BRB No. 05-0369

PRESCOTT KELLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIP SYSTEMS, INCORPORATED/ AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: 12/08/2005
	)	
Self-Insured Employer-Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III, Metairie, Louisiana, for claimant.

Wayne G. Zeringue, Jr. and Christoper Mann (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-1417) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a work-related back injury on September 19, 1997. Employer voluntarily paid clamant total disability benefits under the Act until June 16, 2003, at which time employer began paying permanent partial disability benefits. At the formal

hearing, claimant contended that he is entitled to continuing permanent total disability benefits from June 2003 because employer failed to establish the availability of suitable alternate employment. Employer contended that it established suitable alternate employment based on Ms. Favaloro's June 2003 and October 14, 2004, labor market surveys.

In his Decision and Order, the administrative law judge found that none of the seven positions identified in Ms. Favaloro's June 2003 labor market met employer's burden, because none was part-time, a requirement to which claimant's treating physician, Dr. Hamsa testified at the September 22, 2004, formal hearing. Tr. at 11. Nonetheless, the administrative law judge found that employer established suitable alternate employment based on the delivery driver and service greeter positions contained in Ms. Favaloro's October 14, 2004, vocational report. In so finding, the administrative law judge rejected claimant's contention that these positions were not suitable because they exceeded the permanent work restrictions imposed by Dr. Hamsa on June 30, 2003. Consequently, the administrative law judge awarded claimant compensation for temporary total disability benefits from June 17, 2003 until June 30, 2003, for permanent total disability benefits from June 30, 2003 until October 14, 2004, the date suitable alternate employment was established, and for continuing permanent partial disability benefits from October 14, 2004, based on two-thirds of the difference between claimant's average weekly wage of $483.48, and his post-injury adjusted wage-earning capacity of $88.16.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as here, it is uncontested that claimant is unable to return to his usual employment, claimant has established a *prima* facie case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's physical restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999) *see generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

We reject claimant's assertion that the administrative law judge erred in finding employer established suitable alternate employment as of October 14, 2004. Dr. Hamsa imposed the following restrictions on June 30, 1993: no climbing stairs or ladders; no bending, stooping or lifting; no walking for more than a block and a half; carrying limited to five to eight pounds but not on a sustained basis; working for only four hours per day. Tr. at 10-11. Inasmuch as the administrative law judge credited Dr. Hamsa's testimony that claimant was limited to working part-time, he rejected the positions contained in Ms. Favaloro's June 2003 labor market survey, because none of the seven positions she identified limited claimant to four hours per day. Ms. Favaloro submitted additional jobs to Dr. Hamsa in September 2004. Dr. Hamsa disapproved the jobs because none was part-time. However, he otherwise approved jobs with a 10 pound lifting requirement and stated a delivery driver position would be acceptable if claimant did not have to be seated for too long a period. With regard to a store greeter position, he found such acceptable if it could be limited to four hours per day. Tr. at 13-15.

In her October 2004 report, Ms. Favaloro identified five part-time positions as suitable for claimant given Dr. Hamsa's restrictions: store greeter, delivery driver, shuttle bus driver, shuttle driver/cashier, and bus boy. The administrative law judge found that the delivery driver and greeter jobs are suitable. He found that Dr. Hamsa specifically approved a part-time greeter position. The administrative law judge further found that the delivery driver job did not require sitting for extended periods which Dr. Hamsa had precluded. Decision and Order at 12. The administrative law judge rejected claimant's contention that the jobs' 10-pound lifting requirement exceeds Dr. Hamsa's restrictions, as he had approved jobs with this condition.

In adjudicating a claim, it is well settled that an administrative law judge as the fact-finder is entitled to weigh the evidence and to draw his own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony according to his judgment. *Perini v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969). The administrative law judge fully discussed and weighed the relevant evidence, and he rationally found suitable the part-time greeter and delivery driver jobs, based on Dr. Hamsa's testimony that these positions would be suitable for claimant if they were part-time. Tr. at 14. In addition, the administrative law judge rationally found that the driver position is suitable because it does not require claimant to remain seated for too long. EX 1; Tr. at 13; Decision and Order at 12. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's finding that employer established suitable alternate employment and the consequent finding that claimant is limited to an award of continuing permanent partial disability benefits from October 14, 2004. *See Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT).

Accordingly, we affirm the administrative law judge's Decision and Order.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge