BRB No. 12-0318

TOM PAPANIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW YORK CONTAINER TERMINAL	)	DATE ISSUED: 02/21/2013
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Robert J. Helbock (Helbock, Nappa & Gallucci, LLP), Staten Island, New York, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar), New York, New York, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2011-LHC-00012) of Administrative Law Judge Adele Higgins Odegard 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 injured his back on October 29, 2007, while working for employer as a longshoreman. Claimant has not returned to work since that date. Employer conceded that disability resulted from the injury and it paid temporary disability benefits at various rates between October 30, 2007, and January 31, 2010. Employer stopped payments on January 31, 2010, based upon Dr. Dennis's January 27, 2010, report stating that claimant could return to "full duty" work, wearing a lumbar support, as of February 1, 2010, and that there was no need for further treatment. The only issue before the administrative law judge was whether claimant is entitled to additional temporary disability benefits as of February 1, 2010.[1]

The administrative law judge found that employer established the availability of suitable alternate employment as of February 1, 2010, and, therefore, claimant is limited to temporary partial disability benefits as of this date. Claimant appeals, asserting that the administrative law judge erred in finding the availability of suitable alternate employment established as of February 1, 2010. Specifically, claimant asserts that he did not have work restrictions assigned as of this date and the record contains no evidence, post-surgery, of the availability of suitable alternate employment prior to June 21, 2011. Employer responds, urging affirmance.

Where, as here, it is uncontroverted that a claimant cannot return to his usual work, he has established a prima facie case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In order to meet this burden, an employer must show the availability of realistic job opportunities in the relevant community, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Id.*

On November 20, 2008, employer's vocational counselor, Mr. Lopez, submitted a labor market survey with job descriptions for four sedentary positions that were available as of July 9, 2008.[2] EX 3. Dr. Cammisa performed back surgery on claimant on April 23, 2009. CX 1; EX 2. On January 27, 2010, Dr. Dennis opined that claimant could return to longshore work using a lumbar support. Finding that claimant's longshore work

[1]The parties agreed that claimant's condition has not reached maximum medical improvement.

[2]The sedentary positions were that of Service Operator, Gate Guard, Greeter, and Mobile Security Guard. EX 3. On November 30, 2008, Dr. Dennis reviewed Mr. Lopez's labor market survey, finding claimant capable of performing each of these positions. EX 2.

is more physically demanding than the sedentary positions listed in the November 21, 2008, labor market survey, and in view of Dr. Dennis's May 2011 deposition testimony that claimant could perform light-duty work, the administrative law judge inferred that, as of January 27, 2010, Dr. Dennis was of the opinion that claimant could perform the light-duty positions identified in the 2008 labor market survey. Further, as Mr. Lopez verified that the 2008 labor market survey positions were available on June 21, 2011,[3] the administrative law judge found that employer established the availability of suitable alternate employment as of February 1, 2010, when Dr. Dennis opined that claimant could return to work. As Drs. Cammisa and Seslowe opined that claimant is disabled from longshore work on March 24, 2010, and July 19, 2010, respectively, CX 1, 2, but they did not assign any work restrictions, the administrative law judge found their opinions did not contradict Dr. Dennis's opinion concerning claimant's ability to perform light-duty work.[4]

We agree with claimant that the record does not support the administrative law judge's finding regarding the onset of partial disability benefits as of February 1, 2010, as suitable alternate employment was not shown to be available as of this date. It is employer's burden to establish the availability of suitable alternate employment during a period in which the claimant is capable of working. *See*, *e.g.*, *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Circ. 1996); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1998). The only evidence post-surgery of the availability of suitable alternate employment is Mr. Lopez's testimony that three of the positions from the 2008 labor market survey were available on June 21, 2011.[5] EX 6 at 31-37. Therefore, the administrative law judge erred in reducing claimant's total disability benefits to partial disability benefits prior to this date. *Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT). An administrative law judge may not award partial disability benefits prior to the earliest date suitable alternate employment is shown to be available. *Id.* Further, nothing in the record supports the inference that merely because the positions were available on July 9, 2008, and on June

[3]On July 20, 2011, Mr. Lopez testified that the Service Operator, Gate Guard, and Mobile Security Guard positions listed in the November 21, 2008, labor market survey were available on June 21, 2011. EX 6 at 31-37.

[4]As the administrative law judge observed, Dr. Seslowe did not state an opinion regarding whether claimant had any work restrictions. CX 2 at 40. Although Dr. Cammisa stated, on May 7, 2009, that claimant should avoid any heavy bending, lifting, and twisting, the sedentary positions listed in the 2008 labor market survey did not require any heavy work.

[5]Claimant does not challenge the administrative law judge's finding that the identified positions are suitable for him as of June 21, 2011.

21, 2011, they were also available on February 1, 2010. *See Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). As the earliest date an employer establishes the availability of suitable alternate employment delineates the onset of partial disability benefits, and as employer here did not establish the availability of suitable alternate employment following claimant's surgery until 2011, we modify the administrative law judge's award to reflect that claimant is entitled to temporary partial disability benefits commencing June 21, 2011.[6] Prior to that date, he is entitled to temporary total disability benefits. *Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is modified to reflect that claimant is entitled to temporary total disability benefits from February 1, 2010, until June 20, 2011, and to temporary partial disability commencing June 21, 2011. 33 U.S.C. §908(b), (e). In all other respects, the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[6]Thus, we need not address claimant's contention that the administrative law judge erred in inferring from Dr. Dennis's opinions that claimant was capable of light-duty work as of February 2010.