BRB No. 92-1816

EDWARD FARIAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Edward Farias, West Warwick, Rhode Island, *pro se.*

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order Awarding Benefits (91-LHC-0279) of Administrative Law Judge Martin J. Dolan, 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). In considering an appeal where claimant is without counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law; if so, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

On August 16, 1988, claimant, a pipefitter, was injured during the course of his employment with employer when he tripped over a pallet and fell onto a pile of steel. Employer voluntarily paid claimant temporary total disability benefits from August 17, 1988, to June 26, 1990, based upon an average weekly wage of $461.61, and temporary partial disability benefits from June 27, 1990, to October 14, 1990, at the rate of $147.74 a week. 33 U.S.C. §908(b), (e). Claimant has not returned to work since the date of his work-related injury.

* 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).

In his Decision and Order, the administrative law judge found that, based on the medical and vocational evidence of record, employer established the availability of suitable alternate employment

both in the open market as of June 14, 1990, and at its facility as of March 25, 1991; accordingly, the administrative law judge concluded that claimant was entitled to temporary total disability compensation from August 16, 1988 to June 13, 1990, and temporary partial disability compensation from June 14, 1990 to March 24, 1991.

On appeal, claimant, appearing without the assistance of counsel, challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Claimant further contends that employer is liable for an additional 20 percent premium because more than 10 days elapsed from the date of the administrative law judge's award to claimant's receipt of the monies awarded due to the fact that employer initially sent the check(s) to the wrong address.[1] Employer has not responded to this appeal.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, claimant has established that he is unable to resume his usual employment duties with employer, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment which claimant, by virtue of his age, education, vocational history, and physical restrictions, is capable of performing. *See Air America v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), *rev'g Ketch v. Air America, Inc.*, 8 BRBS 490 (1978); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986). In *Air America*, the United States Court of Appeals for the First Circuit stated that the strength of the presumption of total disability and hence the severity of the employer's burden to overcome the presumption should reflect the reality of the situation. The court determined that, depending on the situation, employer may not have the heavy burden of establishing actual job opportunities. The court, however, also recognized that it is reasonable to require employer to prove the availability of specific suitable alternate jobs when an employee's inability to perform any work seems probable in light of the employee's physical condition and other circumstances, such as employee's age, education and work experience.

In the instant case, the administrative law judge initially concluded that employer established the availability of suitable alternate employment as of June 14, 1990, based upon the testimony of a vocational consultant, Mr. Calandra, and Drs. DiSanto and Russo. Dr. DiSanto, a neurosurgeon, opined on May 8, 1990, that claimant had reached maximum medical improvement with no permanent impairment; Dr. DiSanto placed the following restrictions on claimant: 20 minute intervals of sitting, 30 minute intervals of walking, 10 minute intervals of climbing, 1 hour daily of kneeling or standing and no lifting, bending or twisting, no operation of foot controls, performance of repetitive movements nor work at heights or situations where high speed is involved. EX 6. Dr. Russo, who is board-certified in neurological surgery, initially examined claimant on September 21,

[1]It appears that claimant is contending that the "appropriate" address is that of his attorney, which is the address listed on the first page of the administrative law judge's decision to which claimant refers.

1988, and thereafter continued to treat him; on February 15, 1990, Dr. Russo opined that claimant became partially disabled since all of his findings were within normal range except for some muscle spasm. Mr. Calandra, after interviewing claimant and performing a labor market survey, identified thirteen positions, specifically seven security guard positions and six cashier positions, which he found to be part-time and within the physical restrictions imposed by both Drs. DiSanto and Russo and available as of June 14, 1990. Mr. Calandra noted that he contacted each of the listed employers to determine the requirements of the positions and their availability on a part-time basis. EX 9. We affirm the administrative law judge's determination that employer met its burden of establishing the availability of suitable alternate employment, on a part-time basis, as of June 14, 1990, based upon the vocational testimony and medical opinions of record, as that determination is rational and supported by evidence of record. *See, e.g., Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989).

Next, after concluding that employer had established the availability of suitable alternate employment as of June 14, 1990, the administrative law judge determined that those jobs paid approximately $5.00 per hour[2] and that claimant had thus suffered a loss of wage-earning capacity of $361.61. The administrative law judge calculated this figure by taking claimant's average weekly wage at the time of his injury, $461.61, and subtracting claimant's post-injury wage earning capacity of $100 per week ($5.00 x 20 hours per week). We affirm this calculation, as it is rational and in accordance with law, *see Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988), and the administrative law judge's consequent award of
temporary partial disability compensation to claimant for the period of June 14, 1990 to March 24, 1991. *See generally Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

After careful review of the administrative law judge's decision, we additionally hold that the administrative law judge's determination that claimant is not entitled to disability compensation subsequent to March 25, 1991, is rational and supported by substantial evidence. After awarding claimant temporary partial disability compensation through March 24, 1991, the administrative law judge found that employer had established the availability of suitable alternate employment at its facility as of March 25, 1991. On March 15, 1991, employer offered claimant a light-duty position at its facility as an escort to visitors. Employer indicated that this position would be available as of March 25, 1991, that the position would be tailored to fit claimant's physical restrictions, and that claimant would be paid the same wages and benefits that he had received pre-injury.[3] EX 10; EX 14. In determining that the offered position constituted suitable alternate employment which

[2]This hourly rate is based on the wages paid for these jobs in 1988, the date of claimant's injury. *See* EX 9. *See Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988).

[3]Mr. Griffin, employer's supervisor responsible for placing claimant in a light-duty position, testified that in addition to the escort position employer had available a variety of additional light-duty positions and that primary consideration is given to an individual's medical restrictions when assigning a returning employee to light-duty work. Mr. Griffin noted that although claimant presented himself for light-duty work on March 25, 1991, he subsequently left employer's premises within a few hours and did not return. *See* EX 14.

claimant was capable of performing as of March 25, 1991, the administrative law judge specifically relied upon the opinion of Dr. Hayes, a Board-certified orthopedic surgeon who, after examining claimant on February 7, 1991, opined that claimant was capable of light selected employment, if not his usual occupation, and that claimant's subjective symptoms were disproportional to any residual objective positive physical findings. EX 7. The Board has held that a light-duty position in an employer's facility may constitute evidence of suitable alternate employment if the job is tailored to claimant's medical restrictions and the tasks performed are necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). In the instant case, the administrative law judge concluded that claimant was physically capable of performing the escort position offered by employer, at claimant's full salary plus benefits, on March 25, 1991. Thus, the administrative law judge implicitly found that, as of March 25, 1991, claimant had suffered no loss in wage-earning capacity. Inasmuch as this finding is rational and supported by the record, we affirm the administrative law judge's denial of additional compensation to claimant subsequent to March 25, 1991.

Lastly, claimant asserts that employer should be subject to an additional 20 percent "premium" since more than 10 days elapsed from the award to claimant's receipt of the funds due because the check was not sent to claimant's attorney's office address, as appropriate. Section 14(f), 33 U.S.C. §914(f), provides that compensation payable under the terms of an award must be paid within 10 days after it is due and an additional 20 percent assessment shall attach unless there is a review of the award as provided in Section 21 of the Act, 33 U.S.C. §921, and an order staying payments has been issued by the Board or by the court. *Hines v. General Dynamics Corp.*, 1 BRBS 3 (1974). Under Section 14(f), however, requests must first be directed to the district director.[4] Accordingly, we will not consider claimant's contention, since it is raised for the first time on appeal. *Quintana v. Crescent Wharf and Warehouse Co.*, 18 BRBS 254 (1986). Should claimant seek to pursue additional compensation pursuant to Section 14(f), he must first apply to the district director. *See Miller v. Central Dispatch, Inc.*, 16 BRBS 63 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

[4] Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge