Ms. Reid, claimant's consultant, critiqued the jobs in Ms. Cohen's surveys and opined that none of the jobs was suitable for claimant. She concluded that the jobs "are currently or usually unavailable, not full-time, too strenuous, and/or require education and/or experience beyond Mr. Mendoza's abilities and qualifications. As he is nearing retirement age, it is my opinion that he is not competitively employable and therefore totally and permanently disabled." CX 11A at 7. Ms. Reid also testified at the hearing that claimant is unemployable, based on his age, education, English as a second language, and physical restrictions from the industrial injury. Tr. at 69, 70. Employer submitted Ms. Cohen's post-hearing deposition, where she asserted she contacted the various employers to address Ms. Reid's criticism of the

[1] The 2002 Survey identified the positions as follows: security officer (2), assembler, cashier, janitor, production worker (2), machine operator, security inspector, and wheel assembler. EX 6.

[2] The 2005 Survey identified the positions as follows: coil winder, security officer (3), machine operator, assembler (8), appointment setter, and ice cream maker/dishwasher. EX 5 at 67. Ms. Cohen subsequently withdrew from consideration several assembler positions she had originally identified. EX 8 at 44.

positions, and that the employers agreed they would hire someone with claimant's background. EX 9.

The administrative law judge found claimant "very credible" in describing his injury and the pain and limitations he experiences as a result of his injury. Decision and Order at 14. The administrative law judge also found that on numerous occasions claimant did not understand the questions he was asked and claimant's responses were confusing or unintelligible. *Id.* at 18-19. With respect to Ms. Reid's testimony, the administrative law judge found she properly considered claimant's personal attributes and limitations, such as his being likely to be unable to perform jobs that require him to reach with his right arm due to his short stature, and her accurate assessment of claimant's language skills and the impact that claimant's age, 67, at the time of the hearing, would have on his competitiveness. *Id.* at 15. The administrative law judge found Ms. Cohen to be generally credible, but he found Ms. Cohen's analysis of whether certain positions constitute suitable alternate employment was "overly artificial." *Id.* He stated it appears Ms. Cohen focused almost entirely on whether positions fit claimant's physical restrictions, but neglected to consider whether he would be truly competitive for those positions, based on his actual skills, abilities, education, age, and other factors. The administrative law judge also rejected Ms. Cohen's assessment of claimant's language skills, based on his own observation of claimant, and the vocational test results. *Id.* at 19.

The administrative law judge also critiqued each individual job with respect to each component of the suitable alternate employment analysis. *Id.* at 16-22. Thus, the administrative law judge discussed each job with respect to claimant's physical restrictions, education, language skills, experience and skills/abilities, and claimant's age. Based on this analysis, the administrative law judge concluded that none of the jobs was suitable due to one or more of these factors. *Id.* at 22. The administrative law judge found that 12 of the jobs exceed claimant's lifting limitation as placed by Dr. Wertheimer of 30 pounds or might require claimant to reach at or above shoulder level. *Id.* at 17. The administrative law judge also found that claimant's limited English would hinder his ability to obtain any job, as would his age.[3] *Id.* at 18-20. The administrative law judge found that claimant works slowly, based on the assessment following claimant's work hardening program, CX 8; EX 4, and that he has a low mechanical reasoning ability based on tests claimant took at Concentra. CX 11A. The administrative law judge also relied on claimant's lack of transferable skills, noting his long career as a welder. Decision and Order at 20. Finally, the administrative law judge stated:

[3] The administrative law judge discussed the jobs' requirements that the employee have good communication skills or to follow written and oral instructions without close supervision.

> Hypothetically speaking, a prospective employer might be willing to overlook one or two of Claimant's problems, such as his work restrictions, his weak language skills, his limited education, his narrow work experience, his restricted skills and abilities, or his age. However, in real life, an employer would consider Claimant as a whole person with all of his problems combined, and he would not be a competitive candidate for employment. Therefore, for all of the reasons discussed above, Employer did not meet its burden to demonstrate the availability of suitable alternate employment….

Id. at 22.

It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and has considerable discretion in evaluating and weighing the evidence of record, and drawing inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge's decision to credit claimant's testimony regarding his limitations, his own observations of claimant's testimony at the formal hearing, and the opinion of Ms. Reid is rational. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Moreover, the administrative law judge exhaustively reviewed the suitability of the jobs based on numerous factors, *see Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001), and he rationally concluded that, for one or more reasons, none of the identified jobs is suitable for claimant. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant is totally disabled. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). Because we have affirmed the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, we reject employer's contention that the administrative law judge erred in not addressing whether claimant diligently sought alternate employment after employee's facility closed. *See generally 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).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

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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JUDITH S. BOGGS
Administrative Appeals Judge