BRB No. 93-0346

THOMAS BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CAROLINA SHIPPING COMPANY, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order On Remand of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Carl H. Jacobson (Uricchio, Howe, Krell, Jacobson, Toporek and Theos, P.A.), Charleston, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order On Remand (89-LHC-2919) of Administrative Law Judge Aaron Silverman 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).

This case is on appeal to the Board for the second time. To briefly recapitulate the pertinent facts, claimant sustained a crush injury to the pelvic area on November 13, 1987, while in the course

of his employment as a holdman with employer. Claimant has not returned to work. Employer voluntarily paid claimant temporary total disability compensation from the date of injury to May 9, 1988, 33 U.S.C. §908(b), and thereafter continued compensation at a reduced rate for permanent partial disability. Claimant subsequently sought permanent total disability benefits from May 10, 1988.

In his initial Decision and Order, the administrative law judge found that while claimant was unable to return to his usual longshore work, employer established the availability of suitable alternate employment as a courier. He thus awarded claimant permanent partial disability compensation from May 10, 1988.

Claimant appealed the administrative law judge's decision to the Board. *See Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). The Board vacated the administrative law judge's finding that employer established the availability of suitable alternate employment. Specifically, the Board noted that although several other job opportunities were listed in the two labor market surveys, the administrative law judge only determined that claimant could reasonably secure a driving job as a courier, and that the administrative law judge failed to consider the testimony of the vocational rehabilitation counselor, Patricia Bell, regarding the limitations imposed by claimant's use of Tylenol-3 with codeine, as well as her statement that claimant would probably not be hired for a driving job based on his use of that medication since it made him feel drowsy. The Board thus remanded the case, for the administrative law judge to reconsider the issue of suitable alternate employment, taking into account the effect of claimant's use of Tylenol-3 with codeine as well as claimant's other physical limitations. 25 BRBS at 297-298.

On remand, the administrative law judge found that, based on his review of the relevant evidence including the labor market reports and testimony of Ms. Bell, claimant had a realistic possibility to secure and perform six non-driving jobs. He found that claimant's performance in these jobs would not be affected by his use of Tylenol-3 or any other prescription medication on a periodic basis. The administrative law judge thus reinstated his award of permanent partial disability compensation to claimant.

On appeal, claimant argues that the administrative law judge applied an incorrect standard in determining that employer met its burden to demonstrate available suitable alternate employment, and that the administrative law judge failed to consider all of the limitations imposed upon claimant due to his use of Tylenol-3 with codeine. Employer responds, urging affirmance of the decision below.

Where, as in the instant case, it is uncontested that claimant is unable to return to his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Newport News Shipbuilding and Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). 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, and which he could realistically secure if he diligently tried. *Id.* The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of establishing the availability of suitable alternate employment. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Claimant initially argues that the administrative law judge, when addressing the issue of the availability of suitable alternate employment, applied the wrong standard of proof when he found that claimant had a realistic *possibility* as opposed to a realistic *likelihood* of securing and performing the jobs identified by the vocational counselor. We disagree. The administrative law judge's finding that claimant has a realistic possibility to secure and perform the jobs which he identified as constituting suitable alternate employment comports with applicable law. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT). Further, contrary to claimant's assertion, employer need not establish the availability of suitable alternate employment at the time of the hearing; rather, evidence of job openings available at any time during the critical periods when claimant is medically able to seek work is sufficient. *Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT)*; Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

Claimant next argues that the administrative law judge's finding that claimant's performance in the identified jobs would not be affected by his taking Tylenol-3 or any other prescription medication on a "periodic" basis was erroneous because the record shows that he takes Tylenol-3 on a frequent basis, and because common sense dictates that his job performance would be affected by his taking of a narcotic pain medication which makes him drowsy. Claimant further contends that the administrative law judge failed to consider whether claimant could realistically compete and secure these positions if he were to notify a prospective employer of his use of Tylenol-3. Employer, in the instant case, presented the reports and testimony of the vocational rehabilitation counselor, Ms. Bell, who identified a number of employment opportunities such as parking lot attendant, vending attendant, garage attendant, framemaker, balloonmaker, garage attendant/cashier. She found that these jobs would be appropriate for claimant considering his age, past work history, limited formal education, and physical restrictions as determined by Dr. Arnold. Employer's Exhibits 5, 7. The administrative law judge credited the testimony of Ms. Bell in concluding that employer had established the availability of suitable alternate employment.

It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, the record supports the administrative law judge's characterization of claimant's use of Tylenol-3 as "periodic." Hearing Transcript at 23-24, 80; Claimant's Exhibit C at 7; Employer's Exhibit 5. Moreover, the administrative law judge's decision to rely upon the testimony and reports of Ms. Bell is not inherently incredible or patently unreasonable.[1] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th

[1]We reject claimant's argument that the administrative law judge's implicit finding that claimant is able to perform full-time work is contrary to claimant's restrictions as determined by Dr. Arnold. Dr.

Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, as the administrative law judge's finding that claimant is capable of performing the identified jobs is supported by substantial evidence and is consistent with law, *see generally Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Southern*, 17 BRBS at 64, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment and his consequent award of permanent partial disability benefits.

Accordingly, the administrative law judge's Decision and Order On Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Arnold's testimony of record, however, fails to address the duration of claimant's ability to work; moreover, as the Board stated in its initial decision, the OWCP-5 Form referenced by employer is not in evidence and any restrictions allegedly contained therein cannot be a basis for our decision. *See Bryant*, 25 BRBS at 297 n.1. In contrast, Ms. Bell opined, based upon claimant's restrictions, that claimant was capable of working full-time. Hearing Transcript at 68, 73-74.