BRB No. 05-0467

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| MARK T. ZEPHIR | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: 02/09/2006 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2001-LHC-1890, 2002-LHC-0426) of Administrative Law Judge Daniel A. Sarno, Jr., 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).

This case is before the Board for a second time. To recapitulate the facts, claimant, a machinist, began his employment with employer in 1983. Claimant alleged he sustained an injury to his right shoulder and neck when he slipped and fell on a wet stairway on August 20, 1999, during an emergency evacuation of a ship. Claimant was discharged from employer on November 15, 1999, but reinstated on January 17, 2000, in

settlement of the grievance he filed through his union. Claimant returned to light- duty employment on January 18, 2000. He had surgery on his shoulder in February 2000. Claimant sought benefits for various periods of temporary total disability, including continuing benefits from September 20, 2001. The administrative law judge accepted the parties' stipulation that no work was available at employer's facility within claimant's medical restrictions for the period between November 12, 1999 and January 16, 2000, and continuing from September 29, 2001.

In his original decision, the administrative law judge found that claimant established his *prima facie* case of total disability, but that employer established the availability of suitable alternate employment on the open market, based on a sales position claimant obtained with Dixie RV Sales Superstore (Dixie) selling new and used recreational vehicles, from June 2000 to September 29, 2001. The administrative law judge also found that claimant did not have a loss in wage-earning capacity while he worked in this position and that, as claimant was laid off from this position due to the economic effects of the September 11 attacks and claimant had worked successfully at this job for several months, employer was not required to identify new suitable alternate employment for claimant.

Claimant challenged this decision on appeal, contending he was entitled to ongoing total disability benefits as of September 29, 2001. The Board held that the administrative law judge did not consider whether claimant's position at Dixie was regular and stable enough to establish continuing suitable alternate employment, pursuant to *Edwards v. Director, OWCP,* 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied,* 511 U.S. 1031 (1994). The Board stated that the administrative law judge should address employer's other evidence of suitable alternate employment if the Dixie job was insufficient to establish claimant's ongoing wage-earning capacity. The Board also instructed the administrative law judge on remand to clarify the parties' positions on the issue of the work-relatedness of claimant's neck condition and to address this issue if necessary. *Zephir v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0399 (Feb. 26, 2004).

The administrative law judge found on remand that claimant's position at Dixie, which he held for 15 months, was sufficiently regular to establish his true earning capacity even after he was laid off. The administrative law judge found, in the alternative, that employer met its burden of establishing suitable alternate employment by virtue of the testimony of Mr. Kay regarding automobile sales positions that were available from the time claimant left Dixie. The administrative law judge did not credit claimant's testimony that he was unable to obtain such a sales position as he found it was outweighed by Mr. Kay's observations of claimant's skills, his testimony concerning his conversation with a representative of the Casey Auto Group, and claimant's record as a salesman at Dixie. The administrative law judge concluded that claimant could earn

more as a car salesman than he did at the shipyard and thus does not have a loss in wage-earning capacity. Moreover, the administrative law judge denied temporary total disability benefits for the period claimant was enrolled in college as he found that it was not a Department of Labor (DOL) sponsored program and as claimant could obtain a job that paid more than minimum wage. Lastly, the administrative law judge found that claimant's neck pain is work-related and that employer is liable for medical treatment for this condition.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment as of September 29, 2001, and that claimant did not exercise diligence in seeking a job. Claimant also contends that the administrative law judge erred in finding that he is not entitled to temporary total disability benefits for the period he was enrolled in college. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in finding that the evidence presented by employer's vocational expert is sufficient to establish the availability of suitable alternate employment.[1] In order to meet its burden, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience and physical capacity and restrictions, is capable of performing. *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). A vocational specialist's opinion which properly takes into account claimant's vocational background and experience and mental and physical capacities may be sufficient to establish that claimant is capable of performing available jobs. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). The vocational expert need not have interviewed and tested the employee. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

In the present case, the administrative law judge credited the testimony and reports of William Kay, employer's vocational expert. Decision and Order on Remand at 8-9. Contrary to claimant's contention, Mr. Kay did not rely solely on classified advertisements to establish the availability of sales positions. *Cf. Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989) (classified ads alone insufficient to establish suitable alternate employment because job requirements are unknown). Mr. Kay noted claimant's

[1] Claimant also contends that the administrative law judge erred in finding that the sales position at Dixie was sufficiently "regular and stable" such that his wages from that position represented his wage-earning capacity after he was laid off. Given our disposition of this case, we need not address this contention.

successful tenure as a recreational vehicle salesman and opined that his skills could be transferred to a position as an auto salesman. He referenced sales jobs with large dealerships in the local area that were advertised in the newspaper since September 2001, and he specifically spoke with a representative from a large dealership to discuss the requirements of the sales jobs. Mr. Singleton, a representative of the Casey Auto Group, informed Mr. Kay that the Casey Auto Group has regular openings and is always looking to interview people with experience and with outgoing personalities. H. Tr. at 87. Mr. Singleton also told Mr. Kay that they hire only full-time employees and that the salary ranges from $30,000, for a first-year salesman, to a high of $100,000 in specific circumstances. *Id.* at 87-88. In addition, Mr. Kay based his opinion concerning the suitability of these positions on his observations of claimant's behavior and skills. Mr. Kay testified that he observed claimant during the hearing and noted that claimant had "a smooth delivery, above-average intelligence, and good communication skills." *Id.* at 103. Moreover, in reviewing the physical restrictions related to claimant's injury, Mr. Kay opined that claimant would have no difficulty performing the duties of a salesperson. *Id.* Therefore, as the administrative law judge's finding that employer established the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Hogan,* 23 BRBS at 292; *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985).

Once employer demonstrates that suitable jobs are available, claimant can retain his eligibility for total disability by demonstrating that he was unable to secure employment although he diligently tried. *Fox v. West State, Inc.*, 31 BRBS 118 (1997). In *Trans-State Dredging,* 731 F.2d at 202, 16 BRBS at 76(CRT), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, described claimant's burden in this regard as one of "establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person *genuinely* seeking work with his determined capabilities," quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981)(emphasis in original). The administrative law judge must make specific findings regarding the nature and sufficiency of claimant's alleged efforts in order to determine whether claimant did in fact diligently try, without success, to find another job. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

The administrative law judge found that claimant did not actively seek employment following his termination from Dixie except for a brief attempt in November 2001 and after June 2002. Claimant testified he contacted a number of the employers

seeking car salesmen, but was told that he did not have sufficient experience. Claimant's Deposition at 7-19. The administrative law judge did not credit claimant's testimony that he lacked the experience required for the auto sales jobs. The administrative law judge found claimant's testimony outweighed by Mr. Kay's observations of claimant's skills, as well as by his conversation with Mr. Singleton regarding the type of individuals they hired and claimant's successful record as a recreational vehicle salesman at Dixie. Therefore, as the administrative law judge rationally weighed the evidence, we affirm the administrative law judge's finding that claimant did not diligently seek alternate employment as it is supported by substantial evidence.[2] *Berezin v. Cascade General, Inc.*, 34 BRBS 162 (2000).

In addition, we reject claimant's contention that the administrative law judge erred in failing to award temporary total disability benefits for the period claimant was completing a two-year degree in criminal justice. The administrative law judge rejected claimant's contention that he was entitled to temporary total disability benefits for the period from January 13, 2002, to July 22, 2002, because the classes claimant took were not part of a DOL sponsored or approved program.[3] The administrative law judge found that the cases that have allowed temporary total disability benefits during a period of retraining involved DOL-approved vocational rehabilitation programs. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *see Castro v. General Constr. Co.*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. ___, No. 05-371 (Jan. 9, 2006); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *see also Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001)(claimant was enrolled in state-sponsored program that was subsequently DOL-approved). The administrative law judge found that the degree program in the instant case was not one of these programs. The regulations at 20 C.F.R. §§702.501-508 are aimed at ensuring that a vocational rehabilitation program is appropriate for the injured employee. *See generally Meinert v. Fraser, Inc.*, 37 BRBS 164 (2003). As the classes claimant took lacked oversight by the Department of Labor pursuant to the regulatory criteria, we affirm the administrative law judge's finding that claimant is not entitled to benefits while he was

[2] Claimant does not challenge the administrative law judge's finding that the sales positions paid more than claimant's average weekly wage such that he does not have a loss in wage-earning capacity.

[3] The classes were sponsored through the Virginia Unemployment Commission displaced worker program. H. Tr. at 57.

enrolled in the college program. *See generally Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000).[4]

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[4] The administrative law judge also found that claimant was already capable of earning wages greater than minimum wage and concluded that there was no benefit to employer in claimant's completion of the degree program. However, this finding is not determinative as the correct focus is on claimant's long-term economic security rather than on his short-term ability to earn any particular wage. *See Brickhouse*, 315 F.3d at 294, 36 BRBS at 91(CRT); *Castro v. General Constr. Co.*, 37 BRBS 65, 71 (2003), *aff'd*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 126 S.Ct. ___, No. 05-371 (Jan. 9, 2006).