BRB No. 13-0453

MICHAEL MACKLIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (fka NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED)	)	DATE ISSUED: Apr. 22, 2014
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Charlene A. Morring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2010-LHC-01252) of Administrative Law Judge Kenneth A. Krantz 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). This case is before the Board for a second time.

Claimant sustained a work-related injury to his left knee on November 7, 2008, while working as a rigger for employer. He underwent arthroscopic surgery in December

2008, and returned to light-duty work in employer's tool room in January 2009. JX 1 at 15-16; EX 10 at 5. In May 2009, claimant was diagnosed with prostate cancer; this condition precluded claimant from performing any work beginning in August 2009. HT I at 16; EX 6. On December 4, 2009, claimant saw Dr. Lannik because of a recurrence of his left knee pain. Following this examination, Dr. Lannik reported that claimant was to remain off work until December 18, 2009. HT I at 17; CX 2 at 1. On December 18, 2009, claimant was seen by Dr. Blasdell of the same practice, who stated that claimant could return to work with knee restrictions.[1] HT I at 17; CX 2 at 2-3. By letter dated February 23, 2010, employer advised claimant that, as of the following day, work was available to him within Dr. Blasdell's restrictions. CX 3 at 1. On February 24, 2010, Dr. Graham, claimant's treating urologist, reported that claimant's cancer appeared to be in remission and that claimant's ability to function was close to his initial work capacity. EX 6. On February 25, 2010, Dr. Blasdell stated that claimant could return to full work activities with respect to his left knee condition. CX 4 at 1. Claimant, thereafter, returned to the light-duty work in employer's tool room that he previously had performed, and he continued to work in that capacity as of the date of the first hearing. HT I at 18, 20-21; EX 10 at 5, 7.

In his initial decision, the administrative law judge found claimant entitled to temporary total disability benefits from December 4 to December 18, 2009, during which time he was totally disabled due to his work-related knee injury. The administrative law judge denied benefits from December 18, 2009 to February 24, 2010, since claimant had been released to work with restrictions with respect to his knee but had been taken off work because of his non-work-related cancer. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 4 through December 18, 2009. 33 U.S.C. §908(b). Both parties appealed the administrative law judge's decision.

The Board affirmed the administrative law judge's award of temporary total disability benefits from December 4 to December 18, 2009, based on claimant's work-related knee injury, notwithstanding that claimant also was totally disabled by his cancer during this period. The Board vacated the administrative law judge's denial of temporary total disability benefits from December 18, 2009 to February 24, 2010, and remanded the case for reconsideration of claimant's entitlement to disability benefits during this period.

[1]Dr. Blasdell imposed the following restrictions on claimant, to remain in effect from December 18, 2009 to February 18, 2010: no lifting of more than 20 pounds; no walking or standing for more than an hour at a time without intermittent breaks; no walking on uneven ground or on scaffolding; no kneeling or squatting; and no climbing stairs or ladders. CX 2 at 3. Dr. Blasdell subsequently continued claimant's knee restrictions until February 25, 2010. CXs 2 at 5; 4 at 1.

Macklin v. Huntington Ingalls, Inc., 46 BRBS 31 (2012). On remand, the administrative law judge found that claimant established a prima facie case of total disability, as his usual work for employer as a rigger involved duties outside of the December 18, 2009 work restrictions imposed by Dr. Blasdell, and that employer did not demonstrate the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from December 18, 2009 to February 24, 2010.

On appeal, employer challenges the administrative law judge's award of temporary total disability benefits. Claimant responds, urging affirmance.

Employer contends that the sedentary job claimant held in its tool room upon his post-knee injury return to work from January 2009 to August 13, 2009, and to which claimant returned on February 24, 2010, upon his release from cancer treatment, remained available throughout the period of his alleged total disability. Employer maintains that the ongoing availability of this job establishes that it demonstrated suitable alternate employment, since claimant's inability to perform that job for the period in question was entirely unrelated to his work injury.

On remand, the administrative law judge, having found that claimant established his prima facie case of total disability as of December 18, 2009, rejected employer's contention that the sedentary job claimant held in its tool room upon his return to work from January 2009 to August 13, 2009, satisfied its burden with regard to the period from December 18, 2009 through February 23, 2010. The administrative law judge also found that employer did not offer claimant any actual employment within its facility during the relevant period and that a statement from claimant's supervisor that he would have been willing to allow claimant to work within his restrictions for that period "is not sufficient to indicate that employer was willing and able to offer claimant employment within the restrictions for the period in question." Decision and Order on Remand at 11-12.

Once a claimant has established a prima facie case of total disability by showing that he cannot return to his usual work due to his work injury, as here, the burden shifts to the employer to establish the availability of suitable alternate employment. *Lentz v. 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). Employer can meet its burden by making available to claimant a suitable position at its facility. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *see also Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Claimant was released to work on December 18, 2009, with restrictions to his left knee as a result of the work injury. Substantial evidence supports the administrative law judge's finding that employer did not make available to claimant suitable employment at its faciliity from December 18, 2009 through February

23, 2010. Claimant's supervisor, Gregory Scott, stated that neither claimant nor anyone from employer's workers' compensation office contacted him between August 13, 2009 and February 24, 2010, regarding claimant's return to work or any job availability for claimant. EX 10, Dep. at 6. Mr. Scott added that while employer would have been able to offer work to claimant under the restrictions imposed by Dr. Blasdell, he cannot make determinations regarding work availability or job offers without someone contacting him. *Id.* at 7-8. It was not until February 23, 2010, that employer sent claimant a letter to "advise [him] that there is work available within your temporary restrictions assigned by Dr. Blasdell," and asked claimant to "[p]lease report" to his foreman, Mr. Scott, for work on its second shift. CX 3. Consequently, as substantial evidence supports the administrative law judge's finding that employer did not make suitable employment at its facility available to claimant during the relevant period, it is affirmed.[2] *Hord*, 193 F.3d 797, 33 BRBS 170(CRT); *see generally Buckland v. Dept. of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Shiver v. United States Marine Corps, Marine Base Exch.*, 23 BRBS 246 (1990); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Employer alternatively contends that the administrative law judge erred in finding that its labor market survey did not establish the availability of suitable alternate employment. Employer asserts that the administrative law judge's rejection of certain jobs based on their distance from claimant's home is not warranted in this case since those positions were as equally far from claimant's residence as was employer's shipyard.[3]

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[2]Contrary to employer's contention, this case is factually distinguishable from *Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993). In *Brooks*, the claimant was not entitled to total disability benefits after he was terminated from suitable alternate employment due to his own misconduct and for reasons unrelated to his work injury. Under such circumstances, the employer does not bear a renewed burden of establishing suitable alternate employment. In this case, however, claimant's inability to perform the post-injury job in employer's tool room was due to the limitations imposed by Drs. Lannik and Blasdell pertaining to claimant's work-related left knee injury. As a result, there was a renewed burden on employer to establish the availability of suitable alternate employment and claimant was entitled to total disability benefits after December 4, 2009, until such time that employer met its renewed burden. *See generally Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

[3]There is no evidence that claimant could not drive as a result of the left knee restrictions.

In order to meet its burden of establishing suitable alternate employment on the open market, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing if he diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1999); *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). Employer may rely on a retrospective labor market survey if the jobs identified were available during the "critical period" during which claimant was able to work. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT). However, evidence of a single, suitable job opening is insufficient, as the employer must show a range of suitable jobs. *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT).

The administrative law judge, noting that employer's labor market survey identified nine potentially viable positions, first identified the relevant labor market, under *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994), as the community in which claimant resides, Franklin, Virginia.[4] The administrative law judge found that although employer's vocational expert, Barbara Harvey, did not list specific locations for the job opportunities, her testimony "indicates that she would be comfortable including positions located in Williamsburg [Virginia] on her labor market survey." Decision and Order on Remand at 13. Taking judicial notice that "Williamsburg is nearly 70 miles and an hour and a half drive from Franklin, Virginia," *id.*, the administrative law judge rejected Ms. Harvey's assertions that the positions on her survey are all within claimant's geographical area.[5] The administrative law judge thus rejected positions listed with Keystone, Family Restoration Services, Enterprise, Citywide Protection Services, Eagle Security, Colonial Chevrolet, Regal

[4]In *See*, the Fourth Circuit rejected the employer's contention that the relevant labor market is always the location where the claimant was injured, and instead held that in instances where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. The Fourth Circuit stated that the most persuasive definition of the relevant labor market is the "community in which [claimant] lives." *See*, 36 F.3d at 381, 28 BRBS at 102(CRT).

[5]Ms. Harvey testified that she typically uses a 35 mile radius or a one-hour commute each way for her labor market surveys. She testified that Williamsburg was within the one hour commute. HT II at 23.

Cinemas and the YMCA as they "do not include an address or location." *Id.* at 14. As for the remaining position as a bus monitor with Portsmouth Public Schools, the administrative law judge found that while it is within a more reasonable commuting distance from Franklin, Virginia, the showing of this single job opening is not sufficient, under *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT), to satisfy employer's burden of establishing suitable alternate employment.

We affirm the administrative law judge's finding that employer did not establish suitable alternate employment with its labor market survey as employer has not demonstrated error in the administrative law judge's consideration of the evidence. The administrative law judge rationally found that a 70-mile commute each way, which is 20 miles further than claimant's commute to the shipyard, renders any job in Williamsburg unsuitable. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *B.H. [Holloway] v. Northrop Grumman Ship Systems, Inc.*, 43 BRBS 129 (2009). The administrative law judge's rational rejection of these eight positions renders the sole remaining job opening as a bus monitor with the Portsmouth Public Schools insufficient to meet employer's burden as a matter of law. *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). Therefore, we affirm the administrative law judge's finding that employer's labor market survey is insufficient to establish the availability of suitable alternate employment for the period in question and the resultant award of temporary total disability benefits from December 18, 2009 to February 24, 2010.[6] *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

Claimant's counsel filed a petition for an attorney's fee for work performed before the Board in the prior appeal, *Macklin*, BRB Nos. 11-0776/A, 46 BRBS 31. Subsequently, the parties filed a letter to the Board agreeing to an attorney's fee totaling $3,500, payable by employer to claimant's counsel. We find the agreed-upon fee to be reasonable, and, in light of our affirmance of the administrative law judge's award of benefits, we award claimant's counsel an attorney's fee of $3,500, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C. F. R. §802.203.

[6]In light of the Board's affirmance of the finding that employer did not establish suitable alternate employment, it is unnecessary to address employer's contention that claimant did not diligently seek work from December 18, 2009 through February 24, 2010. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed. BRB No. 13-0453. Claimant's counsel is awarded a fee of $3,500 for work performed before the Board in BRB Nos. 11-0776/A, to be paid directly to claimant's counsel by employer.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge