BRB No. 04-0666

JAMES T. SULLIVAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAYTHEON ENGINEERS AND CONSTRUCTORS, INCORPORATED	)	DATE ISSUED:Mar 30, 2005
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Craig A. Alexander (Adams & Reese/Large Simpson, L.L.P.), Birmingham, Alabama, for claimant.

Kurt A. Gronau (Law Offices of Kurt A. Gronau), Glenwood Springs, Colorado, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2000-LHC-2535) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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, a hazardous waste coordinator on Johnston Atoll, suffered an injury to his back at work on November 12, 1995, which was not diagnosed until he sought medical treatment in the United States for an unrelated leg condition. Upon his return to the atoll in February 1996, claimant was restricted to modified duty based upon restrictions assigned as a result of his back problems. In September 1996, claimant resigned from his position because of his perceived inability to perform his job and because it was "time to go." Subsequently claimant obtained a sedentary position as a control room operator in Alabama. Claimant sought permanent partial disability benefits under the Act for a loss in wage-earning capacity.

In his Decision and Order – Awarding Benefits and Denying Section 8(f) Relief, dated March 21, 2001, Administrative Law Judge Robert J. Lesnick awarded claimant permanent partial disability benefits and denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer appealed to the Board.

On appeal, the Board held that any error the administrative law judge may have committed in failing to address the issues of whether claimant is capable of performing his usual work for employer and whether employer established the availability of suitable alternate employment within its own facility is harmless in light of the uncontradicted medical and lay evidence establishing that employer did not have any jobs suitable for claimant. Thus, the Board affirmed the award of permanent partial disability benefits. The Board also affirmed the administrative law judge's denial of relief under Section 8(f). *Sullivan v. Raytheon Engineers*, BRB No. 01-0643 (April 25, 2002) (unpublished).

Employer appealed the Board's decision to the United States District Court for the Middle District of Florida. The District Court held that the administrative law judge's failure to consider whether claimant can perform his usual work and whether employer established suitable alternate employment at its facility was not "harmless error," and remanded the case for the administrative law judge to consider these issues in the first instance. In all other respects, the Board's Decision and Order was affirmed. *Raytheon Engineers & Constructors, Inc. v. Sullivan*, No. 302597 (M.D. Fla. May 22, 2003).

On remand, the case was assigned to Administrative Law Judge Clement J. Kennington. In his Decision and Order on Remand, the administrative law judge found that claimant cannot perform his usual work and that employer failed to establish the availability of suitable alternate employment within its own facility. He awarded claimant permanent partial disability compensation for a loss in wage-earning capacity. 33 U.S.C. §908(c)(21).

Employer appeals, arguing that the administrative law judge erred in finding that claimant established a *prima facie* case of total disability and that employer failed to

establish suitable alternate employment at its facility.[1] Claimant responds, urging affirmance.

A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to his work-related injury. *See Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). If claimant succeeds in establishing that he is unable to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Employer may meet this burden by offering claimant a suitable light duty position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

The administrative law judge found that claimant could not perform his usual pre-injury job and therefore established his *prima facie* case of total disability. The administrative law judge assessed claimant's physical restrictions and compared them to the requirements of his usual job, relying on both the medical evidence and testimony of claimant and his co-workers. Decision and Order at 2-3. Claimant's usual job required him to work in a team to dispose of processed and non-processed hazardous and non-hazardous wastes, which involved shuffling drums weighing between 100 to 700 pounds and transporting decontaminated materials on forklifts. Tr. at 26, 30, 100. When claimant returned to work on the atoll, he had restrictions on his lifting, turning, bending, standing for long periods of time, and climbing stairs. EX 7. Claimant testified that these restrictions prevented him from riding forklifts, lifting containers, moving drums, and crawling inside the containers, all requirements of his usual job. Tr. at 40-41, 50, 90-92, 100. Claimant's co-worker, Howard Carmack, testified that claimant's back injury affected claimant's job performance. Tr. at 103-110. The administrative law judge found this testimony corroborated by the physicians who treated claimant after he left the atoll. Dr. Savage, who diagnosed claimant as suffering degenerative disk changes and herniation, restricted claimant to medium-duty work. EX 4. Dr. Hrynkiw, who also treated claimant for his back condition, restricted claimant to light-sedentary activities based on his finding that mechanical activities of the spine worsened claimant's condition. EX 5.

[1]Employer also argues that the administrative law judge erred in not considering temporary total disability as an issue. Er's br. at 11. The District Court stated that neither the administrative law judge nor the Board erred in not considering this issue, as claimant did not make a claim for temporary total disability benefits. *Raytheon Engineers*, slip op. at 9.

We affirm the administrative law judge's finding that claimant established his *prima facie* case of total disability as it is rational and supported by substantial evidence. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). The administrative law judge rationally relied on the lay testimony concerning the requirements of claimant's usual work and his inability to perform some of that work, in conjunction with the medical evidence restricting claimant's activities. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge addressed employer's contentions that claimant's continued work from February to September 1996 and his failure to mention his back condition on his exit interview indicate that claimant's physical condition played no part in his leaving the job. The administrative law judge rationally found claimant's failure to include medical reasons as part of the reason for his resignation inconclusive and claimant's working through any pain until the expiration of his contract reasonable in light of the fact that claimant received a 30 percent bonus for completing his contract terms. Decision on Remand at 3; *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991) (choice from among reasonable inferences is left to the administrative law judge).

Employer next argues that it established suitable alternate employment at its facility based upon the adaptations it made to claimant's usual job duties to accommodate his physical restrictions. Employer contends that the supervisor position was physically suitable for claimant, in that claimant had only to drive a truck, complete paperwork, and delegate physical labor. The administrative law judge found that claimant was unable to perform the supervisor job based on the uncontradicted testimony of claimant and Mr. Carmack that the supervisor often had to perform the same heavy labor as the two co-workers on his team; the administrative law judge found that, in essence, the supervisor job is the same as claimant's usual job, which he was unable to perform. Decision on Remand at 5; Tr. at 27, 88, 100-101, 110. The Board is not empowered to reweigh the evidence, and employer has not demonstrated error in the administrative law judge's crediting of this testimony. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *Cordero*, 580 F.2d 1331, 8 BRBS 744. Thus, as it is supported by substantial evidence, the administrative law judge's finding that the supervisor position did not constitute suitable alternate employment is affirmed. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

Employer also contends the administrative law judge erred in finding that employer did not have any other suitable jobs for claimant. The administrative law judge properly found that no other specific job was offered to claimant, even though employer was aware of the extent of claimant's limitations. The administrative law judge found that claimant failed his physical in January 1996, but was allowed to return to his modified usual work. The administrative law judge acknowledged the testimony of Mr.

Jones, employer's safety coordinator that, at the time claimant resigned in May 1996, he was in the process of assessing claimant's physical limitations to see if he were capable of continuing his restricted job duties or to determine if further accommodations could be made. Tr. at 144-145. The administrative law judge thus found the evidence belied employer's contention that it would have offered claimant a suitable position if only it had known of the extent of claimant's injury. The administrative law judge found that Mr. Jones did not continue his investigation into suitable work once claimant resigned even though claimant continued to work until September 1996.

We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment at its facility as it is supported by substantial evidence. Employer did not actually offer claimant any position other than the unsuitable supervisory position, and it cannot rely on speculative positions to satisfy its burden in this regard. *See generally Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). As the only job offered to claimant was unsuitable, we affirm the administrative law judge's award to claimant of permanent partial disability benefits based on the wages of the job claimant obtained on his own in Alabama.

Accordingly, the administrative law judge's Decision and Order on Remand awarding permanent partial disability benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge