BRB No. 10-0547

ALVIN MINOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 06/20/2011
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2009-LHC-0370) of Administrative Law Judge Kenneth A. Krantz 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed by employer from 1979 to 2004 as an outside machinist. He sustained work-related injuries on October 2, 2003 to his neck, right elbow, right hip and back. JX 1; Tr. at 10-11. On January 12, 2004, claimant underwent an anterior cervical discectomy and fusion for right arm pain and a herniated disc as a result of his October 2003 work injury. EX 1 at b; Decision and Order at 4. Because claimant had

continuing pain, he began treating with Dr. Skidmore. EX 1 at d, f, h. On July 22, 2004, Dr. Skidmore released claimant to return to work based on his neck condition but imposed work restrictions due to claimant's low back pain. Thereafter, claimant briefly returned to work for employer in a light-duty position in August 2004 and October 2004, but was unable to continue due to pain. EX 1 at h-k; Tr. at 11-12. Employer had no additional light-duty work for claimant within his physical restrictions and referred claimant to a vocational rehabilitation counselor. As a result of the vocational counselor's assistance, claimant worked as a security guard at a bus station for approximately four weeks in January 2005. Tr. at 12. On July 21, 2005, after claimant's back continued to worsen despite conservative measures, and claimant declined surgery, Dr. Skidmore imposed permanent work restrictions based on a functional capacity evaluation (FCE).[1] Decision and Order at 6; CX 2; EX 1 at s. On December 13, 2005, when claimant's neck and back pain continued to worsen, Dr. Skidmore referred claimant to Dr. Winfield, a pain management specialist. EX 1 at t. Employer voluntarily paid claimant temporary total disability benefits from October 10, 2003 until January 7, 2005, excluding the brief periods he performed light-duty work at its facility. EX 6. Beginning in January 2005, because claimant was working as a security guard, employer reduced claimant's benefits to partial disability payments. EX 6. As the job was short-lived and claimant felt he was unable to work due to continuing pain, he filed a claim for additional benefits.[2]

The administrative law judge accepted employer's concession that claimant cannot return to his usual employment due to his injury. Decision and Order at 15. He found that claimant's condition reached maximum medical improvement on July 21, 2005, the day Dr. Skidmore assigned permanent work restrictions, and that employer presented insufficient evidence to establish the availability of suitable alternate employment. Decision and Order at 14, 16-19; EX 1 at r-s. Moreover, the administrative law judge determined that claimant's disability began on October 7, 2003, the date on which he first lost wages as a result of his October 2, 2003, work injury. Accordingly, the

[1]The FCE identified permanent restrictions applying to claimant's neck and back. Claimant is limited to carrying 30 pounds for a maximum of 100 feet, he is permitted to climb vertical ladders, inclined ladders, and stairs, but only to and from the job, and he may not operate vibratory tools. Claimant may crawl, work above his shoulders, and twist for limited periods. Claimant has no restrictions regarding kneeling, squatting, bending, standing, pushing, pulling, grasping, or operating foot controls. Decision and Order at 6; CX 2.

[2]Claimant returned to Dr. Skidmore in October 2007. An MRI revealed a worsening of claimant's lumbar condition, and Dr. Skidmore suggested surgery as a possibility. EX 1 at u-x. As of the date of the hearing, claimant opted to continue conservative treatment. *Id.* at o.

administrative law judge awarded claimant temporary total disability benefits from October 7, 2003, through January 7, 2005, temporary partial disability benefits from January 8 through 24, 2005, temporary total disability benefits from January 25 through July 20, 2005, and continuing permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b), (e); Decision and Order at 23.

On appeal, employer contends the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment and in failing to address claimant's lack of diligence in seeking a job. Employer contends the administrative law judge erred in awarding claimant temporary total disability benefits while he was working in an employer-provided light-duty position as well as in awarding ongoing permanent total disability benefits beginning July 21, 2005. Claimant responds, urging affirmance of the administrative law judge's decision.

Where, as here, the claimant has established an inability to perform his usual employment duties with his employer as a result of his work injury, the burden shifts to the 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). In order to meet its burden, the employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant by virtue of his age, education, work experience, physical capacity, and restrictions, is capable of performing. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *See v. Washington v. Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Chappell]*, 592 F.2d 762, 10 BRBS 81 (4th Cir. 1979). The employer may rely on a retrospective labor market survey if the jobs identified were available during the "critical period" when the claimant was able to work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). A claimant's entitlement to total disability benefits ends as of the date suitable alternate employment is shown to be available. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

Employer submitted the fact that claimant worked in a light-duty job it provided in July-August and October 2004, a security guard position claimant performed between January 8 and January 24, 2005, and a labor market survey prepared by its expert, Mr. Kay, identifying 12 jobs, as evidence of claimant's ability to work following his injury. Employer asserts that the administrative law judge erred in rejecting this evidence and in

not giving Mr. Kay's report determinative weight.[3] EX 2 at c-j. Employer contends that these jobs were available and within claimant's physical restrictions, and that, additionally, the jobs identified by Mr. Kay were approved by Drs. Skidmore and Winfield. We reject employer's assertions of error.

With regard to the light-duty position at employer's facility, the administrative law judge found that employer did not submit any evidence regarding the duties of that job such that he was unable to assess its suitability. Further, the administrative law judge credited claimant's testimony that he was unable to perform the job because it was causing debilitating low back pain and, as a result, he had to take personal time off work. Decision and Order at 5, 18-19. Accordingly, the administrative law judge rationally found that claimant performed this job "in spite of intense pain and through extraordinary effort." *Id.* at 19. Where a claimant demonstrates he was working solely due to the beneficence of employer *or* due to extraordinary effort and in spite of excruciating pain, an award of total disability benefits while the claimant is working is not precluded. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F. 2d 447, 7 BRBS 838 (4th Cir. 1978); *Reposky v. Int'l Transp. Services,* 40 BRBS 65 (2006). We affirm the administrative law judge's finding that the mere existence of this light-duty position, without more information, does not constitute evidence of available suitable alternate employment as the administrative law judge could not assess its suitability. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149 (2003). Moreover, we affirm the award of temporary total disability benefits during claimant's period of light-duty work. It was within the administrative law judge's discretion to credit claimant's complaints of debilitating pain. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Substantial evidence therefore supports the award of total disability benefits during this period. *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980).

Similarly, we reject employer's assertion that the security job position claimant secured for a short period constitutes evidence of claimant's continuing ability to perform post-injury work. Claimant's job as a security guard in a bus station in January 2005 required him to begin his shift while the bus station was open. During his shift, he would spend significant time walking and standing, and at the end of his shift when he closed the station, he was required to bend down to lock the doors and to complete reports. Tr. at 12-14, 24-26; Decision and Order at 4. Claimant testified that he was having problems

[3]The labor market surveys prepared by Mr. Kay, dated February 28, 2008, and July 31, 2008, were to determine claimant's employability from July 21, 2005 to February 29, 2008 and continuing. EX 2 at c.

performing both the physical and paperwork requirements. Tr. at 12, 14-15; Decision and Order at 4. The administrative law judge found that the physical requirements of the job were within the restrictions given by the doctors; however, he rationally credited claimant's testimony that he had problems performing the duties. Decision and Order at 18-19. Additionally, the administrative law judge found that the reporting requirements of the security guard job exceeded claimant's reading and math abilities as assessed by Ms. Byers, claimant's certified rehabilitation counselor, and, consequently, employer did not establish that claimant could perform this job on a regular, continuing basis. Decision and Order at 19. We affirm the administrative law judge's finding as it is supported by substantial evidence.[4] *See Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *Lentz*, 852 F.2d at 131, 21 BRBS at 112(CRT). Moreover, notwithstanding medical evidence that claimant is capable of some employment, the administrative law judge, as finder-of-fact, rationally credited testimony that claimant is unable to perform the alternate work, based on his subjective complaints of pain. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991).

Finally, we affirm the administrative law judge's finding that the 12 jobs identified by Mr. Kay do not constitute suitable alternate employment. Mr. Kay based his analysis on claimant's medical records, claimant's application for employment with employer, and several job classification publications. Decision and Order at 7; EX 2 at c. Mr. Kay identified positions such as cashier, customer service associate, greeter, and security guard as suitable for claimant. However, the administrative law judge found Mr. Kay's report is based on an inaccurate assessment of claimant's limitations. Decision and Order at 17. Specifically, the administrative law judge found, based on claimant's credible testimony, that claimant does not have a high school diploma and has a significant deficiency of skills in reading and math, based on Ms. Byers's testing. The administrative law judge found Ms. Byers's assessment of claimant's mental acuity based on testing and interviewing claimant more probative than Mr. Kay's assumptions based on a 25-year-old application for employment and past work experience.[5] As he found

[4]Ms. Byers assessed claimant's post-injury marketable skills and found him greatly disadvantaged. She reported that claimant had attended 12 years of special education classes but never received a diploma and that he failed to complete a reading class offered by employer. She also performed testing which revealed a reading level at the 0.3 percentile and a math computation score at the seventh percentile – both of which are significantly below average. Ms. Byers concluded that claimant is functionally illiterate and would not succeed in any vocational endeavor requiring reading or math skills. CX 1.

[5]We reject employer's argument that claimant had sufficient reading and math skills based on his job as a machinist and welder. The administrative law judge

Mr. Kay overestimated claimant's reading and mathematical abilities, the administrative law judge determined that Mr. Kay did not properly consider those skills in conducting his labor market survey. Although the administrative law judge found that the majority of the identified jobs are within claimant's physical restrictions, he concluded they were not suitable because Mr. Kay did not account for claimant's lack of reading and math skills. Decision and Order at 17-18. Therefore, the administrative law judge determined that claimant could not realistically secure and perform any of the identified jobs. *Id.* at 18.

The physical ability to perform a job is not the exclusive determinant as to whether the job is suitable; an administrative law judge must also consider whether the claimant has the vocational skills to successfully obtain and work in a potential job. *Ceres Marines Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999). In this case, the administrative law judge rationally credited Ms. Byers's opinion and determined that claimant does not have the reading or math skills necessary to successfully perform the jobs identified by employer's expert. We affirm this finding as it is rational and supported by substantial evidence. Therefore, we affirm the award of total disability benefits as employer failed to establish the availability of suitable alternate employment. *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

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acknowledged claimant's testimony that he received on-the-job training and became proficient via hands-on repetition of his work. Decision and Order at 3; Tr. at 22-24.

Accordingly, the administrative law judge's Decision and Order is affirmed.[6]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6]Because we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, we need not address employer's contention that the administrative law judge erred in failing to address whether claimant diligently sought work after his 2003 work injuries. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). We also need not address employer's argument concerning claimant's post-injury wage-earning capacity.