BRB No. 97-1429

JAMES RAPALEE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
AVONDALE INDUSTRIES,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Timothy J. Falcon and Jeremiah A. Sprague (Falcon Law Firm), Marrero, Louisiana, for claimant.

Wayne G. Zeringue, Jr. (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Reconsideration (95-LHC-2512) of Administrative Law Judge Lee J. Romero, 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). 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 worked for employer in various positions until September 25, 1991, the date claimant injured his back in the course and scope of his employment. On that date, claimant and another employee attempted to lift a half-pallet with an empty crate on it, but when claimant leaned forward to lift the pallet, he felt a "sharp pain" in his lower back. H. Tr. at 36-37. Claimant sought treatment the next day at employer's first aid office, and he was

referred to a physician. After treatment, including surgery to alleviate the "swollen discs," claimant return to work with employer in its Return to Work Rehabilitation Program. He worked as a security guard at employer's facility from March 22, 1993 to August 15, 1984, when he left work on the recommendation of his treating physician. Claimant sought permanent total disability benefits under the Act.

In his initial Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on February 26, 1993, and that claimant cannot return to his former work. Thus, the administrative law judge concluded that claimant established a *prima facie* case of total disability, and he then reviewed the evidence in order to determine whether employer established suitable alternate employment. After comparing claimant's physical capabilities and qualifications to the positions identified in two labor market surveys performed by Ms. Favaloro, a vocational rehabilitation counselor, the administrative law judge concluded that claimant has the capability of securing four of the identified positions. The administrative law judge also found that claimant did not exercise due diligence in pursuing these positions. Therefore, after averaging the pay for these positions, the administrative law judge found that claimant has a residual wage-earning capacity of $266 per week, and he awarded claimant permanent partial disability benefits as this represented a loss in wage-earning capacity.

Employer filed a motion for reconsideration before the administrative law judge, contesting the award of permanent total disability benefits for the period claimant was employed as a security guard at employer's facility from March 22, 1993 to August 15, 1994. Employer also contended that the administrative law judge improperly rejected as evidence of suitable alternate employment three positions as a service advisor in automobile dealerships presented by Ms. Favaloro at the hearing.

The administrative law judge agreed with employer's contentions and found on reconsideration that the position of security guard at employer's facility, a job which claimant actually performed, was evidence of suitable alternate employment for that period, and that claimant was not entitled to total disability benefits during this time. In addition, the administrative law judge found that as employer was not required to present information concerning job openings directly to claimant in order to establish suitable alternate employment, and as claimant was capable of performing the service advisor positions, the administrative law judge found that these positions are sufficient to establish that claimant has a residual wage-earning capacity of $25,000 per annum. As this represented a capacity to earn wages greater than those he earned prior to the injury, the administrative law judge found claimant had no residual loss in wage-earning capacity. Thus, the Decision and Order was modified to reflect an award of permanent total disability benefits from February 27, 1993 to March 21, 1993; permanent partial disability benefits from March 22, 1993 to August 15, 1994, when claimant worked as a security guard for employer; permanent total

disability benefits from August 16, 1994 to April 28, 1995; permanent partial disability benefits from April 29, 1995, the date of the labor market survey identifying suitable alternate employment, to February 29, 1996, the date the service advisor positions were identified; and no benefits thereafter because there was no further evidence of a loss in wage-earning capacity.

Claimant appeals the administrative law judge's Decision and Order on Reconsideration, contending that the administrative law judge erred in modifying the total disability award to reflect a period of permanent partial disability from March 21, 1993 to August 15, 1994, as he alleges the administrative law judge improperly used a later showing of suitable alternate employment to change claimant's disability status. In addition, employer contends that the administrative law judge erred in finding that the service advisor positions were suitable alternate employment as the precise nature and terms of the position were not introduced. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Reconsideration.

Initially, claimant contends that the administrative law judge erred in modifying the total disability award to one for partial disability from March 21, 1993 to August 15, 1994, the period of time claimant worked as a security guard at employer's facility in employer's Return to Work Rehabilitation Program. As the administrative law judge found that claimant established that he is unable to perform his usual work, the burden shifted to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering the employee a job in its facility, including a light-duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996).

In the present case, it is uncontested that claimant worked as a security guard for employer during the contested period, and claimant does not allege that the job was outside his restrictions during that time or was sheltered employment. Moreover, contrary to claimant's contentions, while employer is not prevented from retroactively establishing the availability of suitable alternate employment, *Stevens v. Director,* OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied,* 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991)(decision on reconsideration), in the instant case employer does not rely on a later showing of available alternate employment, but on evidence that claimant was actually employed. Therefore, we reject claimant's contention and affirm the administrative law judge's award of permanent partial disability benefits from March 22, 1993 to August 15, 1994. *See Darby*, 99 F.3d at 689, 30 BRBS at 94 (CRT).

We also reject claimant's contention that he is entitled to permanent total disability

benefits after April 29, 1995. The administrative law judge reviewed the labor market surveys performed by Ms. Favaloro and found that four of the positions identified were realistic job opportunities for claimant, namely the parking lot cashier position at the airport, a customer safety officer position with Harrah's, a security officer position with Harrah's, and a security guard position with Hilton Hotel. Claimant does not contest these findings on appeal. Thus, claimant's residual wage-earning capacity after April 29, 1995, would be at least $266 per week, the average of the salaries for these four positions, and we reject claimant's contention that he is entitled to permanent total disability benefits. *See generally Avondale Industries, Inc. v. Pulliam,* 137 F.3d 376, 32 BRBS 65 (CRT)(5th Cir. 1998)

The administrative law judge also found that the positions as service advisor at three automobile dealerships conform to claimant's physical capabilities and that claimant is qualified for these positions. Thus, in his Decision and Order on Reconsideration, the administrative law judge found these positions also establish suitable alternate employment as of February 29, 1996, with a salary of $25,000 per annum. In the instant case, Ms. Favaloro, the vocational counselor, testified that, based on her experience with positions of this nature, the physical requirements of the jobs include alternately sitting and standing in the work area, walking around the area with paperwork, and occasionally lifting the hood of a car. H. Tr. at 317-319. She also testified that claimant would work during the daytime hours, when the service bay was open. H. Tr. at 349. After reviewing the positions' minimal physical requirements, and given claimant's background in mechanics, the administrative law judge found that claimant was qualified for the positions. Contrary to claimant's contention, Ms. Favaloro's testimony was sufficiently specific to allow the administrative law judge to conclude that the positions are consistent with claimant's residual restrictions. *See* Emp. Ex. 11; *see generally Fox v. West State Inc.*, 31 BRBS 118 (1997). As the administrative law judge considered all of the evidence regarding the positions, and as claimant has raised no reversible error on appeal, we affirm the administrative law judge's finding that the service advisor positions establish suitable alternate employment as of February 29, 1996, with a salary of $25,000, and thus that claimant has no residual loss in wage-earning capacity after that date. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Sketoe v. Dolphin Titan Int'l,* 28 BRBS 212 (1994)(Smith, J., dissenting on other grounds); *Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990).

Accordingly, the Decision and Order on 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