BRB No. 99-0853

MALCOLM L. DILLARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Chanda L. Wilson and Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-3091) of Administrative Law Judge Fletcher E. Campbell, 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a welder, sustained an injury to his knee on March 1, 1988, during the course of his employment with employer. As a result of this accident, claimant underwent surgery for a torn meniscus in September 1988. Employer voluntarily paid claimant temporary total disability compensation from the date of his injury until August 8, 1995, and, thereafter, permanent partial disability compensation pursuant to the schedule based upon a 30 percent permanent impairment to claimant's right leg. 33 U.S.C. §908(b), (c)(2).

In his Decision and Order, Administrative Law Judge Sarno found, *inter alia,* that claimant's

reflex sympathetic dystrophy (RSD) had fully resolved as of February 1, 1993, and that employer established the availability of suitable alternate employment. Accordingly, as claimant's injury was to a scheduled member, the administrative law judge denied claimant's request for ongoing benefits under the Act. Claimant appealed Judge Sarno's decision to the Board. However, as a result of claimant's subsequent filing of a motion for modification before the Office of Administrative Law Judges, claimant's appeal was dismissed and the case remanded to the administrative law judge. 20 C.F.R. §802.301.

In his Decision and Order on modification, Administrative Law Judge Campbell (the administrative law judge) considered the record before Judge Sarno as well as the additional evidence submitted by both claimant and employer.[1] Based upon his review of the evidence, the administrative law judge found claimant's motion for modification to be timely, adopted the findings of fact of Judge Sarno, concluded that claimant's RSD had resolved and, lastly, determined that employer established the availability of suitable alternate employment. Accordingly, the administrative law judge denied claimant's motion for modification.

On appeal, claimant contends that the administrative law judge erred in concluding that his RSD has resolved, that employer established the availability of suitable alternate employment, and that claimant is not entitled to ongoing disability and medical benefits. Employer responds, urging affirmance.

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[1]The additional evidence submitted by the parties on modification includes the office notes of Dr. Mingione, CX 100, the temperature measurements of Mr. Keister, CX 200, the testimony of employer's vocational rehabilitation counselor, EX 57, and the medical opinion of Dr. Pellegrino, EX 58.

In challenging the administrative law judge's decision, claimant initially asserts that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Where, as here, it is uncontroverted that a claimant is incapable of returning to his usual employment duties with employer, the burden shifts to the employer to prove that the claimant is not totally disabled by presenting evidence of a range of jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified.[2] *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that an employer need not contact prospective employers to inform them of the qualifications and limitations of the claimant and to determine if they would in fact consider hiring the candidate for their position, as this would substantially increase the employer's burden without a commensurate benefit. *Tann*, 841 F.2d at 542, 21 BRBS at 15 (CRT); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Similarly, the Fourth Circuit has held that an employer need not contact the prospective employers listed in a labor market survey to obtain their specific job requirements before determining whether the claimant would be qualified for such work, and that demonstrating the availability of specific jobs in a local market, such as through the South Carolina Job Service, may be sufficient. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264, 31 BRBS 119, 125 (CRT)(4th Cir. 1997). However, recognizing that the administrative law judge, as the fact-finder, must be able to evaluate the appropriateness of the proposed positions given claimant's physical and educational qualifications, the court held that employer may rely on standard occupational descriptions, including those provided in the *Dictionary of Occupational Titles*, to fill out the qualifications for performing the listed jobs. *Id*.

In the instant case, the administrative law judge found that employer established the availability of suitable alternate employment based upon nine positions identified by employer's vocational counselor, Ms. Byers. Specifically, the administrative law judge found the identified positions of assembler and mechanic assembler, as well as seven positions as a survey worker, constituted suitable alternate employment based upon claimant's physical restrictions and vocational abilities. Although claimant, on appeal, avers that he would be unable to perform the job of assembler, claimant fails to allege how the

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[2]The standard for determining disability is the same during Section 22, 33 U.S.C. §922, modification proceedings as it is during the initial adjudicatory proceedings under the Act. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990).

administrative law judge may have erred in concluding that the remaining eight identified positions were suitable. Moreover, claimant's argument that employer may not rely upon positions at employers which have not been directly contacted by employer or which were obtained by accessing the Virginia Employment Commission's job list is without merit. *See Moore*, 126 F.3d at 256, 31 BRBS at 119 (CRT). Accordingly, as the administrative law judge's finding on this issue is supported by substantial evidence and consistent with law, it is affirmed.

Claimant next contends that the administrative law judge erred in relying upon the opinions of Drs. Richmond, Hogan and Pellegrino, rather than the opinions of Drs. Mingione and Neff, in determining that claimant's RSD resolved as of February 1, 1993, and in thereafter denying his request for ongoing medical benefits. We disagree.

Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993). Section 7 does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *See Ballesteros v. Willamette Western Corp.,* 20 BRBS 184 (1988). While it is employer's duty to provide medical services necessitated by an employee's work injuries, *see Kelley v. Bureau of National Affairs*, 20 BRBS 169 (1988), claimant must establish that the requested services are reasonable and necessary for the treatment of the work injury. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, the administrative law judge based his findings regarding this issue upon the medical opinions of Drs. Richmond, Hogan and Pelligrino, and his determination that claimant's subjective complaints were not credible. Based upon her original treatment of claimant and the subsequent examination and evaluation of claimant by Dr. Hogan, Dr. Richmond opined that, within a reasonable degree of medical certainty, claimant's RSD had resolved by February 1, 1993. EX 34. Although Dr. Hogan could not state that claimant had never suffered from RSD, he found that no diagnosis of RSD could be made at the time of his examination of claimant. EX 25. Lastly, Dr. Pellegrino, a Board-certified neurologist and a department head at the Eastern Virginia Medical School, reviewed claimant's medical records and videotapes of claimant's post-injury activities and found no evidence that claimant suffers from RSD. EXS 58, 59. In contrast, the administrative law judge gave less weight to the opinion of Dr. Mingione, claimant's treating physician, who opined that claimant remained disabled from RSD, since Dr. Mingione is a non Board-certified

psychiatrist who lacks expertise in this area of medicine.[3] Additionally, the administrative law judge specifically declined to rely upon the testimony of both Drs. Mingione and Neff because both of these physicians relied heavily upon claimant's unreliable subjective complaints.

The administrative law judge may consider a variety of medical opinions and observations in assessing the extent of claimant's disability. *See Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Contrary to claimant's contention, a physician does not need to examine the claimant to render a credible opinion. *See generally Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Rather, it is well established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler,* 21 BRBS at 33, and is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Inasmuch as it was within the administrative law judge's discretion to rely upon the opinions of Drs. Richmond, Hogan and Pelligrino, and to decline to rely upon claimant's testimony and the opinions of Drs. Mingione and Neff, we affirm his determination that claimant's RSD abated as of February 1, 1993, as that finding is rational and supported by substantial evidence, and his consequent determination that employer is not liable for medical treatment after February 1, 1993, as such treatment would not would be related to claimant's work injury. *See Brooks,* 26 BRBS at 1.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[3]The administrative law judge specifically noted that Dr. Mingione initially disclaimed any expertise in this area, *see* EX 40 at 14, but later reversed his position, *see* EX 54 at 29-30. *See* Decision and Order at 7.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge