BRB No. 89-155

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| JAMES NEEDHAM | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| DRAVO CORPORATION | ) | DATE ISSUED:_____ ) |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand and Decision and Order on Motion for Reconsideration of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Robert S. Garrett (Egler, Garrett & Egler), Pittsburgh, Pennsylvania, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order on Remand and Decision and Order on Motion for Reconsideration (83-LHC-2506) of Administrative Law Judge Reno E. Bonfanti rendered on a claim 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).

This is the second time that this case has been before the Board. Claimant suffered chest pain on September 9, 1981, while at work as a rigger for employer. Claimant was diagnosed as having coronary artery disease, and underwent open-heart surgery for this condition in November 1981. Thereafter, claimant filed a claim for permanent total disability benefits under the Act, maintaining that his inability to work was related to the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

mental stress experienced in his former job. In his Decision and Order, the administrative law judge determined that, although claimant was unable to return to his former duties, his September 1981 episode of chest pain did not constitute an "injury" pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2). The administrative law judge further found that the relevant medical evidence of record failed to demonstrate the existence of a causal link between any mental stress occasioned by claimant's job and claimant's coronary artery disease. Thus, the administrative law judge denied claimant's claim for compensation.

Claimant appealed the denial of his claim to the Board. *Needham v. Dravo Corp.*, BRB No. 84-1381 (Oct. 29, 1987) (unpublished). The Board, noting that claimant established that he experienced an "injury" under Section 2(2) of the Act, *i.e.*, chest pain at work, and the uncontradicted hearing testimony demonstrated that on-the-job conditions existed which could have induced this pain, found claimant to be entitled to the presumption at 33 U.S.C. §920(a). Next, after determining that employer had submitted no evidence sufficient to rebut the presumption, the Board reversed the administrative law judge's finding of no causation, and remanded the case to the administrative law judge to determine the issues of the nature and extent of claimant's disability. *Id.*, slip op. at 2-3.

In his Decision and Order on Remand, the administrative law judge found that claimant is incapable of performing his usual employment duties with employer, and that employer had not met its burden of establishing the availability of suitable alternate employment. The administrative law judge thus awarded claimant permanent total disability benefits. 33 U.S.C. §908(a). The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's credibility determinations and his findings regarding the extent of claimant's disability. Claimant has not responded to this appeal.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing.[1] *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions, which he could realistically secure if he diligently tried. *Id.*; *see Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish realistic, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989). For the job opportunities to be realistic, employer must establish their precise nature, terms, and availability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet the burden of showing suitable alternate employment. *Southern*, 17 BRBS at 66.

[1]As employer has not challenged the administrative law judge's determination that claimant is incapable of resuming his usual employment duties, that finding is affirmed.

Employer initially contends that the administrative law judge erred in requiring it to obtain a job for claimant; specifically, employer alleges that, in order to meet its burden of proof, it need only establish that suitable alternate employment is available for claimant. We reject employer's contention that the administrative law judge applied an improper standard in this case. In addressing this issue, the administrative law judge considered whether employer had established "the existence of realistically available job opportunities in the area where [claimant] resides . . . which [claimant] could secure if he diligently tried." Decision and Order on Remand at 2. Thus, the administrative law judge's decision is consistent with the applicable legal standard. *See Turner*, 661 F.2d at 1042, 14 BRBS at 165.

Employer next contends that the administrative law judge erred in failing to credit the testimony of its rehabilitation expert, Mr. Heckman. We disagree. In the instant case, employer submitted into evidence the testimony of Mr. Heckman, its vocational expert, who set forth various employment positions which he stated were appropriate for claimant. The administrative law judge, however, discredited the testimony of Mr. Heckman and concluded that employer failed to establish the availability of suitable alternate employment. In declining to credit Mr. Heckman's testimony, the administrative law judge noted that Mr. Heckman was unaware that claimant had declared there was severe mental stress at his previous job, and that Dr. Fisher had opined that claimant should avoid stressful situations in future jobs.[2] Tr. at 108. Additionally, the administrative law judge noted that Mr. Heckman had not set forth the precise nature and terms of realistic job opportunities available to claimant. Given the absence of the jobs' requirements, the administrative law judge is unable to determine if claimant is physically capable of performing the jobs. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). We, therefore, affirm the administrative law judge's determination that the testimony of Mr. Heckman and his accompanying labor market survey are insufficient to establish the availability of suitable alternate employment. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).[3] The award of permanent total disability benefits is thus affirmed.

[2]Employer acknowledges the testimony of Dr. Fisher that claimant, although in poor physical condition, could probably function at a level of sedentary activity. *See* Fisher depo. at 21.

[3]Because we affirm the administrative law judge's finding that employer failed to carry its burden of proof in establishing the availability of suitable alternate employment, we need not address employer's contention that claimant did not diligently seek work. *See Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Accordingly, the Decision and Order on Remand and Decision and Order on Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge