BRB No. 05-0611

SON NGUYEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELDRIDGE CONSTRUCTION	)	DATE ISSUED: 03/30/2006
	)	
and	)	
	)	
TEXAS MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Quentin D. Price (Barton, Price, McElroy & Townsend), Orange, Texas, for claimant.

Peter Thompson (Thompson & Reilley, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-00007) of Administrative Law Judge Clement J. Kennington 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).

On November 26, 2001, claimant fell while descending a ladder and injured his left knee during the course of his employment as a welder. Claimant underwent three surgeries on his left knee to repair a torn meniscus and anterior cruciate ligament. On January 3, 2003, claimant's treating physician, Dr. Johnston, opined that claimant's knee had reached maximum medical improvement and that claimant could not return to work as a welder, and he assigned permanent work restrictions. Employer voluntarily paid compensation for temporary total disability from December 10, 2001, to January 3, 2003, and continuing compensation for permanent total disability from January 4, 2003.

In his decision, the administrative law judge found, pursuant to the parties' stipulations, that claimant's left knee reached maximum medical improvement on January 3, 2003, and that claimant is unable to return to his usual employment as a welder. The administrative law judge rejected employer's evidence of suitable alternate employment, and he also found that claimant made a diligent job search. Accordingly, the administrative law judge awarded claimant compensation for permanent total disability from January 4, 2003. 33 U.S.C. §908(a). Alternatively, the administrative law judge found that claimant is entitled to compensation under the schedule for a 35 percent left leg impairment. *See* 33 U.S.C. §908(c)(2).

Employer appeals, challenging the administrative law judge's rejection of its evidence of suitable alternate employment, his finding that claimant diligently sought suitable work, and the admission into evidence of the district director's Memorandum of Informal Conference. Claimant responds, urging affirmance of the administrative law judge's decision.

Where, as here, it is uncontested that claimant is unable to return to his usual employment due to his work injury, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212(CRT) (5th Cir. 1999). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish his entitlement to total disability benefits if he demonstrates that he diligently tried and was unable to secure suitable employment. *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).

The administrative law judge credited the work restrictions of claimant's treating physician, Dr. Johnston, over the restrictions of Dr. Dominques, who examined claimant at employer's request. Dr. Johnston restricted claimant from squatting, kneeling, crawling, climbing, and lifting over 25 pounds, and from both walking and standing more than three hours, for a total of six hours per day. CXs 5 at 14, 16; 11 at 19, 32. Dr. Johnston specified that claimant would also have to be able to sit as needed. Decision and Order at 7; CX 11 at 19. The administrative law judge also found that claimant obtained only an elementary school education in Vietnam, and that he does not read, write or speak English. Tr. at 38-39, 83-84. The administrative law judge found that bench assembly positions at Lofton Staffing, Kelly Services, and Advance Staffing, and a security guard position at Patriot Security, identified in employer's March 20, 2003, labor market survey, are within claimant's physical restrictions. The administrative law judge credited, however, the testimony of claimant's vocational consultant, William Kramberg, to find that these jobs are not suitable for claimant. Decision and Order at 19-20. Specifically, the administrative law judge credited Mr. Kramberg's testimony that security guards in Texas must pass a written examination, which the administrative law judge found would likely preclude claimant's hiring, given his deficiencies with the English language. CX 14 at 24-25. The administrative law judge also credited Mr. Kramberg's testimony that he contacted Lofton Staffing Services and determined that its bench work positions are in the heavy physical demand category. Mr. Kramberg stated that Kelly Services does not have permanent positions and its temporary positions require a basic understanding of English which claimant does not possess. *Id*. at 24-26 In addition, the administrative law judge noted the testimony of Mary Zerson, the vocational rehabilitation counselor who developed the labor market surveys; she stated that claimant would have difficulty securing employment due to his educational limitations. EX 22 at 1-4. The administrative law judge therefore found that none of the jobs identified in employer's March 20, 2003, labor market survey is suitable. Decision and Order at 20. The administrative law judge further rejected the positions identified in employer's September 2004 labor market survey because the job descriptions do not list the physical demand requirements and 18 of the jobs are not actually available. *Id*.; *see* EX 20. The administrative law judge also found that the kitchen and housekeeping jobs identified would not allow claimant to sit when necessary and may involve lifting more than 25 pounds. Finally, the administrative law judge found that claimant rebutted any showing of suitable alternate employment by employer by his unsuccessful applications for jobs at Lofton Staffing, Kelly Services, and Advance Staffing. Decision and Order at 20-21, *see* Tr. at 69-77.

We hold that the administrative law judge rationally credited the deposition testimony and medical records of Dr. Johnston, and claimant's inability to read, write, and speak English, to determine claimant's work capabilities. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Based on these limitations the administrative law judge rationally found that the jobs employer

identified in its labor market surveys are not suitable for claimant. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). We reject employer's contention that the administrative law judge improperly rejected the bench assembly, housekeeping and kitchen positions identified in employer's surveys on the basis that claimant could not sit down as necessary. Employer contends Dr. Johnston did not opine that claimant must be able to sit every 20 to 30 minutes. The record reflects that in his deposition, Dr. Johnson stated claimant should sit for two hours of an eight-hour work day and that "probably every 20 to 30 minutes he may have to sit." CX 11 at 19; *see also* CX 14 at 32-44. Based on this testimony, we hold that the administrative law judge rationally concluded that that kitchen work and housekeeping jobs are not suitable for claimant.[1] *See White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995). Moreover, Mr. Kramberg's testimony constitutes substantial evidence that the bench assembly positions identified in employer's survey are not suitable. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). As employer has not demonstrated any error in the administrative law judge's consideration of the evidence and as the Board is not empowered to reweigh it, the administrative law judge's rejection of employer's evidence of suitable alternate employment is affirmed. *Ceres Marine Terminal*, 243 F.3d 222, 35 BRBS 7(CRT); *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *see Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991); *see generally Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge may draw inferences from the record evidence that "he deems most reasonable in light of the evidence as a whole and the common sense of the situation").

Employer also argues that claimant should have improved his English ability after he became unable to work due to his injury, and that the administrative law judge erred by not considering this lack as evidence that claimant did not diligently seek alternate employment. In his decision, the administrative law judge found that claimant is not required to learn English to rebut a finding of suitable alternate employment inasmuch as an employer must take workers as it finds them, and, in this case, employer was willing to hire claimant notwithstanding his inability to speak English. Decision and Order at 19-20. We hold that the administrative law judge properly rejected employer's contention that claimant must show he attempted to improve his communication skills in order to establish he diligently sought alternate work. *See J.V. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967); *Vandenberg v. Leicht Material Handling Co.*, 11 BRBS 164

[1] The administrative law judge also rejected these positions because they may involve lifting more than 25 pounds. Decision and Order at 20. Employer does not challenge this finding.

(1979); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

Finally, employer argues that the administrative law judge erred by admitting into the record the recommendations made by the district director after the parties' informal conference on April 16, 2003. *See* CX 1 at 11-12. At the hearing, claimant responded to employer's objection by stating that this document is not intended to show the substantive merit of his claim but as evidence establishing claimant's right to an employer-paid attorney's fee. *See* 33 U.S.C. §928(b). Inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has held that an informal conference is a prerequisite for fee liability under Section 28(b), we hold that the administrative law judge did not err in admitting the district director's recommendations into the record for purposes of establishing that an informal conference was held. *See Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *see also* 20 C.F.R. §§702.317, 702.319.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge