

DEBRA ELLISON)
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 Claimant-Respondent)
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 v.)
)
 NAVAL MILITARY PERSONNEL) DATE ISSUED: 08/14/2006
 COMMANDER)
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 and)
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 CONTRACT CLAIMS SERVICES)
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 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Order Denying Employer/Carrier's Motion for Reconsideration of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Lewis S. Fleishman (Law Office of Richard Schechter, P.C.), Houston, Texas, for claimant.

Thomas C. Fitzhugh III and Bradley T. Soshea (Fitzhugh, Elliot & Ammerman, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Order Denying Employer/Carrier's Motion for Reconsideration (2004-LHC-1927) of Administrative Law Judge Russell D. Pulver 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 (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 was injured on April 21, 1999, when a child struck her below the right knee during the course of claimant’s employment at the United States Naval Support Activity, Moral, Welfare and Recreation Child Development Center in La Maddalana, Italy. As a result of the injury, claimant developed reflex sympathetic dystrophy (RSD) in both legs, as well as diabetes, thyroid problems, and clinical depression which have been attributed to her RSD and its treatment.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on April 23, 2003, that claimant cannot return to her usual employment, and that employer failed to establish the availability of suitable alternate employment. Accordingly, he awarded claimant compensation for temporary total disability from April 21, 1999, through April 23, 2003, except for the period from November 1, 1999, to December 18, 1999, when claimant attempted to return to light-duty work at her job, and for permanent total disability from April 23, 2003, onward. Subsequently, the administrative law judge denied employer’s Motion for Reconsideration.¹

Employer appeals the award of total disability benefits, arguing that the administrative law judge erred in concluding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

It is uncontested that claimant cannot perform her pre-injury job duties because of her work injury. The burden therefore shifted to employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). In its effort to establish the availability of suitable alternate employment, employer presented vocational rehabilitation evidence outlining full and part-time unskilled, entry-level jobs.² Dr. Ross, who examined claimant on

¹ In its Motion for Reconsideration, employer argued that the administrative law judge erred in finding claimant is not able to work part-time, if not full time, in the jobs it proffered and that claimant’s inability to work is based on her refusal to have her spinal cord stimulator reprogrammed. In his Order Denying Reconsideration, the administrative law judge noted that, contrary to employer’s contentions, claimant’s physicians had opined only that claimant could attempt to perform some work on her “good days.” Moreover, claimant had attempted to have her stimulator reprogrammed five times over a three year period. Accordingly, he denied the motion.

² The positions identified included telemarketer, receptionist, assembler, customer service representative, front desk clerk, library aid, and school crossing guard. RX 28.

March 8, 2004, RX 23, and found no evidence to support either a diagnosis of RSD or claimant's complaints of pain, approved all the proffered positions. RX 28. Dr. Bacon, who extensively treated claimant, opined that while claimant could probably perform these positions on a "good day," it was unlikely that claimant could find employment that would appropriately accommodate her disorder.³ CX 28 at 426. Claimant agreed that she could perform some work occasionally but testified that her medications for her various conditions, as well as for pain, cause tiredness, drowsiness, and lack of coordination which limit her ability to function and that her condition is highly unpredictable. HT at 290-291. The administrative law judge found, based on Dr. Bacon's opinion, claimant's medication regimen, and the unpredictable nature of claimant's condition, that claimant was not capable of gainful employment.

We reject employer's contention that the administrative law judge erred in rejecting the opinion of Dr. Ross and in finding that claimant was not capable of at least part-time employment. The administrative law judge relied upon the opinion of Dr. Bacon, claimant's treating physician, that although claimant may attempt to work up to four hours a day with appropriate rest and restriction, it was unlikely that she could be "placed in any work capacity that [would] allow her appropriate accommodations for the extent of her disorder." CX 28 at 426. The administrative law judge gave less weight to the opinion of Dr. Ross, who approved the proffered positions, because it was in conflict not only with that of Dr. Bacon and the medical literature on RSD migration but also with claimant's credible complaints of pain and an inability to function.⁴ Order Denying Employer/Carrier's Motion for Recon. at 2. The administrative law judge also found no evidence that Mr. Quintanilla took into consideration claimant's extensive list of prescribed medications which impair her concentration and ability to function. Accordingly, he rejected Mr. Quintanilla's report because it failed to specifically mention claimant's chronic pain, depression, and functional limitations in assessing claimant's employability. Decision and Order at 6; Order Denying Employer/Carrier's Motion for Recon. at 3.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and the administrative law judge's decision to credit the opinion of Dr. Bacon and claimant's testimony over the opinions of

³ Dr. Bacon stated that claimant's prognosis was poor although she could attempt to work up to four hours per day with 15 minute breaks every hour and physical restrictions on her activities. CX 28.

⁴ Claimant testified that she was unable to predict when her condition would become so painful as to totally disable her from any activity, as a result of the pain or the pain medications. HT at 128-129.

Dr. Ross and Mr. Quintanilla is rational. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge rationally found from the credited evidence that claimant is not able to work at all. *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). Therefore, the administrative law judge rationally rejected employer's evidence of available part-time employment. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Thus, as the administrative law judge's finding that employer did not establish the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm the award of total disability benefits.

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Order Denying Employer/Carrier's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge