BRB No. 02-0791

ROBERT HOLDEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/12/2003
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-0344, 0811) of Administrative Law Judge Fletcher E. Campbell, 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, working light duty in employer's X33 department, injured both knees at work on October 11, 1990. Employer voluntarily paid permanent partial disability benefits to claimant for a 32 percent impairment to the right leg and 23 percent impairment to the left leg. Claimant was "passed out" of light duty at employer's facility on June 23, 1997. Subsequently, employer stipulated that claimant is unable to return to his usual work and that no light duty is available to him at its facility. Claimant obtained

work within his restrictions with a different employer on February 24, 2000. Claimant sought total disability benefits from June 23, 1997, the date of his "pass out" from employer's facility, through February 24, 2000. The administrative law judge denied claimant total disability benefits, finding that employer established the availability of suitable alternate employment on the open market as of June 23, 1997.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment on the open market.[1] Employer responds in support of the administrative law judge's decision denying total disability benefits.

Where, as here, claimant is unable to return to his usual employment and suitable alternate employment is no longer available at employer's facility, employer has the burden of establishing the availability on the open market of a range of jobs that are suitable for claimant given his age, education, vocational history and physical restrictions. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). A job that claimant is not educationally qualified to perform or that is too physically demanding does not constitute suitable alternate employment. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

The administrative law judge found that employer established the availability of suitable alternate employment based on the opinion of employer's vocational consultant, William Kay, that the jobs of bartender, bus driver, cashier at a car wash, delivery driver, and unarmed security guard are suitable for claimant given the permanent restrictions imposed by Dr. Felder on October 14, 1999. *See* Decision and Order at 9. These restrictions limit claimant to lifting 40 pounds; occasional kneeling, squatting, bending and twisting; no crawling; frequent pushing/pulling limited to 40 pounds; frequent working above shoulder level; and frequent standing. Emp. Ex. 14. Claimant asserts that Mr. Kay erroneously used the October 14, 1999, restrictions, which are less restrictive than the "permanent" restrictions imposed by Dr. Felder on September 24, 1993, March

[1] Claimant also filed a discrimination claim pursuant to Section 49 of the Act, 33 U.S.C. §948a, which was denied by the administrative law judge. This finding is unchallenged on appeal.

24, 1997, and August 9, 1999.[2] Claimant asserts that all of the jobs identified by employer must fit within all of his restrictions or that they must fit within his most restrictive set of restrictions. Consequently, claimant asserts, the administrative law judge erred in applying the least restrictive set of restrictions in determining whether employer established the availability of suitable alternate employment.

The administrative law judge found that the differing restrictions do not affect the suitability of the jobs identified by Mr. Kay as the restrictions differ only slightly. The administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT)(2d Cir. 1997). Where multiple sets of restrictions are imposed upon claimant, as here, the administrative law judge must determine the applicable set of restrictions. *See generally Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Employer meets its burden of establishing the availability of suitable alternate employment by identifying jobs within the applicable set of restrictions. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Moreover, as employer is attempting to establish suitable alternate employment retroactive to 1997, it cannot rely on more lenient restrictions that went into effect after that date.

Nonetheless, any error made by the administrative law judge in this regard is harmless as there are at least two identified jobs that fit within claimant's most restrictive limitations. The job as a delivery driver, requiring walking 20 feet from truck to service station for two hours per day, sitting six hours, and lifting 20 pounds; and the job as an unarmed security guard, requiring alternate sitting, standing and walking as needed and lifting five pounds, are within all of claimant's permanent restrictions.[3] *See* Emp. Ex. 14. Thus, as substantial evidence of record supports the administrative law judge's

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[2] On September 24, 1993, Dr. Felder restricted claimant to no crawling and limited squatting of no more than 30 minutes in an eight-hour day. Cl. Ex. 1-8; Tr. at 31. On March 24, 1997, Dr. Felder limited claimant to no climbing stairs more than twice per day; no climbing ladders; no squatting more than once every four hours; and no crawling. Cl. Ex. 1-2; Emp. Ex. 1f. Finally, on August 9, 1999, Dr. Felder limited claimant to frequent lifting limited to 50 pounds; occasional lifting more than 50 pounds; carrying 34 pounds for 50 feet; occasional squatting once every four hours; occasional kneeling; climbing stairs to 20 feet twice per shift; pushing/pulling limited to 50 feet frequently; no ladder climbing and no crawling; and sitting 10 minutes for every two hours of standing. Cl. Ex. 7.

[3] Contrary to the administrative law judge's finding that all of the jobs fit within claimant's October 14, 1999, restrictions, the bus driver position does not because it requires lifting 50 pounds in an emergency whereas claimant is limited to lifting 40 pounds. *See* Emp. Ex. 14.

conclusion, we affirm the administrative law judge's finding that employer established the availability of suitable alternate on the open market. *Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002).

Claimant also contends that the administrative law judge erred in finding that the cashier position is suitable given that he has only fourth grade mathematics skills.[4] The administrative law judge refused to infer that all "modern" cashier positions were unsuitable given this limitation. Decision and Order at 9. The administrative law judge questioned Mr. Kay at the hearing, "Did you conclude that he could perform math[emetics] well enough to be a cashier?" Tr. at 57. Mr. Kay responded, "He's got a high school diploma. I didn't actually get to meet with him, but there was some test information and stuff that said he could probably function on at least a fourth grade level or so, just basic math[emetics]. The cash registers usually tell you how much change to give anyway." *Id.* The administrative law judge replied, "All right . . . ." *Id.* Thus, the administrative law judge rationally found that claimant had sufficient ability in mathematics to perform the cashier job based on Mr. Kay's opinion to that effect. *See Seguro*, 36 BRBS 28. Moreover, the description of the cashier position indicates that on-the-job training is provided and that no previous experience is required. *See* Emp. Ex. 14. Thus, contrary to claimant's contention, the administrative law judge did not place the burden on claimant of establishing the job's unsuitability, but appropriately found that employer met its burden of establishing the job's suitability. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Fox v. West State, Inc.*, 31 BRBS 118 (1997). Because employer established the availability of suitable alternate employment on the open market by identifying a range of jobs that are suitable for claimant, we affirm the administrative law judge's denial of total disability benefits for the period at issue.

[4] The cashier job, requiring sitting, standing, and walking as needed; five hours of working with arms extended at shoulder level; and lifting five to thirty pounds, also is within all sets of claimant's restrictions. *See* Emp. Ex. 14.

Accordingly, the administrative law judge's Decision and Order denying total disability benefits from June 23, 1997, through February 24, 2000, 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