

J.S.)
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 Claimant-Respondent)
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 v.)
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 TECNICO CORPORATION)
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 and)
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 SIGNAL MUTUAL INDEMNITY)
 ASSOCIATION, LIMITED)
)
 Employer/Carrier-)
 Petitioners)

DATE ISSUED: 06/24/2009

DECISION and ORDER

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

Douglas L. Brown (Brady Radcliff & Brown LLP), Mobile, Alabama, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (2007-LHC-586) 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, while working for employer as a shipfitter/pipefitter on June 24, 2003, received an electrical shock while welding. As a result of this incident, claimant received second degree burns to the left side of his neck, for which he underwent plastic surgery. Claimant subsequently experienced dizziness, tremors, emotional outbursts, depression, and fainting spells, as well as pain in his neck, right arm, left leg and back. Claimant has

been prescribed multiple medications, including some for memory loss and temper issues, and he has additionally undergone extensive oral surgery. Employer voluntarily paid claimant total disability compensation from June 26, 2003, through September 7, 2005, based on an average weekly wage of \$595.53.

In his Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on June 12, 2006. Next, the administrative law judge determined that claimant was incapable of returning to his usual employment duties with employer, and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from June 24, 2003, through June 11, 2006, and permanent total disability benefits from June 12, 2006, and continuing. 33 U.S.C. §908(a), (b). The administrative law judge also held employer liable for the medical expenses incurred by claimant as a result of his June 24, 2003, work-injury. In his Order Denying Motion for Reconsideration, the administrative law judge compared claimant's medical restrictions with the job descriptions of four specific employment opportunities identified by employer and again concluded that employer's evidence was insufficient to establish the availability of suitable alternate employment.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Claimant has not responded to employer's appeal.

Employer challenges the administrative law judge's award of ongoing permanent total disability benefits to claimant. Specifically, employer asserts that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. 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 New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Where, as in the instant case, claimant has established a *prima facie* case of total disability by demonstrating his inability to perform his usual employment duties with employer, the burden shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *Id.* In order to met this burden, employer must establish the availability of realistic job opportunities within the geographic area in which claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Turner*, 661 F.2d at 1042; 14 BRBS at 164-165; *Wilson v. Crowley Mar.*, 30 BRBS 199 (1996). As the fact-finder, the administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

Employer submitted into evidence vocational evidence which it alleges establishes the availability of suitable alternate employment that claimant could perform; specifically, employer's vocational rehabilitation expert, Ms. Dorsey, identified cashier positions with Home Depot, Lowes and Wal-Mart, and an assistant department manager/paint department job with Home Depot, which she deemed suitable for claimant. These positions were approved by Dr. Schnitzer. EX 15 at 14, 18 - 20.

In addressing the issue of the extent of claimant's disability, the administrative law judge relied upon the functional capacity evaluation performed on December 2, 2004, the neuropsychological evaluation of claimant performed by Dr. Novack, and claimant's testimony in determining claimant's restrictions. In this regard, the functional capacity evaluation restricted, *inter alia*, claimant's lifting from waist to overhead to 15 pounds, while Dr. Novack stated that claimant's motor deficits were substantial and would have a significant impact on his functioning. EXs 10, 16. Claimant testified that he has never operated a cash register, and that his family, two weeks before the formal hearing, unsuccessfully attempted to have him involuntarily admitted to a mental health care facility.¹ Tr. at 81 - 82, 113 - 114. Pursuant to these restrictions and claimant's testimony, the administrative law judge found that the four employment opportunities identified by Ms. Dorsey were unsuitable for claimant. Specifically, the administrative law judge found that the position of assistant department manager with Home Depot, which required assisting with items weighing in excess of 30 pounds, was not appropriate for claimant based upon claimant's 15 pound waist to overhead lifting restriction, and that this position as well as the three identified cashier positions were unsuitable for claimant due to claimant's motor skills deficits. The administrative law judge further found these four positions to be unsuitable based on claimant's significant mental health issues, of which Ms. Dorsey was unaware, and claimant's credible testimony regarding his lack of experience for those positions. Order Denying Motion for Reconsideration at 5 - 6.

In challenging the administrative law judge's determination that it did not establish the availability of suitable alternate employment, employer contends that the preponderance of the evidence supports a conclusion that claimant is capable of performing the assistant department manager and cashier positions identified by its vocational expert. Summarizing evidence favorable to its position, employer asserts that substantial evidence does not support the administrative law judge's finding that claimant is incapable of performing its identified suitable alternate employment, and it has thus met its burden of proof on this issue. Employer's Br. at 14 - 17. We reject employer's

¹ Claimant's post-injury mental health issues include depression and behavioral outbursts. EX 13 at 45. Regarding his family's attempt to have him involuntarily committed, claimant testified that the local probate court recommended him to a health care facility, and that after spending one week in such a facility he was given a hearing and released for follow-up treatment "or they're liable to put me back in there." Tr. at 113 - 114.

contentions of error. The administrative law judge, as the trier-of-fact, is entitled to weigh the evidence and to draw his own inferences from it. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Moreover, “substantial evidence” has been defined as “more than a modicum but less than a preponderance,” *Ortco Contractors, inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003), and we must affirm the administrative law judge’s decision if it is supported by substantial evidence. *O’Keeffe*, 380 U.S. 359.

In this case, employer has failed to demonstrate error in the administrative law judge’s weighing of the evidence.² Employer acknowledges that claimant’s functional capacities evaluation limited his overhead lifting to 15 pounds and that Dr. Roca approved lifting of up to 25 pounds, but it contends that the assistant department manager position is suitable for claimant, despite the requirement that the employer provide assistance with items weighing in excess of 30 pounds, asserting that claimant is “most likely able to provide such assistance.” Employer’s Br. at 16. As the administrative law judge rationally found this requirement was beyond the credited restrictions, we reject employer’s contention and affirm the administrative law judge’s finding that the assistant department manager position with Home Depot is not suitable. The administrative law judge also rationally concluded that the cashier positions with Home Depot, Lowes and Wal-Mart are unsuitable for claimant. In this regard, the administrative law judge’s finding is supported by Dr. Novack’s opinion that claimant suffers from mild memory difficulties and significant motor deficit problems. Thus, the administrative law judge did not err in concluding that claimant could not reasonably perform the required “handling and/or fingering” required of a cashier and that these difficulties would also impede his ability to perform the assistant department manager job. Lastly, the administrative law judge could properly conclude that the identified positions were beyond claimant’s capabilities based on his significant mental health issues as this finding is supported by claimant’s testimony, which the administrative law judge found

² The mere summary of evidence favorable to its position does not demonstrate error in the administrative law judge’s findings. In this regard, employer’s reliance on *Director, OWCP v. Bethlehem Steel Corp. [Roberson]*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980), is misplaced. In *Roberson*, the Fifth Circuit affirmed a Board decision reversing an administrative law judge’s disability finding which was based on the opinion of one physician who found claimant disabled rather than the three doctors who opined claimant could return to work. The decision was not based on three doctors’ opinions supporting a finding of no disability but, rather, on the fact that the opinion supporting the award was not substantial evidence because the doctor relied on claimant’s subjective complaints, whereas the administrative law judge expressed doubts about claimant’s credibility, and the doctor did not state an opinion regarding the injury and any subsequent impairments with any degree of medical certainty. Employer in the present case has not asserted similar deficiencies in the credited evidence.

was credible. Accordingly, as the administrative law judge explicitly considered each of the employment positions identified by employer and his findings that claimant is incapable of performing any of these jobs are supported by substantial evidence, the conclusion that employer failed to meet its burden of demonstrating the availability of suitable alternate employment and the consequent award of total disability benefits to claimant is affirmed. *See Wilson*, 30 BRBS 199; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge