

BRB No. 98-1505

MELVIN L. BLACKEN)
)
 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: Aug. 17, 1999
 NEWPORT NEWS SHIPBUILDING)
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Richard K. Malamphy,
Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, 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-Denying Benefits (97-LHC-1538, 1539) of
Administrative Law Judge Richard K. Malamphy 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 administrative law judge's findings of fact and
conclusions of law if they are supported by substantial evidence, are rational, and are in
accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359
(1965); 33 U.S.C. §921(b)(3).

Claimant worked as a welder for employer since 1973. During the course of his employment for employer, claimant sustained injuries to his neck and both knees, which resulted in permanent work restrictions. Employer provided suitable employment within claimant's work restrictions until December 6, 1997, when claimant was laid off as part of a general layoff of the welding department at the shipyard. At this time, employer offered claimant retirement, which claimant elected to receive commencing January 2, 1998. Employer voluntarily paid claimant weekly compensation of \$338.15 for temporary total disability due to the layoff from December 9, 1997, to January 1, 1997, and thereafter a monthly retirement benefit of \$231.91, based on his age, 57, and his approximately 23 years of service to employer. Claimant's retirement entitled him to general medical coverage, which would otherwise have terminated during the course of the layoff. In March 1997, employer began recalling welders from claimant's former department at the shipyard. Pursuant to the contract between employer and claimant's union, claimant was not subject to recall, as his retirement terminated the employment relationship. Claimant sought alternate employment from March 1997 to the date of the formal hearing on March 24, 1998, but his job search was unsuccessful. Claimant filed a claim for benefits under the Act for total disability from January 2, 1997. Employer controverted the claim and, in the alternative, sought relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge initially determined that the gravamen of this claim is whether claimant voluntarily retired under the Act. The administrative law judge found that claimant's retirement was voluntary and that he was not laid off due to his permanent work restrictions but as part of a general departmental layoff at employer's shipyard. The administrative law judge then found that, under these circumstances, employer had no obligation to recall claimant after he has retired. Since employer paid compensation under the Act from the date the layoff became effective to the date of claimant's retirement, the administrative law judge concluded that claimant is not entitled to additional compensation benefits under the Act. Accordingly, employer's application for Section 8(f) relief was found moot.

On appeal, claimant challenges the administrative law judge's denial of benefits after January 2, 1997. Employer responds, urging affirmance.

We vacate the administrative law judge's denial of benefits as his finding that claimant's status as a voluntary retiree is determinative of claimant's entitlement to benefits under the Act is not in accordance with law. The administrative law judge found that claimant's retirement was voluntary within the meaning of the Act as claimant's work-related condition did not cause his removal from the work force, citing *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986), and the regulation at 20 C.F.R. §702.601. This inquiry, however, is inappropriate in a case involving traumatic injury as opposed to one involving an

occupational disease. In *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997), the claimant injured his back, which required surgery. While recuperating, he received Social Security disability benefits, filed a claim under the Act, and he filed a claim for longevity retirement benefits, which became effective prior to his back condition reaching maximum medical improvement. The administrative law judge awarded claimant benefits for temporary total disability, up to the date claimant's retirement became effective as he could not determine whether claimant's retirement was voluntary or was due to the work injury. The Board reversed the administrative law judge's denial of benefits commencing after the claimant retired. The Board held that in cases of traumatic injury which renders claimant unable to perform his usual employment, his retirement at some point thereafter does not affect whether he has a disability under the Act. *Harmon*, 31 BRBS at 48. The Board noted that an inquiry into the retirement status of a claimant is relevant only when the claimant has an occupational disease, as the 1984 Amendments to the Act provide a formerly unavailable remedy to retirees whose occupational disease manifests itself after retirement. See 33 U.S.C. §§902(10), 908(c)(23), 910(d)(1994); *Harmon*, 31 BRBS at 48; *MacDonald*, 18 BRBS at 181. Thus, the retiree provisions were added to expand the disability benefits available to retired workers with occupational diseases. In a traumatic injury case, the relevant inquiry is whether claimant's return to his usual work is precluded by the work injury. *Harmon*, 31 BRBS at 48. If so, the burden shifts to employer to establish the availability of suitable alternate employment. See, e.g., *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984).

In the instant case, claimant's work-related disability is due to traumatic injuries to his neck and both knees. Inasmuch as the administrative law judge erroneously discussed claimant's entitlement to benefits with reference to the law applicable to occupational diseases,¹ and did not discuss *Harmon*, we must remand this case to the administrative law judge for reconsideration.² Where, as in the instant case, it is undisputed that claimant is unable to return to his usual employment as a welder due

¹Moreover, even if this body of law were applicable, claimant did not retire as defined in Section 702.601(c), which states in pertinent part that "retirement shall mean that the claimant . . . has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce." 20 C.F.R. §702.601(c). Claimant's testimony is uncontradicted that he would have returned to work for employer if recalled and claimant introduced approximately forty-three pages of jobs for which he applied after the layoff, but for which he was not hired. See Tr. at 21-22; CX 1; see generally *Alcala v. Wedtech Corp.*, 26 BRBS 140 (1992).

²We note that the record does not unequivocally establish the type of retirement benefit claimant received from employer. Employer introduced evidence that claimant's retirement is due to his work-related disabilities while claimant testified he received a longevity retirement. Compare EX 9 with Tr. at 22-23.

to work-related injuries to his neck and knees, the burden is on employer to establish the availability of suitable alternate employment by showing the existence of a range of job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. See *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). While a job in employer's facility may constitute suitable alternate employment, *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688, 30 BRBS 93, 94-95 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986), to do so the job must be actually available to claimant. Thus, if employer chooses to provide claimant alternate work in its facility which it then withdraws from claimant for reasons unrelated to any action on claimant's part, employer bears the renewed burden of establishing other alternate employment if it wishes to avoid liability for benefits. *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 24 (1988); accord *Newport News Shipbuilding & Dry Dock Co. v. Cole*, 120 F.3d 262, 1997 WL 457665 (4th Cir. August 12, 1997)(unpublished); see also *Berkstresser v. Washington Area Metropolitan Transit Authority*, 16 BRBS 231, 234 (1984), *rev'd on other grounds sub nom. Director, OWCP, v. Washington Area Metropolitan Transit Authority*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990) (if job relied upon by employer as being suitable alternate employment is within employer's control, employer must offer the job to claimant to satisfy its burden). On remand, the administrative law judge must reconsider claimant's entitlement after the layoff in accordance with *Mendez*. With regard to continuing benefits after the date employer began recalling workers, the administrative law judge must address the facts surrounding claimant's retirement and the recall in accordance with the case law cited above. Should the administrative law judge on remand award claimant benefits for permanent disability, he also must address employer's application for Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits is vacated, and the case is remanded 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