BRB No. 03-0639

CLINTON E. COLLAMORE, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: JUN 14, 2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.), Topsham, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2001-LHC-02281, 2002-LHC-00891, 2002-LHC-00892) of Administrative Law Judge Daniel F. Sutton 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 sustained injuries to his left knee on May 30, 1996, his right foot on September 5, 1998, and both knees on October 21, 1999, during the course of his employment for employer as an outside machinist. Employer voluntarily paid claimant temporary total disability benefits for various periods of time between October 21, 1999, and August 20, 2000, permanent partial disability benefits from August 21, 2000 to September 18, 2000, and permanent partial disability benefits thereafter for a two percent

impairment to each of his knees. Employer procured labor market surveys in November 2000 and February 2002 in order to identify the availability of suitable alternate employment that claimant was capable of performing. Claimant sought and thereafter received vocational assistance from the Department of Labor and the State of Maine; specifically, in July 2001 the State of Maine approved claimant's enrollment in a public administration program with the University of Maine at Augusta.

In his Decision and Order, the administrative law judge, *inter alia*, found that claimant had reached maximum medical improvement as of September 8, 2000, that employer established the availability of suitable alternate employment that claimant was capable of performing as of that date, and that claimant failed to show that he was unable to secure such employment while participating in a vocational rehabilitation program. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from October 21, 1999 through September 7, 2000, and permanent partial disability compensation thereafter for a five percent impairment to each of claimant's knees. 33 U.S.C. §908(b), (c)(2).

On appeal, claimant contends that the administrative law judge erred in determining that employer established the availability of suitable alternate employment as of September 8, 2000. Additionally, claimant avers that, contrary to the administrative law judge's finding, the record contains evidence documenting claimant's inability to work during his participation in a vocational rehabilitation program. Employer responds, urging affirmance.

Claimant initially challenges the administrative law judge's determination that employer established the availability of suitable alternate employment as of September 8, 2000; claimant concedes that suitable alternate employment was established by employer as of October 23, 2000. Where, as in the instant case, it is undisputed that claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability. The burden then shifts to the employer to establish that suitable alternate employment is readily available in the employee's community for individuals with the same age, experience, and education as the employee. The United States Court of Appeals for the First Circuit, within whose jurisdiction the present case arises, has stated that employer meets its burden in this regard by proving that '"there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job."' *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT)(1st Cir. 1991), quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Where, however, an injured employee's medical impairment affects only a specialized skill that is necessary in the claimant's former employment, the First Circuit has held that the employee's resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him; in such a situation, the court stated that it would not put the burden of proof on an employer to establish specific employment opportunities when it

is obvious that that there are available jobs for claimant. *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979). The court added, however, that such a standard is inapplicable where the claimant's medical impairment and job qualifications are such that his suitable job prospects would be expected to be very limited, if existent at all, and that it did not mean to suggest that in many, perhaps all, cases it is not proper to place a substantial burden to show alternative employment opportunities upon an employer. *Id,* 597 F.2d at 779-781 10 BRBS at 513-515; *Dixon v. John J. McMullen & Associates, Inc.,* 19 BRBS 243 (1986).

In the instant case, all parties agree that employer established the availability of specific, suitable alternative employment opportunities within claimant's limitations as of October 23, 2000. *See* Clt's br. at 21; Decision and Order at 15. In his Decision and Order, however, the administrative law judge, although acknowledging that employer did not establish that the specific jobs identified in its vocational counselor's November 2000 labor market survey were in fact open and available on September 8, 2000, the date on which claimant reached maximum medical improvement, found that suitable alternate employment had been established retroactively as of the earlier date.[1] In rendering this finding, the administrative law judge stated that the low unemployment rate in claimant's geographic area and the large number of specific employment opportunities identified by employer between October 23, 2000 and November 30, 2000, constituted substantial evidence in support of a finding that suitable alternate employment was available to claimant as of September 8, 2000. Lastly, the administrative law judge found that as claimant's disability does not foreclose all employment, requiring employer to establish specific employment openings on September 8, 2000, would amount to the enforcement of a mechanical rule which would be contrary to the First Circuit's decision in *Air America.* Decision and Order at 15-16.

We cannot affirm the administrative law judge's conclusion. Initially, the use of economic statistics is insufficient to establish that suitable alternate employment opportunities were actually available on a definitive date, in this case September 8, 2000. *See Price v. Dravo Corp.,* 20 BRBS 94 (1987). Moreover, the instant case is distinguishable from the situation presented in *Air America.* In *Air America,* 597 F.2d 773, 10 BRBS 505, claimant's disability rendered him incapable of performing his former employment duties as an airline pilot. Claimant possessed, however, a college education, extensive work experience, and administrative, supervisory, and technical skills which the court noted would appear to lend themselves well to a variety of jobs. Based upon these facts, the court observed that if "medical impairment affects only a

[1] In rendering this finding, the administrative law judge acknowledged that a later showing of suitable alternate employment cannot be retroactively applied to the date of which claimant reached maximum medical improvement unless such a showing is supported by substantial evidence. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Rinaldi v. General Dynamics Corp.,* 25 BRBS 128 (1991)(decision on reconsideration).

specialized skill that is necessary in [the claimant's] former employment, his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him." *See Air America*, 597 F.2d at 779, 10 BRBS at 513. In contrast to the employee in *Air America*, claimant this case obtained a GED after leaving high school, initially worked on a farm, in a boat shop and in a sardine cannery prior to his being hired by employer as an outside machinist in 1982. Thus, the record developed in the instant case does not demonstrate that claimant possessed a specialized skill that is affected by the impairment that he has sustained to his lower extremities. As *Air America* is distinguishable on the facts of this case, the administrative law judge's reliance on that case to retroactively find that suitable alternate employment existed prior to the demonstration by employer that such employment was actually available cannot be affirmed. Accordingly, we vacate the administrative law judge's determination that employer established the availability of suitable alternate employment as of September 8, 2000, and modify his decision to reflect that employer established the availability of suitable alternate employment on October 23, 2000, the date on which both parties agree that employer first established the actual availability of employment opportunities for claimant. *See* Emp. Ex. 36. Claimant is accordingly is entitled to permanent total disability benefits during the period of September 8, 2000, to October 23, 2000. *See* 33 U.S.C. §908(a).

Despite employer's showing of suitable alternate jobs, claimant may be entitled to total disability benefits if he establishes that these jobs were not reasonably available due to his participation in a DOL-approved rehabilitation program. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse],* 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Castro v. General Constr. Co.,* 37 BRBS 65 (2003). In *Abbott*, the Board and the Fifth Circuit held that despite employer's showing of suitable alternate employment which the claimant was physically capable of performing, the administrative law judge's award of total disability was appropriate on the facts presented. In so concluding, both bodies noted that in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), the Fifth Circuit recognized that the degree of a claimant's disability is not assessed solely on the basis of his or her physical condition; it is also based on factors such as age, education, employment history, *rehabilitative potential* and the *availability of work* that claimant can perform. *Abbott*, 27 BRBS at 204; 40 F.3d at 127, 29 BRBS at 26 (CRT)(emphasis added). Moreover, noting that pursuant to *Turner*, 661 F.2d at 1038, 14 BRBS at 164, an individual may be totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that kind of work," the Fifth Circuit agreed with the Board that the administrative law judge's award of total disability benefits to Abbott was appropriate because the jobs identified by employer were unavailable and could not reasonably be secured while he was enrolled full-time in the DOL-sponsored rehabilitation program. *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26(CRT). The Fifth Circuit also recognized that awarding total disability compensation to Abbott served the

Act's goal of promoting the rehabilitation of injured workers. *Id.*, 40 F.3d at 127, 29 BRBS at 26-27(CRT); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 1260, 23 BRBS 89, 95(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The court stated that courts should not frustrate the DOL's rehabilitative efforts when they are reasonable and result in lower total compensation liability for the employer and its insurer in the long run. *Id.*, 40 F.3d at 128, 29 BRBS at 26(CRT).

In *Brickhouse*, 315 F.3d 286, 36 BRBS 85(CRT), the Fourth Circuit discussed *Abbott* and similarly determined that, in assessing whether a claimant has established that suitable alternate employment is reasonably unavailable due to his participation in an approved rehabilitation program, an administrative law judge should not base his decision on any single factor but should, rather, consider a wide range of relevant factors in determining a claimant's entitlement to total disability benefits during rehabilitation. The court subsequently held that the employee established that suitable alternate employment was not available to him while he was enrolled in a retraining program which required him to be a full-time student, to attend classes regularly, to maintain a 2.0 grade point average, and timely complete the program. *Id.*, 315 F.3d at 293-296, 36 BRBS 91-92(CRT).

Claimant, however, bears the burden of proving that he is unable to perform suitable alternate employment due to his participation in a vocational training program. *See Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000). Claimant can meet this burden by establishing, *inter alia*, that the time needed for his commuting, classes, and homework/hands-on training effectively prohibits outside employment. *See Castro*, 37 BRBS 65; *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

In the present case, claimant correctly asserts that the administrative law judge did not consider relevant evidence contained in the record when he determined that "there is no evidence that the Claimant's rehabilitation plan prohibits him from working." Decision and Order at 18. Contrary to this statement, the record contains both the rehabilitation plan developed for claimant by the State of Maine and approved in July 2001, as well as claimant's testimony regarding his participation in that plan. The rehabilitation plan indicates, *inter alia*, that claimant is required to attend all scheduled classes, maintain at least a 2.0 grade point average, and provide a copy of his grades as well as his class schedule prior to the start of each semester to his counselor, with the ultimate goal of claimant obtaining employment in the field of public administration. *See* Clt's Ex. 12. As regards his participation in this vocational rehabilitation plan, claimant testified that he attends classes at the University of Maine at Augusta four days a week, that he commutes approximately 35 miles to class,[2] that his classes are three hours in

[2] Employer objects to data regarding mileage from *Mapquest*, www.mapquest.com, submitted with claimant's brief. Contrary to employer's statement, claimant did testify regarding his commuting time. Thus, the attachment has not been considered.

length, that he spends six or seven hours preparing his homework, and that he presently has a B average.[3] *See* Tr. at 109-112. Thus, the record contains testimonial and documentary evidence addressing claimant's ability to both participate in his vocational retraining program and obtain suitable alternate employment post-injury. Although the administrative law judge found that there was "no evidence that [claimant] has been less than fully diligent in pursuing his studies and completing the program" and that the "rehabilitation records indicate that the Claimant had been a successful and cooperative student," *see* Decision and Order at 18, he did not consider claimant's testimony and evidence which supported his contention below that the time spent by claimant attending classes, commuting and preparing his homework effectively prohibited outside employment.[4] *See* Clt's post-hearing br. at 7-8. Accordingly, we vacate the administrative law judge's decision regarding the extent of claimant's disability subsequent to October 23, 2001, *see generally Anderson v. Lockheed Shipbuilding & Constr. Co.*, 28 BRBS 290 (1994), and we remand the case for the administrative law judge to fully consider claimant's evidence regarding his alleged inability to work during his participation in his vocational retraining program.[5] *See Castro*, 37 BRBS 65; *Brown*, 34 BRBS 195; *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998).

Accordingly, the administrative law judge's Decision and Order is modified to reflect that employer established the availability of suitable alternate employment as of October 23, 2000, and that claimant is entitled to permanent total disability compensation from the date of maximum medical improvement, September 8, 2000, to October 23,

---

[3] Claimant testified that he commenced classes in January 2001 under a DOL program, from which he was subsequently dropped. Tr. at 108-109. DOL was unable to continue his program because claimant was not receiving benefits at that time. Clt. Ex. 13 at 390. Claimant nonetheless continued with night classes. In July 2001, the State of Maine Department of Vocational Services approved claimant's vocational rehabilitation plan, Clt. Ex. 12; although claimant thereafter commenced a full program, he subsequently dropped an Algebra class; claimant stated, however, that he retook that class during the following semester. *See* Tr. at 112, 121.

[4] In addressing this issue, the administrative law judge stated that claimant relied "on the erroneous position that his participation in vocational rehabilitation perforce establishes that suitable alternate employment is unavailable." Decision and Order at 18. Contrary to this finding, a review of claimant's post-hearing brief and the evidence cited indicates that claimant relied upon the circumstances resulting from his participation in vocational rehabilitation to support his assertion that suitable alternate employment is not realistically available to him.

[5] Regarding this issue, the administrative law judge must, on remand, address the periods of time during which claimant in fact participated in the vocational rehabilitation plan devised for him. *See* footnote 2.

2000. The administrative law judge's award of permanent partial disability benefits subsequent to October 23, 2000, is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge