

BRB Nos. 02-0298
and 02-0298A

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| CHARLES DALE CARTER |) | |
| |) | |
| Claimant-Petitioner |) | |
| Cross-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| CONAGRA, INCORPORATED |) | DATE ISSUED: <u>Dec. 13,</u> |
| |) | <u>2002</u> |
| Self-Insured |) | |
| Employer-Respondent |) | |
| Cross-Petitioner |) | |

DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order Denying Claimant's Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

R.A. Osborn, Jr. and R.A. Osborn, III (Osborn & Osborn), Gretna, Louisiana, for claimant.

Alan G. Brackett (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for employer.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and the Decision and Order Denying Claimant's Motion for Reconsideration (2000-LHC-2810) of Administrative Law Judge C. Richard Avery 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as an assistant superintendent at employer's grain elevator, when on September 14, 1996, he slipped on a puddle of water and fell, injuring his back. Claimant reported the accident immediately and was treated at Meadowcrest Hospital. Although he attempted to return to work, his symptoms increased, and he sought treatment with Dr. Gorbitz. Dr. Gorbitz diagnosed degenerative disc disease and subsequently released claimant for light duty. Claimant continued to experience pain each time he attempted to return to work. He testified that he returned to most of the same duties he had performed prior to his September 1996 injury. Claimant has not attempted to work since January 1999, and he sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found that claimant reached maximum medical improvement as of April 28, 1997, and that claimant established that he is unable to return to his former duties as an assistant superintendent. In addition, the administrative law judge found that employer established the availability of suitable alternate employment, and thus awarded permanent partial disability benefits. The administrative law judge summarily denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment, and thus in awarding permanent partial disability benefits. Employer responds, urging affirmance of the administrative law judge's finding on this issue. On cross-appeal, employer contends that the administrative law judge erred in finding that claimant was not able to return to his former position as an assistant superintendent. Claimant did not respond to this appeal.

We initially address employer's contention on cross-appeal regarding the administrative law judge's finding that claimant was unable to return to his usual employment due to his work-related injury. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to his work-related injury. See *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985).

In the present case, the administrative law judge found that Dr. Gorbitz is the only physician to address claimant's work ability. Specifically, Dr. Gorbitz opined

¹ The administrative law judge also found that claimant never requested authorization from employer to be examined or treated by Drs. Kinnard, Horn, or Hubbell, and thus that employer is not liable for these medical expenses. 33 U.S.C. §907. In addition, the administrative law judge denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). As these findings are unchallenged on appeal, they are affirmed.

that claimant was restricted from bending, kneeling and twisting, and that he should limit walking to three hours per day, and lifting, squatting and climbing to one hour per day. Cl. Ex. 2 at 87; Emp. Ex. 2. He also stated that claimant should only lift up to 20 pounds and that he could work an eight hour day. *Id.* In a report dated November 12, 1996, Dr. Gorbitz stated that whenever claimant has some exacerbation of his symptoms, he should remain at home at rest. Cl. Ex. 2 at 21; Emp. Ex. 2. In a letter dated October 27, 1998, Dr. Gorbitz reiterated his restriction against carrying objects heavier than 20 pounds and against repetitive bending. However, he opined that claimant would be able to perform his usual job as an assistant superintendent as described by Dr. Stokes's job analysis.

The administrative law judge compared claimant's restrictions with the job analyses performed by Ms. Nancy Favoloro and Dr. Larry Stokes. Dr. Stokes stated that claimant was required to carry a grain sample of 5-10 pounds from the control room to the front office and to lift 25 pound buckets occasionally during a week's time. Emp. Ex. 4; Cl. Ex. 20. He classified claimant's position as light duty and stated that it required only occasional standing, walking, pushing and pulling, and frequent sitting. *Id.* Dr. Stokes concluded that claimant could perform his duties as an assistant superintendent. Tr. at 100. The record also contains a job analysis performed by Ms. Favoloro who described claimant's position of assistant superintendent as requiring frequent sitting, intermittent standing, walking, lifting up to 30 pounds. Cl. Ex. 21. She stated that claimant is occasionally called upon to carry tools, pull electrical cables and barge cables, and that his duties require frequent stooping, kneeling and crouching and occasional crawling along beams. *Id.* She stated that claimant also performs the duties of a laborer when needed, and during shutdowns, assists in other cleanup and repair work. Claimant testified that Ms. Favoloro's description of the assistant superintendent position was more accurate than the description by Dr. Stokes. Tr. at 63.

In reviewing the evidence, the administrative law judge found that both Ms. Favoloro and Dr. Stokes stated that claimant's duties included occasionally carrying buckets of grain that weighed between 25 and 30 pounds each. The administrative law judge found that this lifting requirement exceeds the restrictions imposed by Dr. Gorbitz. In addition, the administrative law judge found that both Ms. Favoloro and claimant stated that claimant was required to stoop and kneel every day, and that Dr. Gorbitz had specifically advised against such activity. The administrative law judge also found that when work was slow, claimant performed the duties of a laborer, which included activities Dr. Gorbitz advised against. Finally, the administrative law

² The frequency of the shutdown work depends upon the grain season. Cl. Ex. 21 at 163.

³ Dr. Gorbitz stated that claimant should avoid bending, kneeling, twisting, standing, and that only intermittently could he walk, lift or squat. He stated that claimant should limit lifting to no more than 20 pounds. Emp. Ex. 3.

judge found that Dr. Gorbitz stated that claimant needed to take time to rest when he suffered an exacerbation, but employer stated that the position needed to be fully staffed at all times.

Contrary to employer's contention, the record supports the administrative law judge's conclusion that claimant cannot perform his former job. Claimant testified that 90 to 95 percent of his responsibilities were in the control room, as long as there was ship running, but his duties varied in slow periods when there was a breakdown or in the summertime. Tr. at 74. Moreover, as the administrative law judge found, both Dr. Stokes and Ms. Favaloro stated that claimant's position as an assistant superintendent required that claimant occasionally carry up to 30 pounds, which exceeded the restrictions imposed by Dr. Gorbitz. The administrative law judge thoroughly reviewed the evidence of record and employer has raised no reversible error on appeal. Thus, as the job description provided by Ms. Favoloro and claimant, and the restrictions imposed by Dr. Gorbitz, support the administrative law judge's finding that claimant's work injury prevented him from returning to his usual employment, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability. See *Padilla*, 34 BRBS at 52; *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Claimant contends on appeal that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Once claimant establishes that he is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); see also *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the position identified by employer. See *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997).

⁴ We need not address employer's contention regarding the relevancy of the testimony of Mr. Parks, a former assistant superintendent, as the administrative law judge did not rely on this testimony in reaching his conclusion that claimant was unable to return to his former duties.

In the present case, the administrative law judge found that Dr. Stokes performed a labor market survey on August 7, 1998 in which he identified six positions in the light to sedentary category, with wages ranging from \$7.50 to \$14.42 per hour. Emp. Ex. 4. On September 30, 1998, Dr. Gorbitz approved five of the six available positions, including home security sales associate, sales representative, courier, area store supervisor and general manager. Emp. Ex. 2. The administrative law judge found that Dr. Stokes detailed the physical requirements of each position, and after comparing them with the physical restrictions assigned by Dr. Gorbitz, found that claimant is capable of performing all of the five identified positions. Decision and Order at 15 He also found that the positions were available on August 7, 1998, and continue to be available.

Claimant contends that the administrative law judge erred in failing to consider claimant's inability to work on a full-time, regularly scheduled basis. However, Dr. Gorbitz testified in his deposition that claimant would be able to perform the five approved positions on a full-time basis. Emp. Ex. 8 at 50; Cl. Ex. 2. In addition, Dr. Gorbitz testified that claimant would be less likely to suffer an exacerbation of his back condition if he worked within the physical restrictions as stated. He noted that individuals with chronic back conditions are prone to some exacerbation, but if it is mild, claimant should be able to continue to perform a light-duty sedentary job. Emp. Ex. 8 at 34; Cl. Ex. 2. In a work restriction evaluation performed on August 18, 1999, Dr. Gorbitz opined that claimant is able to work eight hours a day. Emp. Ex. 2. In addition, Dr. Richard Bunch performed a functional capacity evaluation on September 30, 1997, and concluded that claimant is able to perform a job with the physical demand level of "light-medium." Emp. Ex. 3. The administrative law judge concluded that claimant would be able to perform the duties of the five positions approved by Dr. Gorbitz as they are "well within his restrictions," and that his restrictions do not totally prevent him from work. Decision and Order at 15. As the administrative law judge has thoroughly considered the evidence of record, and claimant has raised no reversible error on appeal, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment as it is supported by substantial evidence, and thus affirm the award of permanent partial disability benefits. See *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting); *Jones v. Genco*, 21 BRBS 12 (1988).

⁵ We decline to address employer's contention regarding claimant's residual wage-earning capacity as it was raised only in its response brief and not via a cross-appeal. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge