BRB No. 90-1561

ANTONIO GONZALES, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	DATE ISSUED:
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Order Granting Motion for Reconsideration of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Carlos Garza (Martin, Micks, Garza, Bunce), Galveston, Texas, for the claimant.

Michael D. Murphy (Fulbright & Jaworski), Houston, Texas, for the employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Order Granting Motion for Reconsideration (89-LHC-786) of Administrative Law Judge Ben H. Walley awarding benefits 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 findings of fact and conclusions of law of the administrative law judge which 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. §921(b)(3).

Claimant injured his lower back while working as a pipefitter for employer on July 12, 1985. Employer voluntarily paid claimant temporary total disability benefits from July 13, 1985 through October 16, 1987. 33 U.S.C. §908(b). Claimant has not been engaged in gainful employment since his 1985 work injury. In 1990 claimant filed this claim under the Act, seeking permanent total disability benefits.

In his initial Decision and Order, the administrative law judge initially found that there is no dispute that claimant is unable to perform his usual work as a pipefitter due to his work-related back condition. The administrative law judge then found that employer did not meet its burden of establishing the availability of suitable alternate employment. The administrative law judge found that one of the positions identified by employer, as dining room/floor attendant at Luby's Cafeteria, might be suitable for claimant; however, the administrative law judge stated that there were discrepancies between the labor market survey and the testimony of employer's vocational counselor, Mr. Quintanilla, regarding both the specific job description and the actual number of hours claimant would be required to work in a given week. He therefore found that none of the jobs was suitable, and determined that claimant was entitled to an award of permanent total disability as of July 1, 1987, the date he found claimant reached maximum medical improvement, and continuing.

Employer filed a motion for reconsideration of the administrative law judge's Decision and Order. Employer explained the discrepancy found by the administrative law judge by stating that the figure of 25 hours per week listed in the labor market survey was a generic figure provided by the Texas Employment Commission, and that both the specific job summary in the survey and Mr. Quintanilla's testimony indicated that a number of jobs at Luby's Cafeteria as floor attendant or dining room attendant was available at 20 hours per week. The administrative law judge, in an Order Granting Motion for Reconsideration, found that employer's statement was sufficient to clarify the discrepancy regarding the number of hours required and that the discrepancy regarding the job description was insignificant, and that therefore employer met its burden of establishing the availability of suitable alternate employment. The administrative law judge therefore modified his award to one for permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), for a loss of wage-earning capacity commencing July 1, 1987, and continuing.

On appeal, claimant initially contended the administrative law judge erred in finding that employer met its burden of establishing the availability of suitable alternate employment based on only one specific job, citing the holding of the United States Court of Appeals for the Fourth Circuit in Lentz v. The Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). Subsequently, however, employer filed a response brief in which it noted that the United States Court of Appeals for the Fifth Circuit -- the jurisdiction in which this case arises -- rejected the Lentz approach in P & M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116 (CRT) (5th Cir. 1991), and held that the identification of one suitable alternate job opportunity may be sufficient to satisfy employer's burden. Claimant then filed a supplemental

brief in which he acknowledges that the holding in P & M Crane governs the instant case; however, claimant also argues that the single job opportunity as floor attendant is not suitable because there is no "reasonable likelihood" that he can compete for this one job. Claimant asserts that Mr. Quintanilla admitted that the job required continuous standing and walking, which exceeds claimant's physical restrictions, and failed to take into account the fact that claimant uses a cane and takes medication. Claimant also contends that the job is not suitable because it does not take into account his need to lie down periodically. Employer responds to this appeal, urging affirmance.

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. Once claimant shows he can no longer perform his usual work, employer must show the existence of realistically available employment opportunities within the geographical area where claimant resides, which he could perform based upon his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. Id.; see also Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the instant case, employer's location of one suitable alternate position as floor attendant/dining room attendant at Luby's Cafeteria is sufficient to meet the P & M Crane standard, particularly in light of Mr. Quintanilla's testimony and the labor market survey which indicate that, in fact, "a number" of such jobs was available at Luby's Cafeteria at 20 hours per week. Emp. Ex. 2; Tr. at 99. Moreover, the administrative law judge reasonably relied on the testimony of Mr. Quintanilla, who stated the job was suitable for claimant after comparing the requirements of the job with the physical restrictions outlined by claimant's treating physician Dr. Jinkins. See McCullough v. Marathon Letourneau Co., 22 BRBS 359 (1989). Dr. Jinkins stated in his deposition that claimant could work at a sedentary job, even an eight hour job, if he could alternate sitting, standing and walking, and periodically lie down. See Emp. Ex. 1 at 45, 53; see also Emp. Ex. 3, OWCP 5 Form. Mr. Quintanilla testified that he relied on the OWCP 5 work restriction evaluation form completed by Dr. Jinkins in March 1987, which limited claimant to walking intermittently four hours a day, standing intermittently four hours a day, and lifting no more than 20 pounds. Tr. at 87.

Further, we specifically reject claimant's contention that the job identified by Mr. Quintanilla was beyond claimant's physical restrictions because it required continuous standing and walking and did not permit claimant to periodically lie down if necessary. McCollough, 22 BRBS at 359. Although Mr. Quintanilla conceded that the job of the floor attendant entails a "process" of continuous standing and walking, see Tr. at 114, he testified that the job was within the restrictions placed by Dr. Jinkins and

that he informed the potential employer of the restrictions. Tr. at 87, 113-115. Mr. Quintanilla testified that the term "intermittent" in the OWCP 5 Form, as applied to claimant, meant that claimant could work at a job where he combined walking, standing, and sitting, but would not be required to engage in any of these activities on a continuous basis. Tr. at 87-88. In addition, Mr. Quintanilla opined that claimant could lie down if necessary during his breaks.[1] Tr. at 100-101. The administrative law judge's finding that the job is within claimant's restrictions thus is supported by substantial evidence.

Accordingly, the Order Granting Motion for Reconsideration of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1] We reject claimant's argument that the job is unsuitable for him because he takes medication and requires the use of a cane in walking. Dr. Jinkins stated in his deposition that while it is possible medication might affect claimant's ability to perform sedentary work, the amount of medication could be adjusted. Emp. Ex. 1 at 51-52. In addition, Dr. Jinkins stated that he took note of the fact that claimant carried a cane in his office visits even though he walks without a limp and does not require the cane for support. Emp. Ex. at 41-42.