BRB No. 01-0905

JAMES W. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: August 22, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision on Remand (1997-LHC-2495) of Administrative Law Judge Richard E. Huddleston 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).

This case is before the Board for the second time. Claimant, a pipefitter, suffers from bilateral carpal tunnel syndrome due to a work injury sustained on May 11, 1993. Claimant returned to work post-injury at employer's facility in a light duty capacity until August 26, 1996, when he was passed out of work. Claimant has not worked since then. The administrative law judge initially awarded claimant permanent total disability benefits, finding that employer did not establish the

availability of suitable alternate employment on the open market through two security guard and four cashier positions.

In *Brown v. Newport News Shipbuilding & Dry Dock Corp.*, BRB No. 00-0318 (Dec. 5, 2000) (unpublished), the Board affirmed the administrative law judge's finding that three of the four cashier positions are not suitable based on the record evidence but remanded for the administrative law judge to reconsider their suitability if, on remand, he admitted into evidence Dr. Kline's approval of these jobs. The Board also remanded for the administrative law judge to consider the suitability of the cashier position at Denbigh Toyota which the administrative law judge had not addressed. The Board vacated the administrative law judge's finding that the two security guard positions are not suitable for claimant and remanded the case for reconsideration, as the administrative law judge's inference that these positions would inevitably require claimant to respond to an emergency was not supported by any record evidence.

On remand, the administrative law judge admitted into evidence Dr. Kline's approval of the jobs identified by employer, but again concluded that employer did not establish the availability of suitable alternate employment. Consequently, the administrative law judge again awarded claimant permanent total disability benefits. On appeal, employer challenges the administrative law judge's findings that the two security guard positions and the cashier job at Denbigh Toyota are not suitable for claimant. Claimant responds in support of the administrative law judge's award.

Employer initially contends that the administrative law judge erred in finding that the security guard jobs with Diversified Industrial Concepts (Diversified) and Virginia Department of Transportation (VDOT) identified by its vocational expert, David Karmolinski, and approved by claimant's treating physician, Dr. Kline, are not suitable. Once claimant establishes an inability to perform his usual employment because of a job-related injury, as conceded by employer in the instant case, the burden shifts to employer to establish the availability of suitable alternate employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In order to defeat employer's showing of the availability of suitable alternate employment and retain eligibility for total disability benefits, claimant must establish he diligently sought, but was unable to obtain, alternate employment opportunities. *See 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); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In the instant case, the administrative law judge determined that the security guard jobs at Diversified checking trucks in and out of a naval base and at VDOT patrolling its parking lot are not suitable for claimant. The administrative law judge concluded that employer did not meet its burden of establishing that these jobs are suitable since there was confusion concerning the appropriate *Dictionary of Occupational Titles (*DOT) classification number used by Mr. Karmolinski. Mr. Karmolinski indicated on his labor market survey worksheet the DOT number for security officer instead of security guard.[1] The administrative law judge seized upon Mr. Karmolinski's erroneous identification of that number in finding that employer did not establish suitable alternate employment because it was unclear to what extent Dr. Kline relied upon the mis-information in approving the jobs. The administrative law judge further stated that the DOT description of a security guard job contains duties claimant is unable to perform. Decision on Remand at 4.

[1]The DOT number for "security guard" is 372.667-034 and Mr. Karmolinski referenced the number for "security officer" which is 189.167-034. *See* Decision on Remand at 3, 4; Emp. Ex. 11(l).

We agree with employer that the administrative law judge's finding that employer did not establish the suitability of the security guard jobs based on Mr. Karmolinski's erroneous identification of the applicable DOT number is not rational or supported by substantial evidence. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(employer may meet its burden of establishing suitable alternate employment by demonstrating the availability of specific jobs in a local market and by relying on standard occupational descriptions to fill out the qualifications for performing such jobs); *Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd,* 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000) (Board affirmed the administrative law judge's rational determination that employer did not establish the availability of suitable alternate employment by application of the descriptions contained in the DOT where the vocational expert did not describe the duties required of the jobs); Decision on Remand at 3-4; Emp. Ex. 11(k), (l). In this case, Mr. Karmolinski's reporting of the "wrong" DOT number, as well as the actual DOT description of the duties that *may* be assigned to a security guard, are irrelevant, as the actual duties of the identified positions are set out in the description of each job.[2] *See* Emp. Ex. 11. It is these duties that must be compared with claimant's physical restrictions, educational and vocational background, and other relevant factors in order to determine if employer established suitable alternate employment. *See, e.g., Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 33 BRBS 109 (1998).

In its initial decision, the Board discussed the restrictions Drs. Kline and Lee placed on claimant's physical activities. *See Brown*, slip op. at 2. Mr. Karmolinski took these restrictions, as well as claimant's educational and vocational history, into consideration in identifying suitable jobs for claimant. *See* Emp. Ex. 11; Tr. at 46-56. Dr. Kline approved both security guard jobs for claimant, Emp. Ex. 11(k), (l), and Mr. Karmolinski testified that each prospective employer stated that claimant would be a viable candidate for the position. Thus, as the uncontroverted evidence of record establishes that the security guard jobs are suitable for claimant, we reverse the administrative law judge's finding that employer did not establish the availability

[2]Mr. Karmolinski's reference to the DOT states "some sample occupations [suitable for claimant] include, but are not limited to:"

Security Guard 189.167-034
Cashier 211.462-014

Mr. Karmolinski then identified actual job opportunities he believed were suitable for claimant. Each position contains a description of the job's requirements. Emp. Ex. 11. The "erroneous" DOT number also is listed at the top of VDOT job description. *Id.*

of suitable alternate employment. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Based on this holding, the case must be remanded to the administrative law judge to determine the date suitable alternate employment became available and whether claimant established diligence in seeking alternate employment of the general type shown by employer to be suitable and available. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Tarner*, 731 F.2d 199, 16 BRBS 74(CRT); *see also Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); Cl. Ex. 1; Tr. at 23-24. If claimant established he diligently sought employment, the administrative law judge may reinstate his total disability finding. In any event, claimant is entitled to total disability benefits until the date suitable alternate employment became available. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). If claimant is only partially disabled, his recovery is limited to that provided by the applicable schedule. *See* 33 U.S.C. §908(c)(1)-(20); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

Employer next contends that the administrative law judge erred in finding that the cashier job at Denbigh Toyota is not suitable. Mr. Karmolinski identified this cashier job as located in the dealership and stated it would include handling transactions from both the service and parts departments. Tr. at 60-61. In determining that this job is not suitable, the administrative law judge rationally found that payment in cash was not precluded, that this duty would require claimant to count change, and that the counting of change would require claimant to manipulate small objects using both hands which he cannot do.[3] *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); Decision on Remand at 5-6; Emp. Exs. 2vv, 4b, 6c, 11(o). Based on the administrative law judge's rational findings, we affirm the administrative law judge's determination that the cashier job at Denbigh Toyota is not suitable.[4]

Accordingly, the administrative law judge's Decision on Remand is affirmed in part and reversed in part, and the case is remanded for further consideration consistent with this opinion.

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[3]Claimant's left hand is his dominant hand. *See* Emp. Ex. 6. Dr. Kline restricted claimant from competitive manipulations of small items with his right hand. Emp. Exs. 2vv, 4b. Dr. Lee stated that claimant will not be able to perform well in jobs requiring fine motor skills with his right hand. Emp. Ex. 6c.

[4]The administrative law judge's finding that the three remaining cashier positions, at Piccadilly's Cafeteria, Goodwill Industries, and Bon-Air Cleaners, do not constitute suitable alternate employment is affirmed as unchallenged on appeal.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge