BRB No. 99-1143

VENETTE S. LANDRETH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	DATE ISSUED: 08/02/2000
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Amending Previous Decision of James W. Kerr, Jr, Administrative Law Judge, United States Department of Labor.

Charles Lee Attaway, Texarkana, Texas, for claimant.

Andrew Z. Schreck (Galloway, Johnson, Tompkins & Burr), Houston, Texas, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order Amending Previous Decision (98-LHC-2622) of Administrative Law Judge James W. Kerr, 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

Claimant developed carpel tunnel syndrome in both wrists, which the parties agreed arose during the course of her employment for employer as a mail clerk. Claimant underwent

right wrist surgery on January 9, 1996, and September 13, 1996, and left wrist surgery on March 22, 1996. Claimant, however, had continuing complaints of bilateral, radiating wrist pain, cramping and numbness. Employer voluntarily paid compensation for temporary total disability, 33 U.S.C. §908(b), for various periods from March 22, 1996, to February 17, 1997, the stipulated date of maximum medical improvement, and for permanent partial disability, 33 U.S.C. §908(c)(3), for an 11 percent impairment of the left hand and a 22 percent impairment of the right hand. Claimant sought continuing benefits under the Act for permanent total disability.

In his Decision and Order, the administrative law judge first found that claimant is unable to return to her usual employment as a mail clerk. He next credited the opinions of Drs. Lux, Ford and Greenspan to find that claimant is incapable of working. Assuming, *arguendo*, that claimant could work at a light-duty job, the administrative law judge found that employer did not establish the availability of suitable alternate employment by way of an August 1998 labor market survey. Accordingly, the administrative law judge awarded claimant benefits for temporary total disability from January 9, 1996, to January 28, 1996, and from March 22, 1996, until February 17, 1997, which is the stipulated date of maximum medical improvement, and, thereafter, continuing benefits under the Act for permanent total disability, 33 U.S.C. §908(a).[1]

[1]In his initial Decision and Order, the administrative law judge awarded claimant compensation for temporary total disability from the date of injury to the date of maximum medical improvement; however, claimant was able to work for employer from June 17, 1994, to January 8, 1996. Moreover, the administrative law judge awarded claimant compensation for permanent partial disability of each hand for the same percentages of impairment as employer had voluntarily paid. On his own motion, the administrative law judge, in his Order Amending Previous Decision and Order, corrected the dates benefits are payable for temporary total disability to the periods claimant was actually unable to work and, pursuant to his findings in the Decision and Order, amended the award of benefits for permanent partial disability to an award of benefits for permanent total disability from the

On appeal, employer contends the administrative law judge erred by failing to state his rationale for crediting evidence that claimant is unable to work or, at best, is capable only of light-duty employment over medical evidence that claimant is capable of more strenuous work. Employer also contends the administrative law judge erred in finding that employer did not establish the availability of suitable alternate employment through its August 1998 labor market survey. Claimant responds, urging affirmance.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In order to demonstrate a *prima facie* case of total disability, claimant must establish that she is unable to return to her usual work. *See Harmon v. Sea-Land Service*, 31 BRBS 45 (1997). Once claimant establishes that she is unable to return to her usual employment as a mail clerk, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience and physical or psychological restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). A labor market survey may be rationally discredited if it fails to take into consideration all relevant restrictions found by the administrative law judge. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1992).

In the instant case, after summarizing all of the evidence of record, the administrative law judge relied on the opinions of Dr. Osborne and Marcus Utley, employer's vocational consultant, in finding that claimant cannot return to her usual employment as a mail clerk. Dr. Osborne, who examined claimant at employer's request, stated that claimant cannot repetitively pinch or grip items. EX 3 at 3. Mr. Utley stated that claimant's restrictions rule out re-employment with employer. Tr. at 80; *see also* Tr. at 65-66, 71, 101-102. As these opinions constitute substantial evidence that claimant cannot return to work as a mail clerk, we affirm the administrative law judge's finding that claimant is unable to return to her usual employment. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *see also Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

The administrative law judge further found claimant cannot work at all, based on the opinions of Drs. Lux, Ford and Greenspan. Dr. Lux opined that claimant is unable to work at all, inasmuch as she is unable to lift, carry, crawl, climb or repetitively use her hands. CX 1. Dr. Greenspan opined that claimant is permanently disabled by extreme pain, which is

---

date of maximum medical improvement.

caused by her bilateral carpel tunnel syndrome. CX 14. Dr. Ford, claimant's treating psychiatrist, stated that claimant's wrist pain would cause her to miss work more than three days a month. CXS 2, 4. Employer contends that the administrative law judge erred by relying on this evidence without explicitly finding it entitled to greater weight than the opinion of claimant's treating physician, Dr. Carrell, that claimant could return to her usual work, the opinion of Dr. Dibella, a consulting physician, that she could work light-duty, and the opinion of Dr. Osborne that claimant could work light-duty, with no repetitious pinch and grip movement and that claimant magnified her symptoms.

In adjudicating a claim, it is well-established that the administrative law judge is entitled to weigh the evidence, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991). In the instant case, we hold that the administrative law judge's decision to rely on the medical opinions of Drs. Lux, Greenspan, and Ford is rational and supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 359; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir.1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge gave a brief but accurate description of the contrasting theories on the extent of claimant's ability to work. Specifically, he found more persuasive the opinion of Dr. Greenspan that claimant suffers from extreme, severe disabling pain, based on objective signs including tachycardia, diaphoresis (sweating), and hyperventilation upon performing simple manual muscle tasks, over the opinion of Dr. Osborne that claimant magnified her symptoms. Accordingly, we hold that the administrative law judge sufficiently detailed his rationale for finding that claimant is not capable of working, and we affirm that finding as it is supported by substantial evidence. *See generally Mijangos*, 948 F. 2d at 941, 25 BRBS at 78 (CRT); *see also H.B. Zachry Co. v. Quinones*, 206 F.3d 474 (5th Cir. 2000). Therefore, we affirm the administrative law judge's award of total disability benefits.

If claimant is incapable of performing any work, then employer cannot otherwise establish the availability of suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP, v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Nonetheless, we will address employer's challenge to the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, assuming *arguendo*, that claimant is capable of light-duty employment. The administrative law judge noted the opinion of Stanley Brummal that claimant is not employable, as the occupations she may be capable of performing do not exist in sufficient numbers in the labor market. CX 17. The administrative law judge also found that the testimony of Marcus Utley, a vocational consultant, established that, of the jobs identified in employer's August 1998 labor market survey, claimant could possibly work only as a

personal care sitter. He next credited the testimony of the two personal care sitter employers identified by the labor market survey, Julie Spriggs and Evelyne McDonald, to find that a position as a sitter requires physical effort and that, as such, claimant is incapable of working as a personal care sitter. Employer contends that the administrative law judge misconstrued the testimony of Mr. Utley to find that the only identified position claimant could perform is as a personal care sitter and the testimony of Ms. McDonald that she expected sitters to lift uninjured clients who had fallen to the ground. Moreover, employer argues that the administrative law judge failed to explain his basis for concluding that claimant is not physically capable of working as a sitter or as a runner for a bank. We disagree.

The administrative law judge's crediting of Mr. Utley's testimony that claimant's work restrictions would allow employment only as a personal care sitter and Ms. McDonald's testimony that claimant's duties would include picking up uninjured clients who had fallen to the ground supports the administrative law judge's conclusion that employer did not establish the availability of suitable alternate employment. Specifically, Mr. Utley testified that claimant's mental limitations and emotional problems would probably preclude stressful jobs and working with crowds and people; thus, he opined that claimant is probably limited to the sitter positions identified in his labor market survey. Tr. at 88-90, 101. Ms. McDonald testified that sitters are expected to lift a fallen but uninjured client so long as lifting is unlikely to injure the sitter. EX 11 at 20. Moreover, the administrative law judge's conclusion that claimant is physically incapable of working as a sitter is supported by the credited report of Dr. Greenspan that claimant exhibits extreme, disabling pain upon performing simple manual tasks. Therefore, as the administrative law judge's finding that claimant is unable to work as a personal care sitter is rational and supported by substantial evidence, we affirm the administrative law judge's alternative conclusion that employer did not establish the availability of suitable alternate employment, and that claimant thus is totally disabled.[2] *See* g*enerally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Accordingly, the administrative law judge's Decision and Order and Order Amending Previous Decision are affirmed.

SO ORDERED.

[2]We reject employer's alternate contention that claimant's one day per week custodial work with her parents at their church establishes the availability of suitable alternate employment as employer failed to establish if claimant performed any duties that result in her having a wage-earning capacity. *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge