BRB No. 92-1013

REGINALD LAWSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES INCORPORATED	)	DATE ISSUED
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order on Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

William R. Mustian, III (Stanga & Mustian, P.L.C.), Metairie, Louisiana, for claimant.

Richard S. Vale (Blue, Williams & Buckley), Metairie, Louisiana, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision and Order on Reconsideration (90-LHC-2637) of Administrative Law Judge Richard D. Mills 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 findings of fact and conclusions of law of the administrative law judge if they 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).

*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).

Claimant, while in the course of his employment as a welder for employer, aggravated his

underlying degenerative lumbosacral disc disease. Claimant was diagnosed as having a bulging disc at L4-5 and a disc herniation at L5-S1; as a result of this condition, claimant has not worked since September 1989. Claimant thereafter filed a claim seeking disability compensation under the Act.

In his Decision and Order, the administrative law judge determined that employer failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's injury was work-related, that claimant reached maximum medical improvement on October 24, 1990, and that claimant is incapable of performing his previous employment duties with employer. After further finding that employer established the availability of suitable alternate employment, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act. 33 U.S.C. §908(c)(21). Lastly, the administrative law judge found employer to be entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Thereafter, in his Decision and Order on Reconsideration, the administrative law judge modified his award to reflect claimant's entitlement to temporary total disability compensation from September 28, 1989, through October 24, 1989, *see* 33 U.S.C. §908(b), and permanent partial disability compensation thereafter.

On appeal, claimant challenges the administrative law judge's findings regarding the nature and extent of his disability. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's findings regarding the date claimant's condition became permanent. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Mills v. Marine Repair Service*, 21 BRBS 115 (1988). Moreover, if anticipated surgery is not expected to improve claimant's condition, the condition may be permanent. *See White v. Exxon Co.*, 9 BRBS 138 (1978)(Smith, J., dissenting), *aff'd mem.* 617 F.2d 292 (5th Cir. 1980). Furthermore, the date a doctor rates a condition may be deemed to be the date of maximum medical improvement. *See Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd* 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *rev'd on other grounds en banc*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990).

In this case, the administrative law judge found that claimant's condition became permanent on October 24, 1990, the date on which Dr. Hamsa, claimant's treating physician, opined that claimant had a 10 percent permanent whole man impairment. *See* Decision and Order at 9. Contrary to claimant's contentions, neither Drs. Hamsa, Williams nor Applebaum recommended surgical intervention. Dr. Hamsa recommended enzyme injections and noted that a diskectomy would not be the best treatment for claimant. Dr. Williams, although acknowledging that surgery for claimant is a consideration, stated that he favored conservative measures. *See* Williams depo. at 12-13. Lastly, Dr. Applebaum opined that surgical intervention is not needed at this time. *See* CX-6. Based upon the record before us, the administrative law judge's finding of permanency as of October 24, 1990, the date claimant received a disability rating from his treating physician, is supported by substantial evidence; his finding of permanency is therefore affirmed.

Claimant next contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Where, as in the instant case, a 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. *See P & M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied* 935 F.2d 1293 (5th Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographical area where the claimant resides which claimant is capable of performing, based upon his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

In the instant case, the administrative law judge, based upon the credited opinion of Ms. Palmer, employer's vocational rehabilitation expert, concluded that employer established the availability of suitable alternate employment. Specifically, the administrative law judge noted that although the positions of assembly worker and truck driver set forth by Ms. Palmer were not suitable for claimant, the positions of security guard and dispatcher were appropriate. Based upon these two positions, the administrative law judge determined that claimant was permanently partially disabled.

The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of establishing the availability of suitable alternate employment. *Southern*, 17 BRBS at 66. In order for employment opportunities to be considered realistic, however, employer must establish their precise nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.,* 16 BRBS 272 (1984). Contrary to claimant's assertion, an administrative law judge may credit a vocational expert's opinion even if the expert did not interview and test the employee, as long as the expert was aware of the employee's age, education, industrial history, and physical limitations when exploring local job opportunities. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). In his decision, however, the the administrative law judge made conflicting findings regarding the two positions which he found constituted suitable alternate employment. Initially, the administrative law judge stated that the positions of security guard and dispatcher were within claimant's physical restrictions, *see* Decision and Order at 8; thereafter, the administrative law judge stated that employer's vocational expert provided no details regarding the necessary skills for the security guard or dispatcher positions.[1] *See id.* at 9. Given the absence of a description of a job's requirements, an administrative law judge is unable to determine if claimant is capable of performing the job. *See generally P & M Crane Co.,* 930 F.2d at 431, 24 BRBS at 122 (CRT); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). Based upon the administrative law judge's conflicting statements regarding the skills necessary to perform the positions determined to constitute suitable alternate employment, we vacate the administrative law judge's finding that

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[1]It appears that Ms. Palmer's labor market survey was not entered into evidence at the formal hearing.

employer has established the availability of such employment, and we remand the case for him to specifically compare claimant's physical restrictions and vocational background with the duties of the positions identified by employer in order to determine whether the jobs are suitable. *See generally P & M Crane Co.,* 930 F.2d at 431, 24 BRB at 122 (CRT). If, on remand, the administrative law judge determines that employer has established the availability of suitable alternate employment, in order to neutralize the effects of inflation, he must calculate claimant's loss in wage-earning capacity by adjusting claimant's post-injury wage level to the level paid pre-injury, and compare that wage level with claimant's pre-injury average weekly wage. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

Accordingly, we vacate the administrative law judge determination that employer established the availability of suitable alternate employment, and we remand the case to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Decision and Order on Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge