U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0249

MARK J. GORSLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DUWAMISH SHIPYARD	)	DATE ISSUED: Mar. 26, 2015
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Daniel Thompson (Thompson & Delay), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott), Seattle, Washington, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-LHC-00899) of Administrative Law Judge Jennifer Gee 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, rational, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 6, 2006, claimant suffered a lower back injury at work. Claimant was manually closing an electric gate when the gate abruptly stopped midway, causing

claimant painful back spasms.[1] Claimant continued to work, but he treated with Dr. Duran, his family physician, who diagnosed "acute lumbosacral strain," recommended claimant see a specialist, and prescribed light-duty work for two weeks and Vicodin for pain. Claimant continued to suffer back pain and on March 13, 2007, Dr. Duran restricted claimant from bending, crawling, or lifting above ten pounds for 60 days, and he prescribed Vicodin for claimant to take as needed. CX 1, 2. Over the next several years, claimant continued to seek medical treatment for his lower back condition, undergoing multiple rounds of epidural steroid injection therapy and physical therapy.[2] During this time, Dr. Duran filled claimant's prescriptions for narcotic pain relievers, and prescribed other psychoactive drugs such as Lamictal, Prednisone, and Prozac for mood stabilization, allergies, and depression. CX 2 at 125, 142. Claimant also was evaluated by several specialists regarding the necessity of back surgery.[3] However, based on the evaluations of Drs. Kerr and Wong, employer informed Dr. Duran that it would not authorize the surgery and would not approve further prescriptions for narcotic medications. CX 11 at 2.

[1] This was claimant's fourth back injury, the third he had experienced with employer, and the first that occurred under the jurisdiction of the Longshore Act. Prior to the November 2006 injury, claimant was taking Vicodin as needed for his occasional back pain, and he performed his work without restriction.

[2] On June 1, 2007, employer permanently closed the job site location where claimant worked, and claimant became unemployed. Tr. at 113; CX 7. Claimant did not return to any work after this date, and employer began paying temporary total disability benefits beginning June 2, 2007. Tr. at 113-114; CX 2 at 185. Employer stopped payment of disability compensation on November 12, 2010.

[3] On August 3, 2007, Dr. Brack, an orthopedic surgeon, stated there was a 50 percent chance a lumbar fusion would reduce some of claimant's low back complaints. CX 7 at 3. On October 25, 2007, Dr. Yenni, an orthopedic surgeon, stated that there would not be a significant improvement in symptoms unless claimant agreed to surgical intervention. CX 8 at 14. However, claimant did not pursue surgery at that time. On July 1, 2008, Dr. Duran opined claimant may be a good surgical candidate as his condition had deteriorated. CX 2 at 142. On August 28, 2008, Dr. Shin, a neurosurgeon, opined that regular exercise and weight reduction would be the best possible course of action; however, surgery also was an option. On November 1, 2008, at employer's request, Drs. Kerr and Wong, an orthopedic surgeon and neurologist, respectively, evaluated claimant. They diagnosed left lumbar radiculopathy and lumbosacral strain related to the November 6, 2006 work injury; they did not endorse fusion surgery and recommended that claimant discontinue using all narcotic medications. CX 12.

Pursuant to employer's request that claimant undergo a psychiatric evaluation, Dr. Hamm, a psychiatrist, diagnosed an adjustment disorder and medically-prescribed opiate dependency on June 28, 2010. Dr. Hamm opined that most of claimant's problems were caused by overmedication and that he did not have any psychiatric restrictions related to the November 6, 2006 work injury itself. CX 14. By contrast, on November 10, 2010, Dr. Duran, claimant's family physician, diagnosed bipolar disorder, while on December 12, 2011, Dr. Early, a psychiatrist, diagnosed depressive and anxiety disorders, attributable in part to claimant's chronic pain, and possible iatrogenic medication delirium. CX 2 at 237; CX 33 at 33.

Claimant was involuntarily committed to Telecare Recovery Partnership (Telecare) on December 15, 2011, for psychotic disorders. CX 36 at 7. At that time, claimant was on 21 medications, eight to ten of which were psychoactive drugs, including Percocet and Oxycodone for his chronic pain. CX 35 at 48; Tr. at 188-189. He was delirious, confused, disoriented, and had a gross disruption in his brain function. Claimant responded well to treatment and was discharged on December 28, 2011. EX 3 at 16. He was described as stable and reality-based with normal speech; he was not displaying any of the signs or symptoms that resulted in his admission. *Id*. On discharge, claimant's medications were significantly reduced, and he was taking a total of six medications, at much lower doses. CX 32 at 468-469, 483, 485.

The issues raised before the administrative law judge were whether lumbar surgery should be authorized, whether claimant's psychiatric condition is work-related, whether employer established the availability of suitable alternate employment, and whether claimant is entitled to reimbursement of medical costs. The administrative law judge authorized lumbar surgery. The administrative law judge found that claimant does not have a bi-polar condition, but that he does have a work-related psychological condition. The administrative law judge found that claimant's back and psychological conditions have not reached maximum medical improvement. Moreover, based on the parties' stipulation, the administrative law judge found that claimant cannot physically perform his usual job due to his back condition, even if employer's facility had not closed. The administrative law judge found employer's labor market surveys do not establish the availability of suitable alternate employment; thus, claimant is entitled to ongoing temporary total disability benefits. The administrative law judge also found that because both claimant's back and psychological conditions are work related, employer is liable for the medical treatment of these conditions, claimant should be reimbursed for any treatment and medications he was prescribed for them, and he should submit any such bills to the district director for an accounting. Employer challenges these findings, and claimant responds, urging affirmance of the administrative law judge's decision.

Employer first challenges the administrative law judge's general reliance on the opinion of Dr. Duran, claimant's treating physician, on the ground that Dr. Duran is

responsible for overprescribing medications for claimant. Employer contends that Dr. Duran's judgment must be called into question by these actions. Without addressing the overmedication issue, the administrative law judge found that Dr. Duran's opinion is credible and that, as claimant's treating physician, his opinion regarding claimant's back condition is entitled to substantial weight. Decision and Order at 23.[4] However, employer has failed to allege any reversible error made by the administrative law judge in reliance on Dr. Duran's opinion. Employer, in one sentence, merely contends the administrative law judge erred in relying on Dr. Duran's opinion to support her finding that lumbar fusion surgery is reasonable and necessary treatment for claimant's work-related back injury. *See* Emp. Br. at 23. Employer has thereby failed to demonstrate that the doctor's misjudgment regarding medication necessarily renders his judgment regarding surgery fatally flawed.

Even if consideration of Dr. Duran's "overprescribing" medication casts doubt on the wisdom of his medical judgment in recommending that claimant undergo lumbar surgery, Dr. Shin also presented surgery as an option to claimant, as the administrative law judge found. In September 2008, Dr. Shin formally requested that employer authorize surgery.[5] Employer refused to authorize surgery. CX 11 at 2; *see* n.3, *supra*. When an employer refuses to authorize requested medical treatment, claimant is not required to renew his request, but is entitled to the treatment at employer's expense, provided he establishes it is reasonable and necessary for this work-related injury. *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). Claimant did not undergo the surgery after the 2008 request, but, in January 2011, he returned to Dr. Shin complaining of continuing pain. CX 10 at 10. Dr. Shin advised that there was no guarantee that surgery would be beneficial, but, if claimant was willing to take the risk of failure, he stated an L4-5, L5-S1 transforaminal lumbar interbody fusion was an option to attempt to relieve claimant's pain. CX 10 at 18, 25. The administrative law judge relied on Dr. Shin's opinion to establish that claimant made a prima facie case for compensable medical treatment, and that employer failed to show, through the opinions of Drs. Brack,

[4] The administrative law judge specifically stated that "[t]here is nothing in the record to disparage Dr. Duran's credibility, and [employer] has not introduced any evidence that would reflect negatively on his credibility." Decision and Order at 23. Employer had suggested otherwise in its post-hearing brief: employer had adverted to Dr. Duran's "over-medicating" claimant, noting in particular the diagnosis of likely "toxic encephalopathy" by the doctors at Telecare. Emp. Post-hearing Br. at 19.

[5] The record discloses that Dr. Shin informed claimant of the risks of surgery. CX 10 at 9.

Wong, Kerr and Burns, that the surgery was unreasonable or unnecessary.[6] Decision and Order at 40-41. The administrative law judge properly concluded that claimant is entitled to choose between valid options and that it is up to claimant to weigh the benefits and costs of his options. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). Employer does not raise a challenge to these findings, and thus we affirm the administrative law judge's determination that employer is liable for back surgery, should claimant elect to undergo it.

Employer next challenges the administrative law judge's finding that claimant has a disabling, work-related psychological condition. Specifically, employer contends that any psychological condition associated with claimant's overmedication had resolved prior to the formal hearing, such that employer is not liable for continuing medical benefits for this facet of claimant's condition. Moreover, as the administrative law judge found that claimant does not have a bipolar disorder, employer contends the administrative law judge erred in holding employer liable for the treatment of claimant's entire "psychological impairment" which may include treatment for a bipolar disorder.

As employer correctly asserts, the administrative law judge did not apply Section 20(a) to determine the work-relatedness of claimant's psychological impairment. Nonetheless, substantial evidence of record supports her finding that claimant established that his psychological impairment is, at least in part, caused by overmedication for the back injury.[7] *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). Dr. Hamm opined on June 28, 2010, that claimant has an "adjustment disorder with mixed emotional features." CX 14 at 11. Dr. Hamm stated

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[6] *See* n.3, *supra*. Dr. Burns opined on March 22, 2010, that claimant's back condition did not require surgery and that claimant's pain would not be "altered very much" should he undergo surgery. CX 13 at 5.

[7] In addressing the work-relatedness of claimant's psychological impairment, the administrative law judge rejected the opinions of Dr. Duran and Mr. Coleman, claimant's therapist, that claimant has bipolar disorder. The administrative law judge observed that both psychiatrists of record, Drs. Hamm and Early, thought claimant's history inconsistent with bipolar disorder, and the administrative law judge rationally assigned greater weight to the opinions of Drs. Hamm and Early, based on their credentials as psychiatrists. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). Moreover, as claimant did not file a cross-appeal on this issue, we decline to address claimant's contention that the administrative law judge's finding in this regard is erroneous. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

that most of claimant's psychological problems stemmed from overmedication. *Id*. The administrative law judge relied on Dr. Hamm's explanation of the relationship between claimant's psychological symptoms and his medications.[8] Decision and Order at 35; Tr. at 191-193. Dr. Hamm stated that claimant would have to be weaned off the drugs in order to fully assess his other psychological conditions; Dr. Hamm also opined that claimant's "emotional issues and adjustment problems" were not causally related to the back injury. CX 14 at 13. The administrative law judge observed that Dr. Early's opinion that overmedication contributed to claimant's symptoms is supportive of Dr. Hamm's opinion.[9] CX 2 at 237; CX 33 at 33. Thus, because some of the psychoactive medications that led to claimant's being overmedicated were prescribed for the treatment of claimant's November 6, 2006 work-related back injury, the administrative law judge rationally found that claimant's psychological condition is related to this injury. *See generally Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986). Further, the administrative law judge accurately observed that, despite the possibility that Dr. Duran may have been medically wrong to prescribe so many psychoactive drugs, this does not constitute an intervening cause that would sever the causal connection between claimant's psychological impairment and his work. *Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988) (fault on the part of a physician, even if it might amount to an actionable tort, does not break the chain of causation); Decision and Order at 38-39. The administrative law judge weighed the evidence as whole and rationally explained her findings. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). Consequently, as it is supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant suffered psychological symptoms related to the November 6, 2006 work injury. Employer's contentions concerning its liability for medical benefits for claimant's psychological condition will be addressed *infra*.

Employer next contends the administrative law judge's award of medical benefits is overbroad as she: generally ordered reimbursement to claimant for all past expenses;

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[8] Dr. Hamm explained that claimant was taking between eight and ten psychoactive drugs at the time he was involuntarily committed and there was "no doubt in [Dr. Hamm's] mind" that claimant would have had toxic symptoms resulting from these prescriptions, as pharmacologic research shows there will be side effects and drug interactions in an individual taking over five psychoactive drugs. Tr. at 188-189.

[9] Dr. Early diagnosed "possible iatrogenic medication delirium" and depressive and anxiety disorders due to a combination of psychosocial stress and injury-related stress. Decision and Order at 36; CX 33 at 6. Dr. Early also stated, "I do not believe it is reasonable to deny the important contribution of chronic pain and disability from the physical injury as a significant cause of the ongoing depression and anxiety." CX 33 at 6; EX 6 at 55.

inappropriately delegated to the district director issues requiring findings of fact; and also ordered employer to pay expenses for non-work-related psychological conditions. Claimant responds that he stipulated to employer's having paid all past medical expenses, including prescriptions, related to the lumbar condition. Tr. at 10-12; Cl. Resp. Br. at 35.

The administrative law judge noted that claimant had not submitted any bills for which he sought reimbursement. Nevertheless, the administrative law judge generally ordered claimant "to submit documentation of bills and prescription medications to the District Director for an accounting of costs for which he is entitled to reimbursement." Decision and Order at 44. The administrative law judge awarded claimant future medical benefits for his lower back injury, including the lumbar surgery, as discussed, and for claimant's psychological impairment. *Id*. at 46. As claimant concedes that he had no claims for reimbursement regarding his lumbar condition, any error the administrative law judge made in directing claimant to submit to the district director bills for this condition is harmless. We have affirmed the administrative law judge's finding that employer is liable for lumbar surgery should claimant elect to undergo it. The administrative law judge thus properly held employer liable for "any expenses related to that surgery." Decision and Order at 44; 33 U.S.C. §907(a).

With respect to medical benefits for claimant's psychological condition, we reject employer's contention that the administrative law judge's award is overbroad. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). As discussed, the administrative law judge's finding that claimant sustained work-related psychological symptoms is supported by substantial evidence. Therefore, employer is liable for reasonable and necessary treatment for these symptoms, 33 U.S.C. §907(a), even if some physicians concluded the symptoms were due to bipolar disorder, a condition the administrative law judge found that claimant does not have, because the administrative law judge properly credited the opinions of Drs. Hamm and Early who related those same symptoms to overmedication.[10]

Employer correctly states that, pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d), a claimant is entitled to reimbursement only for out-of-pocket expenses he incurred for reasonable and necessary care for his work-related condition. *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43, 46 (1986). If another insurer has paid claimant's expenses for covered medical care, it is entitled to reimbursement only if it intervenes in claimant's claim under the Act. *Id.* Claimant's private health insurer has

[10] Medications which were prescribed for a psychological disorder prior to the time claimant developed his psychological problem due to overmedication obviously are not encompassed since the only psychological problems the administrative law judge found covered were those related to the over-prescription of medication.

not intervened in this case. Thus, the administrative law judge's order that employer is liable for past medical benefits for claimant's psychological condition is modified to reflect that employer must reimburse claimant only for his out-of-pocket costs. In this regard, the administrative law judge did not err in delegating the accounting of such costs to the district director. *See generally Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002). If a factual controversy arises over the work-relatedness of any particular claim for past or future medical care for claimant's lumbar or psychological conditions, the parties retain the right to a hearing on the matter before an administrative law judge. *Id.; see also Preston*, 380 F.3d 597, 38 BRBS 60(CRT).

Employer also appeals the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Once, as here, the claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to the employer to establish the availability of specific jobs the claimant can perform, which, given the claimant's age, education, and background, he could likely secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

In this case, the record contains vocational assessments with labor market surveys conducted by Mr. Bennett, and the October 17, 2011 vocational assessment of Mr. MacKinnon. CX 23; EXs 16, 19. Mr. Bennett's October 7, 2011 survey listed 42 jobs, available between February 11 and July 17, 2011; the May 1, 2012 survey listed nine jobs available between April 12-20, 2012; the May 4, 2012 survey listed 37 jobs, eight of which were available in late 2007, 12 which were available in 2008, 11 which were available in 2009, and nine which were available in 2010. EXs 16, 19. On October 17, 2011, Mr. MacKinnon issued a vocational assessment based on his review of all medical records, his September 20, 2011 meeting with claimant, and claimant's work history and demonstrated work aptitudes. CX 23. Mr. MacKinnon reviewed Mr. Bennett's October 7, 2011 labor market survey and concluded that it was not reasonable to assume that the identified jobs are suitable for claimant.[11] Mr. MacKinnon further opined that claimant

[11] This survey listed 20 customer service representative positions, five dispatcher positions, four sales positions, four mechanical assembler positions, four security officer positions, and one of each of the following: machine operator, mobile janitor, production worker, RV parts and service representative, receptionist/office assistant. Based on a technical assessment of claimant's vocational aptitude, Mr. MacKinnon determined that claimant does not meet the aptitude requirements for the customer service representative or dispatcher positions. Mr. MacKinnon further determined that claimant has no experience or transferable skills for the sales and receptionist/office assistant positions, and claimant's medical records indicated he could not lift the 40-50 pounds required of

was not likely gainfully employable at the time due to a combination of a worsening mental health condition, limitations from the back injury, and pre-existing factors, such as ADHD. CX 23 at 12.

Considering the vocational evidence, the administrative law judge found that Mr. Bennett's labor market surveys are not creditable "and should be disregarded" because they are based entirely on the September 30, 2010, functional capacity evaluation (FCE) of Dr. Becker, whose report the administrative law judge found not credible,[12] and because they omitted consideration of claimant's psychological condition, pre-existing ADHD, and medication regimen.[13] Decision and Order at 28-31, 37-38. The administrative law judge also noted that Dr. Duran "would not approve" Mr. Bennett's labor market surveys. CX 1 at 22. The administrative law judge additionally found Mr. Bennett's labor market surveys unreliable because Mr. Bennett failed to contact many of the prospective employers, which led the administrative law judge to question whether the jobs actually were in existence and available on the dates in question, and because claimant was not qualified for many of the jobs.[14] *Id.* at 31. By contrast, the

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the mechanical assembler, mobile janitor, machine operator, production worker, RV parts and service positions, and one of the four Security Guard positions. CX 23. Mr. MacKinnon opined that the remaining three Security Guard positions may also be unsuitable if claimant is expected to physically confront an intruder while on patrol. Mr. MacKinnon recommended that an attending physician evaluate claimant's physical ability to perform this position.

[12] The administrative law judge found Dr. Becker's report "difficult to comprehend," noting that she was "trouble[ed by] the degree of disparity between Dr. Becker's findings and the findings of all other medical professionals in this case." Decision and Order at 28. Specifically, the administrative law judge found Dr. Becker's statement, "There are no clinical onsets of symptoms in the all lumbar planes of motion. The lumbar axis functions are intact for work related tasks," to appear to be saying that claimant's lumbar spine appears to be normal with no disability symptoms, a finding that is at odds with the rest of the record. Decision and Order at 28-29; EX 7 at 63.

[13] The administrative law judge found Mr. Bennett dismissed any concerns regarding claimant's medication regimen and psychological issues, stating that "[t]he [medical evaluation] of [Dr. Hamm] did not identify any psychiatric reason that would prevent [claimant] from working." The administrative law judge found this conclusion undermined by Dr. Hamm's diagnosis of opiate dependency. Decision and Order at 30.

[14] Specifically, the administrative law judge found claimant was not qualified for jobs requiring a college degree, previous medical or related laboratory experience, strong

administrative law judge found Mr. MacKinnon's report entitled to significant weight because Mr. MacKinnon considered all medical evidence of record, including the physical capacity evaluations of Drs. Yenni, Kerr and Wong, in addition to that of Dr. Becker, and took into account claimant's psychological issues. *Id.* at 31-32. The administrative law judge observed that Mr. MacKinnon accurately described claimant's abilities and restrictions, and analyzed each of the types of jobs identified by Mr. Bennett in concluding that claimant could not realistically obtain employment. *Id.* at 32; CX 23.

Employer asserts the administrative law judge erred in rejecting all of its evidence of suitable alternate employment without discussing claimant's specific restrictions and the specific jobs it identified. We reject employer's contention as it has not established reversible error in the administrative law judge's decision to find claimant totally disabled. The administrative law judge rationally found that Dr. Becker's assessment of claimant's capabilities is not entitled to any weight because he seemingly found claimant to have a normal lumbar spine, contrary to the opinions of all the other doctors. Decision and Order at 28-29; *see generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As Mr. Bennett based his October 7, 2011 labor market survey on Dr. Becker's findings, the administrative law judge rationally rejected it as well. *Id.* Mr. MacKinnon, whom the administrative law judge fully credited, stated in his October 17, 2011 report that "it is not likely that claimant is gainfully employable at this time due to a combination of residuals from the industrial injury and pre-existing conditions. . . ." CX 23 at 12. Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's rejection of employer's October 2011 labor market survey.[15] *See DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

The administrative law judge did not specifically discuss employer's 2012 market surveys. She noted that, in his November 2, 2011, report, Mr. Bennett additionally reviewed the restrictions placed by Drs. Yenni, Kerr and Wong, and that he concluded

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computer skills, strong math skills, strong writing skills, and specialized mechanical skills.

[15] The administrative law judge did err, however, to the extent she discredited the survey for failing to show that prospective employers were contacted to determine if they would in fact consider hiring someone with the claimant's restrictions and abilities. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *cf. Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991) (observing that none of the employers contacted stated they would hire the disabled claimant).

therein that the restrictions would permit claimant to return to his usual work if it were available. EX 19 at 418-419. The administrative law judge rationally rejected this interpretation of these physicians' restrictions in view of the stipulation that claimant is unable to return to his usual work. *See* Decision and Order at 25 n.14, 30; *see generally Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In his May 1, 2012, report, Mr. Bennett reviewed claimant's psychological status upon his release from Telecare,[16] and again found claimant capable of semi-skilled light to medium work as outlined in Dr. Becker's rejected 2010 functional capacity evaluation. Given the deficiencies in the foundation of Mr. Bennett's report and the administrative law judge's crediting of Mr. MacKinnon's October 17, 2012 report, in which he stated the work assessments were outdated; claimant's condition had been deteriorating; and that claimant "was not likely gainfully employable," CX 23 at 12, the administrative law judge could reasonably conclude on this record that employer's evidence was insufficient to establish the availability of suitable alternate employment. *See, e.g.*, *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660; *see also Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6th Cir. 2013). Therefore, we affirm the administrative law judge's award of total disability benefits. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). As employer correctly contends, however, the parties stipulated that employer had paid claimant total disability through November 12, 2010. *See* Decision and Order at 3. Therefore, we modify the administrative law judge's decision to award continuing temporary total disability benefits from November 13, 2010.

[16] Mr. Bennett stated that, upon discharge, claimant was assessed as "stable," not demonstrating any of the conditions that led to his admission, and prepared to establish an independent living situation. EX 19 at 426.

Accordingly, the administrative law judge Decision and Order Awarding Benefits is affirmed, as modified herein.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge