BRB No. 13-0523

MICHAEL L. COLVIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUTCO, INCORPORATED	)	DATE ISSUED: May 15, 2014
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Randolph C. Slone, Slidell, Louisiana, for claimant.

Henry H. LeBas and Nichole LaBorde Romero (LeBas Law Offices), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2012-LHC-0954) 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 findings of fact and conclusions of law of the administrative law judge if they 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 October 6, 2008, claimant sustained a neck injury when he fell to the bottom of a boat while working for employer in New Orleans as a plumber/pipefitter. Tr. at 35, 74. Claimant experienced neck pain radiating down his right arm, and sought treatment from

Dr. Butler, a Board-certified orthopedic surgeon. CX 1 at 1. On July 2, 2009, Dr. Butler performed an anterior cervical discectomy and fusion at C4-C5.[1] *Id*. at 26-27. Claimant, who testified that he continues to experience neck pain and right arm symptoms, attempted to perform day labor for a plumbing company but discontinued this work after five days because of pain; he has not since been employed. Tr. at 38-39, 45, 49-50, 61; CX 8 at 57, 63. Dr. Butler prescribed Percocet for claimant's pain, which claimant continues to take on a daily basis. CXs 1; 8 at 31, 46, 62, 65-66; Tr. at 43, 48-49. Claimant was taking Percocet when he underwent functional capacity evaluations (FCEs) on January 13 and August 11, 2011. CXs 6, 7; Tr. at 43-44; *see* Decision and Order at 4. Employer voluntarily paid claimant temporary total disability benefits from October 16, 2008 through June 21, 2011, and temporary partial disability benefits from June 22, 2011 through the date of the formal hearing. 33 U.S.C. §908(b), (e).

In his Decision and Order, the administrative law judge first stated that it is undisputed that claimant's neck condition is causally related to his October 6, 2008, work accident. He further found that claimant suffers from ulnar neuropathy of his right elbow which also is causally related to the October 6, 2008 work accident.[2] The administrative law judge found that claimant's neck condition and ulnar neuropathy reached maximum medical improvement on January 17, 2011. Having accepted the parties' stipulation that claimant is incapable of returning to his usual employment duties with employer, the administrative law judge found that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from October 6, 2008 through January 16, 2011, and permanent total disability benefits commencing January 17, 2011, and continuing. 33 U.S.C. §908(a), (b).

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance. Employer filed a reply brief.

Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to perform his usual employment duties, the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT)

[1] Previously, claimant underwent cervical fusion surgeries at C5-C7 in 1990 and 1991, and back surgery in 1999 or 2000. Tr. at 59-60; CX 1 at 1-2.

[2] The administrative law judge additionally found that claimant subsequently developed myelomalacia and clonus, but he concluded that those conditions are not causally related to claimant's work injury. Decision and Order at 49-50.

(5th Cir. 1992); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that in order to meet this burden, employer must establish that job opportunities are reasonably available in the community, which claimant is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). As the fact-finder, the administrative law judge must compare claimant's restrictions and qualifications to the requirements of the jobs identified by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

In a 62-page Decision and Order, the administrative law judge thoroughly reviewed the medical and vocational evidence in this case. *See* Decision and Order at 3-39. In determining claimant's physical restrictions, the administrative law judge rationally relied on the results of claimant's two FCEs, CXs 6, 7, noting that claimant's treating physician, Dr. Butler, concurred with the results of the FCEs. CXs 1 at 57-58, 60-61; 8 at 25-28; Decision and Order at 54-55. Based on the results of the FCEs, the administrative law judge found that claimant has the following restrictions: no lifting of more than 20 pounds from the floor to his waist; no lifting of more than 10 to 20 pounds overhead from his waist; no crouching; and only occasional walking, climbing and crawling.[3] Decision and Order at 55. Next, the administrative law judge addressed the positions identified in the labor market surveys conducted by employer's vocational

[3] Employer on appeal makes a vague argument that there is no evidence specifically stating that claimant's inability to perform alternate work was due to restrictions from his work-related injury. *See* Emp. Petition for Review and brief at 19-20. Contrary to employer's assertion, the administrative law judge found that both claimant's ulnar neuropathy and his cervical condition are causally related to his October 6, 2008 work injury. Decision and Order at 43, 49-50. As noted by employer, the administrative law judge found that claimant's myelomalacia and clonus are unrelated to his work injury. *Id.* at 49-50. In determining claimant's work-related physical restrictions, the administrative law judge relied on the two FCEs, both of which were performed prior to the onset of the myelomalacia and clonus. *Id.* at 52, 54-55; CXs 6, 7; *see also* Decision and Order at 16; CXs 1 at 60-65; 8 at 57-58. Thus, employer's argument that physical restrictions unrelated to claimant's work injury should not be considered in determining claimant's ability to perform alternate jobs is unavailing since the administrative law judge did, in fact, factor out the effects of claimant's subsequent conditions in making this determination. Decision and Order at 52, 55; *see Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013).

experts, Ms. Hagelin and Ms. Seyler, and concluded that this evidence does not satisfy employer's burden of establishing the availability of suitable alternate employment. Decision and Order at 55-55; *see also id.* at 25-39.

Employer has failed to demonstrate error in the administrative law judge's determination that it did not establish the availability of suitable alternate employment. First, we reject employer's contention that the administrative law judge erred by excluding the positions located in Louisiana on the basis that, because claimant had returned to his permanent home in Texas, those jobs were not within the relevant labor market. While the Fifth Circuit has not specifically addressed the issue of determining the relevant labor market when a claimant relocates post-injury, the United States Court of Appeals for the Fourth Circuit has stated that, in cases where a claimant relocates following an injury, the administrative law judge should determine the relevant labor market for establishing the availability of suitable alternate employment after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence, and the degree of undue prejudice to employer in proving the existence of suitable alternate employment in a new location. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). The court also stated that the most persuasive definition of the relevant labor market is the "community in which [claimant] lives." *Id.*, 36 F.3d at 381, 28 BRBS at 102(CRT). The Fourth Circuit's holding in *See* was subsequently followed by the United States Court of Appeals for the First Circuit in *Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997), wherein that court endorsed an "on the facts approach" and further stated that the claimant's chosen community is presumptively the proper choice for determining a claimant's earning capacity and that employer bears the burden of showing that the move to a new locale is unjustified.

As correctly noted by the administrative law judge in this case, *see* Decision and Order at 56, the Board has held in a case arising within the jurisdiction of the Fifth Circuit that the criteria set forth in *See* and *Wood* were appropriately utilized to discern the relevant labor market for purposes of establishing suitable alternate employment. *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23, 27 (2001); *see also Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005). Thus, applying the factors set out in *See* and *Wood*, the administrative law judge in this case found that at the time of claimant's injury, he was living in his motorhome in Louisiana, where he had gone to find work, but that his permanent home was in Killeen, Texas, where he owned a home. Decision and Order at 4, 56; Tr. at 40. The administrative law judge determined that claimant's initial relocation back to his permanent home in Killeen following his

injury was reasonable.[4] *Id.* The administrative law judge additionally noted that employer obtained the vocational services of Ms. Hagelin, who was herself located in Texas, where she interviewed claimant. *Id.* at 4, 28-29, 56. Therefore, as the administrative law judge properly considered the evidence in light of appropriate factors, we affirm his conclusion that the Louisiana jobs identified in Ms. Hagelin's May 13, 2011 labor market survey do not constitute suitable alternate employment as they were not located in the relevant labor market. *Holder*, 35 BRBS at 27.

Moreover, employer has not established reversible error in the administrative law judge's determination that the Texas jobs identified by Ms. Hagelin do not meet employer's burden of establishing the availability of suitable alternate employment.[5] *See* Decision and Order at 55. To satisfy its burden under *Turner*, 661 F.2d 1031, 14 BRBS 156, employer must show that claimant is capable of performing the jobs identified by the vocational expert given his physical restrictions and other relevant factors. *See Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). Without sufficient information regarding the identified jobs' requirements, the administrative law judge, as fact-finder, is unable to determine whether the jobs are compatible with claimant's restrictions. *See Hernandez*, 32 BRBS 109. The administrative law judge has considerable discretion in evaluating the evidence of record

[4] Following his cervical surgery in 2009, claimant sold his home in Killeen because he could no longer afford it, and thereafter lived in his motorhome in Copperas Cove, Texas. Tr. at 41; CX 5 at 25. Claimant later relocated to Lumberton, Mississippi, where he presently lives in his motorhome on his sister's property, because he could not afford to live elsewhere. Tr. at 41, 70-71; *see* Decision and Order at 4.

[5] Ms. Hagelin identified five jobs in Texas in her May 13, 2011 labor market survey; her report indicates that the survey was based on an Internet search and that calls to the employers listed in the survey were not returned. EX 6; *see* Decision and Order at 30-31. The May 13, 2011 report contains no information regarding the physical requirements of the listed jobs. EX 6; Tr. at 174-75; Decision and Order at 34. In her hearing testimony, Ms. Hagelin provided rather cursory information regarding some of the physical demands of the jobs identified in her May 13, 2011 report. Tr. at 151-53, 178-84; Decision and Order at 32, 34. On redirect examination of Ms. Hagelin, employer's counsel first elicited testimony about a subsequent labor market survey conducted by Ms. Hagelin on June 16, 2011, in which she identified additional jobs in Texas; the June 16, 2011 report was subsequently admitted into evidence. Tr. at 168-72, 186, 192-93; CX 15. The June 16, 2011 report contains no description of the identified jobs, CX 15, but Ms. Hagelin testified that the employers listed in the report would accommodate claimant's restrictions. Tr. at 172, 188-92; *see* Decision and Order at 33-34.

and is entitled to draw his own inferences from it. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 430, 34 BRBS 35, 37(CRT) (5th Cir. 2000); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). The administrative law judge is not bound to accept the opinion of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the administrative law judge fully considered Ms. Hagelin's May 13, 2011 report and her hearing testimony regarding the Texas jobs identified in that report and he rationally found that her descriptions of the listed jobs do not provide sufficient detail to permit him to determine their suitability for claimant. *See* n.5, *supra*; Decision and Order at 30-34, 55; *Hernandez*, 32 BRBS 109; *see also Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *cf. Marine Repair Services, Inc. v. Fifer*, 717 F.3d 327, 47 BRBS 25(CRT) (4th Cir. 2013); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997) (employer may rely on standard occupational job descriptions to flesh out the requirements of jobs). Similarly, the administrative law judge rationally found the descriptions of the additional Texas jobs identified in Ms. Hagelin's June 16, 2011 report to be insufficiently detailed; moreover, he acted within his discretion as fact-finder in declining to accord dispositive weight to Ms. Hagelin's opinion that the jobs in that report comport with claimant's restrictions. *See Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). We therefore affirm the administrative law judge's finding that the Texas jobs identified by Ms. Hagelin are insufficient to establish the availability of suitable alternate employment.

We also reject employer's contentions of error regarding the administrative law judge's consideration of the labor market survey conducted by Ms. Seyler following claimant's relocation to Mississippi. *See* n.4, *supra*. In her November 7, 2012 report, Ms. Seyler identified eight jobs located in Mississippi. EX 7. The administrative law judge thoroughly reviewed Ms. Seyler's report and hearing testimony, and concluded that the jobs she identified do not meet employer's burden of establishing the availability of suitable alternate employment. Decision and Order at 34-39, 57-58. On appeal, employer presents argument only with respect to the administrative law judge's findings regarding the positions of bus driver and camera operator.[6] Emp. Petition for Review and brief at 17-18, 20. Contrary to employer's reference to "extraneous factors," *see id.* at 20, it is well-established that "the physical ability to perform a job is not the exclusive determinant whether the job constitutes suitable alternative employment." *Ledet*, 163

[6] As employer has not identified error by the administrative law judge with respect to his rejection of the remaining six jobs identified by Ms. Seyler, s*ee* Decision and Order at 57, we affirm his finding that those jobs do not meet employer's burden of establishing the availability of suitable alternate employment. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

F.3d at 905, 32 BRBS at 214-15(CRT) (citing *Turner*, 661 F. 2d 1031, 14 BRBS 156); *see also Hinton*, 243 F.3d 222, 35 BRBS 7(CRT). Rather, the administrative law judge must consider the "specific capabilities of the claimant, that is, his age, background, employment history and experience, and intellectual and physical capacities." *Ledet*, 163 F.3d at 905, 32 BRBS at 215 (CRT) (quoting *Turner*, 661 F.2d at 1042, 14 BRBS at 164). In this case, the administrative law judge appropriately considered the relevant vocational factors in determining whether the bus driver and camera operator jobs constitute suitable alternate employment for claimant. Specifically, the administrative law judge reasonably found that the bus driver position does not comport with claimant's background or experience. Decision and Order at 57. In this regard, he found that the position requires a class B commercial driver's license (CDL) with a passenger endorsement and one year of related training or experience. *Id*. at 36-38, 57; *see* EX 7; Tr. at 219-21, 224-26. The administrative law judge found that although claimant previously worked as a delivery driver, he does not have experience driving a passenger vehicle nor does he have the requisite CDL license with a passenger endorsement.[7] *Id.* Moreover, the administrative law judge rationally determined that the camera operator job, a surveillance monitoring position at a department store, is not appropriate considering claimant's age and background. Decision and Order at 36, 38, 57; *see* EX 7; Tr. at 231-33. Acknowledging that on-the-job training would be provided, the administrative law judge nonetheless found that the job was not suitable in light of the uncontradicted evidence regarding claimant's difficulty using computers.[8] Decision and Order at 5, 27, 32, 38, 57; *see* CXs 3 at 6; 5 at 26; EX 7 at 2; Tr. at 53-54, 64, 115, 150, 248-49. As the administrative law

[7] Although employer asserts, without citation to the record, that claimant currently holds a CDL license, albeit one without a passenger endorsement, *see* Emp. Petition for Review and brief at 19, Ms. Seyler's report states only that claimant had a current Texas driver's license. EX 7 at 2.

[8] In the alternative, the administrative law judge found that even were the camera operator job to be considered suitable for claimant, this single job does not satisfy employer's burden of establishing the availability of suitable alternate employment. Decision and Order at 54, 57. As correctly stated by the administrative law judge, where there are no special circumstances suggesting that claimant could have obtained the single job that he can perform, a showing of a single job is insufficient to meet employer's burden of establishing the availability of suitable alternate employment. *See Ryan v. Navy Exchange Service Command*, 41 BRBS 17 (2007); *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). As substantial evidence supports the administrative law judge's finding that no such special circumstances were shown in this case, we affirm his alternative finding that the camera operator job, standing alone, does not satisfy employer's burden of establishing the availability of suitable alternate employment.

judge's finding that the bus driver and camera operator positions are not suitable for claimant given his age, work experience and other vocational limitations is supported by substantial evidence, and as employer has not established any reversible error in his reasoning, we affirm the administrative law judge's finding that these positions do not establish the availability of suitable alternate employment. *See Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet*, 163 F.3d 901, 32 BRBS 212(CRT). We therefore affirm the administrative law judge's conclusion that employer did not establish the availability of suitable alternate employment, and his consequent award of total disability benefits to claimant.[9]

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[9] As claimant's duty to diligently seek employment does not arise until employer successfully establishes the availability of suitable alternate employment, *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), we need not address employer's contentions regarding claimant's willingness to engage in a diligent job search.