BRB No. 00-0318

JAMES W. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK CORPORATION	)	DATE ISSUED: Dec. 5, 2000
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Richard E. Huddleston, 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, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits of Administrative Law Judge Richard E. Huddleston (97-LHC-2495) 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 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. S . §921(b)(3).

Claimant was diagnosed with work-related bilateral carpal tunnel syndrome, which necessitated surgery on both wrists. The parties stipulated that claimant's condition reached maximum medical improvement on May 12, 1997, and that claimant cannot return to his

usual work as a result of restrictions imposed following surgery. The administrative law judge found that employer did not establish the availability of suitable alternate employment, and thus he awarded claimant continuing permanent total disability benefits. 33 U.S.C. §908(a). Employer appeals the administrative law judge's finding that it did not establish the availability of suitable alternate employment, and claimant responds, urging affirmance of the award of permanent total disability benefits.

Once, as here, claimant establishes his inability to return to his usual work, 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); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In order to meet this burden, employer must establish the existence of a range of jobs which are reasonably available and for which claimant is realistically able to compete given his age, education, vocational history and physical restrictions. *See Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

In 1994, claimant's left hand condition reached maximum medical improvement. Dr. Kline stated that claimant can comfortably lift 20 pounds, and that he should avoid prolonged overhead work. EX 2n. Following the operations on claimant's right wrist, he was restricted by Dr. Kline to sedentary work with occasional lifting of up to 10 pounds, pushing or pulling with the right hand, and simple and firm grasping. Claimant was restricted to negligible frequent or constant lifting. Dr. Kline also restricted claimant from activities involving speed or manual dexterity, or those requiring competitive manipulations of small items with his right hand. EX 2vv, 4b. Dr. Lee stated claimant is restricted from significant reaching and lifting above shoulder level with his right arm, but that he can occasionally lift, carry, and pull/push 10 pounds frequently or 25 pounds occasionally below shoulder level. Dr. Lee restricted claimant from jobs requiring sustained gripping or use of vibrating tools, and he stated claimant will not be able to perform well in jobs requiring fine motor skills with his right hand. EX 6c.

At the hearing, employer introduced into evidence the labor market report and testimony of David Karmolinski, a vocational consultant. EX 11. He identified two security guard positions and four cashier positions which he deemed suitable in light of the restrictions placed by Dr. Kline and claimant's transferrable skills. The administrative law judge rejected the security guard positions because he found that claimant eventually would have to respond to an emergency and Dr. Lee stated that claimant's ability to respond to such would be "greatly compromised" by his restrictions. The administrative law judge rejected three of the cashier positions based on claimant's testimony that small items fall from his hands, and the opinions of Drs. Lee and Kline that claimant cannot manipulate small items or engage in repetitive motion with

his right hand. The administrative law judge did not specifically consider the suitability of the fourth cashier job, as the identification of a single position is insufficient to establish the availability of suitable alternate employment. Decision and Order at 6, citing *Lentz,* 852 F.2d at 129, 21 BRBS at 109(CRT).

Employer contends that the administrative law judge erred in evaluating the suitability of the positions identified by Mr. Karmolinski. For the reasons discussed below, we affirm the administrative law judge's rejection of three of the cashier positions, but we remand the case for reconsideration of the suitability of the security guard positions and the fourth cashier position.

With regard to the three cashier positions, we hold that the administrative law judge rationally found that they are not suitable, as claimant would not be able to count change with his restrictions. The administrative law judge relied on the opinions of Drs. Kline and Lee that claimant is restricted from positions that require manual dexterity or competitive manipulations of small items with his right hand, and that claimant will not be able to perform well at jobs requiring fine motor skills with his right hand. The administrative law judge also cited claimant's credible testimony that small items fall out of his right hand. *See* Tr. at 26. As the administrative law judge's findings with regard to these positions are rational, and his conclusion is supported by substantial evidence, we affirm the administrative law judge's rejection of these positions. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

We agree with employer, however, that the administrative law judge's rationale for rejecting the two security guard positions cannot be affirmed. The administrative law judge stated that "common sense" dictates that a security guard eventually would have to respond to an emergency, and that claimant would not be able to do so, based on the restrictions set out by Drs. Lee and Kline. Although the administrative law judge is permitted to draw inferences from the evidence, the inference that claimant would have to respond to an emergency is not supported by the evidence submitted in this case. Specifically, Mr. Karmolinski stated that the position as a security guard with Diversified Industrial Concepts would require claimant to be stationed in a guard booth at a gate of the Norfolk Naval Base and to check the paperwork of the truckers entering the base and to ensure that the trucks

[1]The administrative law judge stated that the cashier job at Denbigh Toyota arguably would not involve cash transactions, but he did not fully discuss the suitability of the position, as it was the only position remaining. *Lentz,* 852 F.2d at 129, 21 BRBS at 109(CRT).

have proper stickers affixed to them. Tr. at 49-50; EX 11e. The job with the Department of Transportation in Suffolk requires the employee to patrol the parking lot in a vehicle provided by the department, and to check in at each station. EX 11f. There is no suggestion in the record evidence that the employee would have to respond to emergencies, and the administrative law judge's inference that such an action is required based only on the title of the job must be vacated. *Cf. Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999) (administrative law judge rationally inferred from a security guard job description from the *Dictionary of Occupational Titles* that a claimant may have to respond to emergencies in a way contrary to his restrictions).

Moreover, the administrative law judge took out of context Dr. Lee's opinion regarding claimant's inability to respond to an emergency. The administrative law judge stated that Dr. Lee opined that claimant's restrictions would prevent him from responding to an emergency. Actually, Dr. Lee stated that, "Placement in any job involving *work at heights* should be done with extreme caution since working safely and responding to emergencies will be greatly compromised due to his right upper extremity impairments." EX 6c. As there is no support in the record for the administrative law judge's rationale in finding that the two security guard positions are not suitable for claimant, we vacate the administrative law judge's finding. The case is remanded to the administrative law judge for further consideration of whether these two positions, as well as the cashier position at Denbigh Toyota, constitute suitable alternate employment. *See Moore*, 33 BRBS at 54; *Hernandez v. National Steel & Shipbuilding Co.,* 32 BRBS 109 (1998). If suitable alternate employment is established, the administrative law judge must determine the extent of claimant's physical impairment and award permanent partial disability benefits accordingly. *See generally Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d

[2]We note that at the hearing the administrative law judge stated that the record was not being held open for the receipt of any additional evidence. Tr. at 76. Post-hearing, and before the post-hearing briefs were filed, employer submitted to the administrative law judge Dr. Kline's approval of all six positions identified as suitable alternate employment. Employer requested that these approvals be admitted into the record. The administrative law judge apparently did not rule on the admissibility of this evidence, nor does he discuss it in his decision. The Board's decision herein is based on the evidence admitted into the record. Should the administrative law judge decide to admit this additional evidence on remand, he may also reconsider the suitability of the cashier jobs, notwithstanding the Board's affirmance of the administrative law judge's decision based on the evidence currently admitted.

836, 33 BRBS 160(CRT) (4th Cir. 1999); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

Accordingly, the administrative law judge's award of permanent total disability benefits is vacated, and the case is remanded for reconsideration consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge