BRB No. 12-0390

ROBERT E. KNIPP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 04/17/2013
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
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.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

John Schouest, Limor Ben-Maier and M. Lane Lowrey (Kelley Kronenberg), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2011-LDA-00155, 00156) 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *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 asserted he sustained work-related injuries to his neck and shoulders on November 27 and December 21, 2008, in the course of his overseas work for employer as a plumber.[1] Claimant returned to the United States from his last work stint with employer on December 31, 2008, and has not since been employed. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b).

The administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), which employer did not rebut, and he thus concluded that claimant established the compensability of his work injuries. The administrative law judge found that claimant cannot return to his usual employment as a plumber, and that employer did not establish the availability of suitable alternate employment.[2] The administrative law judge thus ordered employer to pay claimant compensation for temporary total disability from December 22, 2008 to September 13, 2010, and for permanent total disability, 33 U.S.C. §908(a), commencing September 14, 2010.

On appeal, employer challenges the administrative law judge's finding that its labor market survey did not establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

It is well established that where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to perform his usual employment duties, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). If the employer makes such a showing, claimant can nonetheless prevail in his quest to establish total disability if he

[1]Claimant's work for employer occurred in Iraq in 2004 for about a year, in Afghanistan from September to November 2007, and again in Iraq from November 19, 2008 until his return to the United States on December 31, 2008.

[2]Employer submitted a labor market survey conducted on June 30, 2011, by Susan Rapant, which identified jobs overseas, jobs in Joplin, Missouri, where claimant once lived, and jobs where he currently resides in Quinlan, Texas.

demonstrates that he diligently tried and was unable to secure such employment. *See 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).

Employer first challenges the administrative law judge's rejection of the light-duty jobs it identified overseas. Dr. Van Hal, claimant's treating physician, opined that "claimant cannot return to the heavier work he was doing, especially in a foreign environment." EX 17 at 191. The administrative law judge interpreted this statement as precluding all overseas employment. Decision and Order at 27. We affirm the administrative law judge's rejection of the overseas positions, albeit on different grounds. *See, e.g., Padilla v. San Pedro Boat Works,* 34 BRBS 49 (2000). In also rejecting Joplin, Missouri as a relevant labor market, the administrative law judge found that claimant had lived in Quinlan, Texas, where he has a young child, for the three years prior to the hearing. The administrative law judge therefore rationally found that Quinlan is the relevant labor market. *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001)*; see Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). Although claimant had had two prior overseas stints in 2004 and 2007, he had not made a career of overseas employment as had the claimant in *Patterson v. Omniplex World Services,* 36 BRBS 149 (2003). In *Patterson,* the claimant had worked in U.S. embassies in nine different countries, including some after his work injury. Limited to the facts of that case, the Board held that the administrative law judge was required to consider whether claimant's actual post-injury overseas jobs established suitable alternate employment. *Id.* at 153-154. As the facts herein are not the same as in *Patterson,* and as the administrative law judge rationally found the relevant labor market to be in and around claimant's home in Quinlan, Texas, we conclude the administrative law judge did not err in refusing to review the suitability of the overseas jobs.

Employer next contends the administrative law judge erred in determining some of claimant's physical restrictions. The administrative law judge credited the "Work Capacity Evaluation Musculoskeletal Conditions," Form OWCP-5c, which Dr. Van Hal completed on September 14, 2010. CX 1 at 67. This form, inter alia, lists claimant as requiring five to ten minute breaks every hour and proscribes more than one hour of reaching with the right arm. With respect to the left arm, the form appears to prohibit claimant from reaching above shoulder level, but the notations are sufficiently unclear such that the administrative law judge could conclude that claimant also is proscribed from all reaching with the left arm. As the administrative law judge has drawn a permissible inference from this evidence, we affirm his finding in this respect. *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); *Monta v. Navy Exch. Serv. Command*, 39 BRBS 104 (2005). Substantial evidence also supports the administrative law judge's finding that the rest breaks are required, as they are listed as a "permanent restriction" on Form OWCP-5. *Hawaii Stevedores, Inc. v. Ogawa*, 608

F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010) (affirms administrative law judge's application of "recommended" break restriction).

Employer next contends that claimant's initial 25-pound lifting restriction was increased to 10 pounds based on a post-injury event such that the administrative law judge erred in relying on the increased restriction to find some jobs unsuitable. When claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability due to both injuries if the subsequent injury is the natural or unavoidable result of the original work injury. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc* 31 BRBS 13 (1997); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); *Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, 901 F.2d 1112 (5th Cir. 1990). If, however, the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening event, employer is relieved of liability for disability attributable to the intervening event. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120(CRT) (5th Cir. 1983); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9 (2001), *aff'd mem.*, 32 F. App'x 126 (5th Cir. 2002).

In his March 15, 2011 report, Dr. Van Hal increased claimant's lifting restriction from 25 pounds to 10 pounds, noting that claimant had two car accidents as a result of his having difficulty turning his head and "an incident [of] chest wall discomfort, that appears musculoskeletal … as he was picking up sheetrock or plywood with another person." CX 1 at 71. Dr. Van Hal also stated, "no other new illnesses or injuries reported except as listed" and that claimant continues to have symptoms in his back and shoulders. *Id*. Contrary to employer's contention, there is not substantial evidence of record that these reported incidents constitute an intervening cause of claimant's increased lifting restriction, as opposed to resulting from the natural progression of claimant's work injuries. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). Therefore, we affirm the administrative law judge's reliance on a ten-pound lifting restriction as it is rational and supported by substantial evidence.

Employer next contends that the Americans with Disabilities Act (ADA) is applicable to the issue of suitable alternate employment, such that the jobs it has identified, which are close to being within claimant's restrictions, should have been viewed in combination with the requirements of the ADA that prospective employers provide reasonable accommodations for employees with disabilities. We reject this contention. It is employer's burden to show that the claimant is capable of performing the identified jobs given his physical restrictions and other relevant factors. *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 165; *see also Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). It is insufficient for employer to merely argue that a prospective employer might have to accommodate claimant's disability. Absent evidence that the jobs' requirements are or

actually will be suitable for claimant, employer has not met its burden to establish the suitability of the proffered jobs.[3]

Employer also challenges the administrative law judge's finding that several specific positions are unsuitable for claimant.[4] The administrative law judge may reject positions identified in a labor market survey if they fail to account for all relevant restrictions found by the administrative law judge or if it is unclear from the evidence whether a job is suitable. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Canty v. S.E.L Maduro*, 26 BRBS 147 (1992). The administrative law judge found that the security guard position requires a clean criminal history with no felonies or misdemeanors and that some of the physical demands of the job exceed Dr. Van Hal's restrictions. EX 19 at 13-14. Claimant testified that he had a misdemeanor conviction in the 1980s.[5] The physical requirements of this job include occasional lifting up to 25 pounds and stooping; both requirements exceed claimant's work restrictions as found by the administrative law judge. CX 1 at 67, 71.

The lobby security position with Allied Barton requires, "[n]o criminal convictions as specified under Allied Barton guidelines." EX 19 at 14. The administrative law judge found it "is unclear if claimant is eligible for this position on this basis without further clarification." Decision and Order at 29. Moreover, the administrative law judge found it is unclear if the job would allow claimant to take the necessary rest breaks. *Hawaii Stevedores, Inc.*, 608 F.3d 642, 44 BRBS 47(CRT).

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[3]An employer is not required to contact prospective employers to ascertain specific job requirements or to ask if they will hire claimant with his limitations. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Nonetheless, it is employer's burden to supply evidence of the requirements of the jobs for comparison with claimant's restrictions. If employer seeks to establish the suitability of a position through application of the ADA, it bears the burden of showing that any actual accommodations to the jobs' requirements are within claimant's restrictions.

[4]We reject employer's contention that the administrative law judge erred by rejecting positions on the basis that claimant does not have a GED, HT at 15-16, 47, 51-53, since the administrative law judge explicitly noted that claimant's GED or lack thereof was not a "controlling factor" in determining job suitability. Decision and Order at 28 n. 3.

[5]The administrative law judge stated that he was not relying solely on the misdemeanor conviction in finding certain jobs unsuitable. Decision and Order at 28 n.3.

The day porter/janitor position requires restocking restrooms with tissues, towels and soap, sweeping, mopping, dusting, vacuuming, and gathering and emptying trash; it is listed as a light-duty position. EX 19 at 16. The administrative law judge found that this job exceeds claimant's work restrictions because restocking restrooms would require claimant to reach multiple times throughout the day, and likely with both arms, which is beyond claimant's reaching limitations. CX 1 at 67.

The administrative law judge found the cashier position unsuitable because it requires reaching, which is beyond claimant's capabilities. *Id.* The administrative law judge also found the forklift operator job unsuitable because it requires many activities beyond claimant's restrictions, such as lifting from 20-25 pounds, pushing, pulling, bending, squatting, kneeling and reaching. Decision and Order at 30.

The administrative law judge's finding that employer did not establish the suitability of the jobs is rational, supported by substantial evidence, and in accordance with law. *See, e.g., Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT); *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995); *Canty*, 26 BRBS 147. As employer has not established any reversible error in the administrative law judge's consideration of the evidence, we affirm the administrative law judge's award of total disability benefits.[6] *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

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

[6]Accordingly, we need not address employer's contention that claimant did not rebut its showing of suitable alternate employment by establishing that he diligently sought but was unsuccessful in finding a suitable job. *See Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990). Similarly, we need not address employer's contentions regarding claimant's post-injury wage-earning capacity.