BRB No. 01-0673

ROBERT T. GIER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SWIFTSHIPS, INCORPORATED	)	DATE ISSUED: May 10, 2002
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Aubrey E. Denton (Porter, Denton & Guidry, L.L.C.), Lafayette, Louisiana, for claimant.

Laurie Briggs Young (Adams and Reese, LLP), New Orleans, Louisiana, for self-insured employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (98-LHC-2070) of Administrative Law Judge Lee J. Romero, 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 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).

This case is on appeal for the second time. Claimant received an electrical shock on August 23, 1994, during the course of his employment as a welder for employer. Claimant has not worked since that time. Employer voluntarily paid claimant temporary total disability benefits from August 26, 1994 through October 2, 1997, and permanent partial disability benefits thereafter. 33 U.S.C. §908(b), (c)(21). In his decision, the administrative law judge initially found that the position of security guard offered to claimant by employer did not

constitute suitable alternate employment. Next, the administrative law judge determined that the labor market surveys prepared by employer's vocational experts were insufficient to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from August 26, 1994 to April 9, 1996, the date on which the parties stipulated that claimant reached maximum medical improvement, and permanent total disability compensation from April 10, 1996, and continuing. 33 U.S.C. §908(a).

Employer appealed the administrative law judge's decision. The Board held that the administrative law judge's rejection of the offered security guard position as suitable alternate employment was not supported by the medical evidence upon which the administrative law judge relied. The Board also held that, contrary to the administrative law judge's finding, the positions identified in Ms. Moffett's labor market surveys sufficiently establish the nature and terms of the identified employment opportunities available to enable the administrative law judge to determine if claimant is capable of performing the identified jobs. The Board thus vacated the administrative law judge's finding with regard to suitable alternate employment, and remanded the case to the administrative law judge for reconsideration of the evidence of record regarding this issue. *Gier v. Swiftships, Inc.*, BRB No. 99-0999 (June 23, 2000) (unpub.).

In his Decision and Order on Remand, which is the basis of this appeal, the administrative law judge found that the position of security guard offered to claimant by employer constituted suitable alternate employment and that it became available on October 27, 1997. Next, the administrative law judge determined that the labor market surveys prepared by employer's vocational expert, Ms. Moffett, established the availability of suitable alternate employment on the open market. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from April 10, 1996, to October 26, 1997, and continuing permanent partial disability compensation from October 27, 1997.

In this appeal, claimant challenges the administrative law judge's finding that the security guard position which employer offered claimant is suitable, and that it became available on October 27, 1997. Claimant also argues that the administrative law judge erred in finding suitable the jobs identified by Ms. Moffett. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as in the instant case, claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards. Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 36(CRT)(5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F. 2d 424, 24 BRBS 116(CRT) (5th

Cir. 1991). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing given his age, education, work experience and physical restrictions and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In order to meet its burden by way of a job in its facility, employer must demonstrate the availability of work which is necessary and which claimant is capable of performing. *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).

We affirm the administrative law judge's finding that the security guard job employer offered claimant constitutes suitable alternate employment. The administrative law judge found that Dr. Cowen and Dr. Abben approved this job as suitable for claimant. CX 2a at 70; CX 3 at 80; CX 4 at 11-12, 19-20, 23; EX 34 at 35; EX 7; *see generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Moreover, the administrative law judge independently compared in detail the job description with claimant's physical, environmental and non-exertional capacities and found it suitable.[1] Accordingly, we hold that the security guard job in employer's facility establishes suitable alternate employment. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *see also Darby*, 99 F.3d 685, 30 BRBS 93(CRT).

Claimant next contends that the administrative law judge's finding that employer established that the guard position was available on October 27, 1997, is not supported by substantial evidence. We disagree. As claimant contends, "[t]here is no reference at all in

[1]Employer's human resources manager, Elaine Singleton, testified that employer always had a security guard position, that there are three security guard shifts at each of employer's two facilities, and that the position is not necessarily filled by injured employees. Tr. at 291, 307. Therefore, claimant's allegation that this is a sheltered position is not supported by the evidence of record. *See generally Buckland v. Dep't of the Army/ NAF/CPO*, 32 BRBS 99 (1997).

[Mr. Marron's] . . . October 31, 1997 status report to the security guard position." EX 12 at 150. In his November 30, 1997 report, however, Mr. Marron, employer's vocational expert, states, "I had [claimant] lined up with a job at [employer] as a security guard." EX 12 at 148. In finding that the job was available on October 27, 1997, the administrative law judge rejected employer's argument that the security guard position was available earlier, on April 9, 1996, when claimant reached maximum medical improvement. He stated that the date of availability of the security guard position was never noted specifically in the record evidence except when Mr. Marron reopened his file on October 27, 1997, and he therefore determined that the security guard position was then available. Decision and Order at 6. As the administrative law judge's inference as to when this position was available is reasonable based on this evidence, we affirm the finding that the security guard position was available on October 27, 1997. *See generally* *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The administrative law judge also found that employer also established the availability of suitable alternate employment on the open market. Claimant lists a myriad of restrictions which he alleges the administrative law judge did not take into account in finding that employer established suitable alternate employment.[2] The administrative law judge stated, "I find that Claimant's post-remand catalog of exertional, environmental and non-exertional limitations allegedly preventing his return to employment and caused by and occurring since his work injury, if reported as symptomatology, are subsumed within the foregoing restrictions assigned by his treating physicians." Decision and Order on Remand at 3. The administrative law judge noted that Drs. Cowen and Abben imposed restrictions of no lifting

[2]Claimant alleges that he is limited to working at a sedentary level, needing frequent positional changes and frequent breaks, being restricted from exposure to excessive heat, excessive stress or a job requiring frequent sedentary lifting, needing to be in a dust and smoke free environment, needing a repeat functional capacities evaluation (FCE) before returning to work, not being able to tolerate full-time work, having a 19 percent whole body impairment, and not being able to work and attend school at the same time.

of more than 20 pounds occasionally, no prolonged standing or sitting, avoidance of significant physical exertion, and no exposure to excessive heat or stress.[3] CXs 3, 4; EX 7. As it is undisputed that these are the restrictions the physicians imposed

[3]Claimant's assertions regarding the FCE are rejected, as both Drs. Abben and Cowen reviewed the FCE and presumably considered it in formulating their restrictions. CX 3 at 48; CX 4 at 19-20.

on claimant, it was reasonable for the administrative law judge to consider that the restrictions imposed by the physicians encompass those alleged by claimant.[4]

[4]Claimant argues that Dr. Abben's testimony that he is not sure that claimant can work full time establishes his inability to work full time. The Board has previously addressed this issue, holding that Dr. Abben's opinion cannot be interpreted to mean that claimant could not return to work full time, and this decision constitutes the law of the case. *See Gier v. Swiftships, Inc.*, BRB No. 99-0999 (June 23, 2000) (unpub.), slip op. at 3. *See Dean v. Marine Terminals*, 15 BRBS 394 (1983) .

The administrative law judge found that employer established the availability of 12 positions based on three labor market surveys conducted by Ms. Moffett, on July 21, 1998, August 3, 1998, and December 18, 1998. EX 22. Those positions were either approved by Dr. Abben, Dr. Cowen, or both, and found suitable by the administrative law judge based on the physicians' approval and his review of the jobs' requirements in light of claimant's restrictions.[5] Decision and Order at 7-8. Therefore, as the administrative law judge's finding that these positions constitute suitable alternate employment is based on physicians' approval and the administrative law judge's independent review of them, it is supported by substantial evidence.[6] *See generally* *Sketoe v. Dolphin Titan Int'l,* 28 BRBS 212 (1994) (Smith, J., concurring and dissenting), *rev'd on other grounds sub nom. Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). As the administrative law judge's finding that employer established the availability of suitable alternate employment both in employer's facility based on the security guard job, and on the open market, based on employer's labor market surveys, is supported by substantial evidence, it is affirmed.

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

SO ORDERED.

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[5]The administrative law judge rejected the hot shot driver position identified in Ms. Moffett's August 1998 survey as unsuitable, as it requires constant sitting with infrequent opportunity for standing or walking, which he considered incompatible with claimant's need for frequent positional changes.

[6]Claimant asserts that the administrative law judge erred in ignoring claimant's attending college when deciding whether he is capable of working full time. We reject claimant's contention. There is no evidence in this case that claimant was enrolled in an OWCP-sponsored rehabilitation program. Thus, this case is not similar to *Abbott v. Louisiana Ins. Guar. Ass'n,* 27 BRBS 192 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). The burden of proof is on claimant to show that he is unable to perform suitable alternate employment due to his participation in an approved vocational program. *See Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000); *see also Brown v. National Steel & Shipbuilding Co.,* 34 BRBS 195 (2001). Moreover, claimant last attended college in the fall of 1997. Tr. at 140-141. Therefore, in this case, the administrative law judge did not err in not considering how claimant's attending college affected his ability to perform full-time employment.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge