BRB No. 98-1035

JULIAN MITCHELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 26, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

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

Benjamin M. Mason (Mason & 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 (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).

Claimant, an inside welder, injured his right hand at work 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 on February 6, 1995, on the first shift, and worked February 6 and 7, 1995. He was scheduled to work in this same position until February 10, 1995, but asserts that he could not do so due to pain. After February 10, 1995, claimant was scheduled to work light duty on the second shift, but he never returned to work. Claimant 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 claimant additional disability benefits after finding that employer established the availability of suitable alternate employment at his pre-injury wages. The administrative law judge also denied claimant 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.

On appeal, claimant challenges the administrative law judge's denial of additional disability and medical benefits. Employer responds in support of the administrative law judge's Decision and Order to which claimant has replied.[1]

We first address claimant's challenge to the administrative law judge's denial of additional disability benefits. Claimant initially contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment prior to February 6, 1995, as employer did not offer claimant a suitable light duty job at its facility or admit into the record any evidence regarding the availability of suitable alternate employment on the open market. Where, as in the instant case, it is undisputed that claimant is unable to perform his usual employment duties with employer, 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); *Lentz v. The Cottman Co.*,

[1]Claimant filed a motion to expedite this case and subsequently a motion for extension so that the Board may address this case prior to June 26, 1999. In light of our timely disposition of this case prior to April 27, 1999, claimant's motions are moot.

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). One way that employer can meet this burden is by providing claimant with a suitable light duty job performing necessary work within its facility. *See Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Unlike the situation where employer is attempting to demonstrate the availability of suitable alternate employment on the open market, where employer is relying on jobs within its facility to meet this burden, it may not claim that jobs within its exclusive control are available to claimant unless it actually makes the jobs available to him. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *see also Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Wilson v. Dravo Corp.,* 22 BRBS 463 (1989); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

We agree with claimant that employer did not establish the availability of suitable alternate employment prior to February 6, 1995. Although the administrative law judge acted within his discretion in assigning little, if any, weight to Dr. Weaver's attempt in 1997 to excuse claimant from work from December 1, 1994, until March 8, 1995, as it was "extremely belated," the administrative law judge accurately noted that both Drs. Smith and Gwathmey, orthopedic specialists, examined claimant shortly after his injury and found him capable of light duty work with restrictions. Decision and Order at 3 n. 4, 9; Cl. Exs. 1, 2, 9. Dr. Smith restricted claimant to light duty work on December 16, 1994, and Dr. Gwathmey limited claimant to light duty work for two weeks beginning on February 6, 1995.[2] As claimant was restricted to light duty work prior to February 6, 1995, but employer did not offer claimant a light duty job at its facility prior to this time and did not introduce evidence of the availability of suitable jobs on the open market, employer did not establish the availability of suitable alternate employment prior to February 6, 1995, as a matter of law. *See Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT); *Lentz*, 852 F.2d at 129, 21 BRBS at 190 (CRT); *Tarner*, 731 F.2d at 199, 16 BRBS at 47 (CRT).

[2]Dr. Gwathmey issued two sets of restrictions on February 1, 1995. One states that claimant is restricted from lifting greater than 25 pounds, vertical climbing, and heavy sustained gripping. The other states that claimant is restricted from lifting greater than 20 pounds, the use of vibratory tools, heavy use of the right hand, and vertical climbing. Cl. Exs. 9a, e.

Consequently, we reverse the administrative law judge's finding that employer established the availability of suitable alternate employment prior to February 6, 1995, and we hold that claimant is entitled to total disability compensation prior to this date. *See generally Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

Claimant next contends that employer did not establish the availability of suitable alternate employment on or after February 6, 1995, as the light duty job employer provided at its facility was not within his restrictions. On February 6 and 7, 1995, claimant worked at employer's facility in a light duty outdoor job. Tr. at 32. The administrative law judge determined that this position constituted suitable alternate employment after crediting the testimony of claimant's supervisors, Messrs. Cash and Fowler, that this work was within claimant's restrictions, over claimant's contrary testimony. Decision and Order at 9; Cl. Ex. 9; Tr. at 25-27, 30-31, 70-80, 119, 147. The administrative law judge acted within his discretion in finding claimant's testimony not credible as the record reflected that as early as December 20, 1994, claimant was trying to get out of any kind of work, and when the shipyard clinic pressed claimant for medical documentation, he simply did not return. Decision and Order at 9; Cl. Ex. 4; Emp. Ex. 1. Moreover, the administrative law judge acted within his discretion in finding that claimant's protestations that he stayed out of work after February 7, 1995, due to his inability to perform the light duty work was weakened by his demeanor when questioned about the plan to change his work schedule to second shift in February 1995, which would have interfered with the operation of his van pool which he ran for first shift employees. Decision and Order at 9; Tr. at 101. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

We cannot affirm, however, the administrative law judge's finding that employer established suitable alternate employment through this position at its facility. On February 13, 1995, claimant returned to see Dr. Gwathmey, who recommended that claimant be given a position indoors so as to avoid cold temperatures. Cl. Ex. 9f. The administrative law judge found that employer had no knowledge of this new restriction as claimant did not inform employer. Decision and Order at 9-10. An employer's lack of knowledge of new restrictions may be a valid basis for finding that a job consistent with prior restrictions may continue to constitute suitable alternate employment. In this case, however, contrary to the administrative law judge's finding, the record is not clear that Dr. Gwathmey is, in fact, claimant's chosen physician. Emp. Ex. 2a; Cl. Exs. 9a, h; Tr. at 63-67.[3] If,

[3]On a form entitled "Employee's Selection of Physician," it appears claimant initially chose, on January 17, 1995, Dr. McArthur as his treating physician, he being

on remand, the administrative law judge finds that Dr. Gwathmey is "employer's" doctor, the February 13, 1995 restrictions may be imputed to employer. *See generally Slattery Assocs., Inc. v. Lloyd*, 725 F.2d 780, 16 BRBS 44 (CRT)(D.C. Cir. 1984).

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one of three physicians offered by employer under the Virginia Workers' Compensation Act. Emp. Ex. 2a. There is a notation at the bottom of this form stating "changed to Dr. Gwathmey. Re-signed form 1/18/95." On January 18, 1995, employer wrote a form letter to Dr. Gwathmey, stating that "the patient is being referred to you by the Newport News Shipbuilding Clinic for evaluation and treatment of a work-related injury to his right hand." Cl. Ex. 9h. Thereafter, on February 1, 1995, Dr. Gwathmey wrote to Dr. Reid, a physician at the shipyard clinic, "Thank you for sending Mr. Mitchell to see me..." Cl. Ex. 9a. This evidence does not unequivocally support the administrative law judge's finding that claimant chose Dr. Gwathmey as his treating physician. On the other hand, claimant testified that he reluctantly chose Dr. Gwathmey at his prior counsel's insistence. Tr. at 63-67.

Moreover, the administrative law judge erred in stating that claimant never took any new work restrictions to employer, as the record indicates that employer's medical department received on April 27, 1995, a copy of Dr. Morales's work restrictions, recommending that claimant not work in "extremes of temperature." Dr. Morales also stated that claimant was restricted to lifting 10 pounds, from strenuous repetitive use of the his hands, and from more than one hour per day climbing, pushing and pulling.[4] Cl. Ex. 6cc. Thus, the job employer provided claimant in February 1995 may not constitute suitable alternate employment as of April 27, 1995, when employer actually became aware of claimant's new restrictions. *See Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

[4]The administrative law judge found Dr. Morales's opinions concerning claimant's ability to work confusing and contrary to the opinions of the other credible medical experts, as Dr. Morales initially found claimant capable of light duty, then found him totally disabled, and subsequently stated that claimant was totally disabled since he began treating claimant. Decision and Order at 9; Cl. Ex. 6. Although the administrative law judge rationally questioned Dr. Morales's opinion that claimant was totally disabled, the administrative law judge could not rationally discredit the restrictions imposed by Dr. Morales on this basis, as they are not inconsistent with Dr. Gwathmey's previous restrictions or with the opinions of the other doctors limiting claimant to light duty work.

Consequently, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment after February 6, 1995, and we remand this case to the administrative law judge. On remand, the administrative law judge must first reexamine the record evidence regarding whether Dr. Gwathmey was claimant's choice of treating physician. If not, the February 13, 1995 restrictions may be imputed to employer, and the administrative law judge should reevaluate the position supplied to claimant in order to determine its suitability in light of these restrictions. In either event, the administrative law judge must reconsider whether the jobs employer provided in February 1995 establish the availability of suitable alternate employment on or after April 27, 1995, when Dr. Morales's restrictions were received by employer. If the jobs employer actually provided claimant are found to be not suitable,[5] the administrative law judge cannot rely on general testimony that work within claimant's restrictions was available at the shipyard, absent evidence that employer offered a specific job to claimant within his restrictions. *Berkstresser*, 16 BRBS at 234; *see also Mendez*, 21 BRBS at 22; Decision and Order at 5 n. 10, 10; Tr. at 139-141, 172-175, 201-203.

We next address claimant's contention that the administrative law judge erred in refusing to award him medical benefits for Dr. Morales's treatment from April 19, 1995, to June 4, 1996. Under Section 7(d) of the Act, 33 U.S.C. §907(d), claimant is entitled to recover medical benefits if he requests employer's authorization for treatment, employer refuses the request, and the treatment thereafter procured on claimant's own initiative is reasonable and necessary. *See Lloyd*, 725 F.2d at 780, 16 BRBS at 44 (CRT); *Schoen v. United States Chamber of Commerce*, 30 BRBS 112 (1996)*; Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); 33 U.S.C. §907(d).

[5]In this regard, the administrative law judge should consider the suitability of both the outdoor position employer provided on the first shift, and the job on the second shift to which claimant was to transfer had he returned to work.

The administrative law judge held that employer was liable for claimant's treatment by Dr. Morales after June 4, 1996, as claimant's treating physician, Dr. Gwathmey, constructively refused to treat claimant on that date.[6] Decision and Order at 10-11. On February 13, 1995, Dr. Gwathmey continued claimant's work restrictions and his prescription for anti-inflammatory medication, and stated that he would recheck claimant in three weeks. Cl. Ex. 9. Claimant did not return to Dr. Gwathmey in the recommended three weeks, but instead started treatment with Dr. Morales on April 19, 1995. Cl. Ex. 6. On June 4, 1996, claimant returned to Dr. Gwathmey, who was unable to make any treatment recommendations as he was unaware of the results of tests ordered by Dr. Morales. Cl. Ex. 9c. The administrative law judge found that this constituted a refusal to treat, and that thereafter employer is liable for the treatment provided by Dr. Morales.[7]

Regardless of whether Dr. Gwathmey is "claimant's" or "employer's" doctor, we affirm the administrative law judge's rational finding that Dr. Gwathmey did not refuse to treat claimant on February 13, 1995, based on his notation that claimant should return in three weeks. *See generally Betz v. Arthur Snowden Co.,* 14 BRBS 805 (1981). The administrative law judge erred, however, in neglecting to inquire as to whether claimant requested and was refused authorization to treat with Dr. Morales. *See generally Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57 (CRT)(D.C. Cir. 1989); *Schoen*, 30 BRBS at 113. As there is evidence of record which could establish that claimant requested employer's authorization, we vacate the administrative law judge's denial of medical benefits for Dr. Morales's treatment prior to June 4, 1996, and remand this case for further consideration.[8] If the evidence establishes that claimant requested employer's authorization to change physicians, the administrative law judge must determine if employer denied claimant's request, and if so, whether Dr. Morales's treatment from April 19, 1995, was reasonable and necessary. *See Lloyd*, 725 F.2d at 780, 16 BRBS at 44 (CRT); *Schoen*, 30 BRBS at 112; *Anderson,* 22 BRBS at 20.

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[6]If Dr. Gwathmey is, in fact, claimant's treating physician, this analysis is in error as a claimant is excused from seeking authorization for a change in physicians only if employer's physician refuses to treat claimant. *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

[7]This finding is unchallenged on appeal and is, therefore, affirmed.

[8]The relevant evidence includes employer's clinic note dated April 25, 1995, stating, "Kathy Jane of Dr. Morales's office called for a pre-cert admittance to hospital from Dr. Morales. Informed Ms. Jane that Dr. Gwathmey is treating physician," Dr. Morales's office notes from May 31, 1995, indicating that the physician is awaiting authorization from employer, and claimant's counsel's letter dated November 21, 1995, copied to employer stating, "Claimant requests the scheduling of an informal conference on the issues of . . . authorization by Dr. Lawrence Morales as treating physician, and authorization of surgery in order to return claimant to work status." Cl. Exs. 4, 6, 17.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment prior to February 6, 1995, is reversed, and the decision is modified to reflect claimant's entitlement to total disability compensation prior to this date. The administrative law judge's finding that employer established the availability of suitable alternate employment from February 6, 1995, and continuing is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's denial of medical benefits for Dr. Morales's treatment prior to June 4, 1996, also is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge