U.S. Department of Labor

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

BRB No. 14-0323

TERRY GRIMM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VORTEX MARINE CONSTRUCTION	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: May 29, 2015
	)	
Employer/Carrier-Petitioners	)	
	)	
GENERAL CONSTRUCTION COMPANY	)	
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law), Coronado, California, for claimant.

James P. Aleccia and Marcy K. Mitani (Aleccia & Mitani), Long Beach, California, for Vortex Marine Construction and Signal Mutual Indemnity Association.

Katherine F. Theofel and James E. Chapman (Finnegan, Marks, Theofel & Desmond), San Francisco, California, for General Construction and St. Paul Fire and Marine.

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

PER CURIAM:

Vortex Marine Construction and Signal Mutual Indemnity Association (Vortex) appeal the Decision and Order and the Order Denying Reconsideration (2012-LHC-00955, 2012-LHC-00957) of Administrative Law Judge William Dorsey 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant claimed he sustained cumulative orthopedic injuries and a hearing loss as a result of his work in marine construction for various employers. Specifically, claimant was engaged in covered employment as a pile driver for General Construction from January 2002 to October 2003, for Captain's Choice for a short period ending May 16, 2005, and for Vortex from January 29, 2004 to January 6, 2005, and from July 11 to August 25, 2005. He subsequently performed non-covered employment for The Otay River Group sometime between August 25, 2005 and 2007, and for Kiewit Pacific (Kiewit) from July 30, 2007 until he retired, allegedly due to the cumulative effect of his orthopedic injuries, on March 17, 2010. Claimant filed claims against four employers, General Construction, Captain's Choice, Vortex and Kiewit. Kiewit was dismissed from the proceedings for lack of jurisdiction,[1] and Captain's Choice reached a Section 8(i) settlement, 33 U.S.C. §908(i), with claimant. The remaining employers, General Construction and Vortex, controverted claimant's claims. Vortex was claimant's last covered employer.

[1] Kiewit was dismissed from the claim, because the All-American River, where claimant performed his work for that employer, is not a navigable body of water covered by the Act.

In his decision, the administrative law judge found that claimant sustained cumulative work-related injuries to his shoulders, elbows, knees, neck and low back, as well as a 1.9 percent binaural hearing loss, all of which were due at least in part to his work with Vortex. The administrative law judge found that claimant is totally disabled as a result of his work-related orthopedic injuries, and that claimant's non-covered work following his employment with Vortex was not an intervening cause of claimant's disability. The administrative law judge found that Vortex did not establish the availability of suitable alternate employment.[2] The administrative law judge thus awarded claimant medical and permanent total disability benefits from March 18, 2010, payable by Vortex. 33 U.S.C. §§907, 908(a). The administrative law judge found that Vortex is entitled to Section 8(f) relief, 33 U.S.C. §908(f).

The administrative law judge denied Vortex's motion for reconsideration. The administrative law judge reiterated that the credible medical evidence establishes that claimant sustained ongoing orthopedic injuries from the same type of work throughout his entire career, such that Vortex, as the last covered employer, is liable for claimant's benefits. The administrative law judge rejected Vortex's intervening cause arguments, i.e., that claimant's subsequent work with Kiewit is the cause of claimant's present disability, because Vortex did not establish what portion of claimant's disability is due to his work with Kiewit.

On appeal, Vortex challenges the administrative law judge's findings that it is the responsible employer and that claimant is totally disabled. Claimant and General Construction each respond, urging affirmance of the administrative law judge's decision.

Vortex first contends that claimant did not sustain any aggravating injuries while in its employ. Vortex alternatively asserts that either one of claimant's prior covered employers, General Construction or Captain's Choice, is the responsible employer, or that claimant's disabling condition is due to his subsequent employment with Kiewit. Thus, Vortex asserts that it is not the responsible employer.

Vortex first asserts the administrative law judge erred in finding that claimant sustained injuries during his employment with it. Once, as here, the Section 20(a)

[2] The administrative law judge also found that while claimant's hearing loss is related to his work for Vortex, claimant is not entitled to permanent partial disability benefits for that loss because he is entitled to the maximum compensation rate for his permanently totally disabling orthopedic injuries. *See Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956).

presumption, 33 U.S.C. §920(a), is invoked,[3] the employer may rebut it by producing substantial evidence that the claimant's employment did not cause, accelerate, aggravate, or contribute to the injury. 33 U.S.C. §920(a); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). When the employer produces substantial evidence that the claimant's injury is not work-related, the Section 20(a) presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, with the claimant bearing the burden of proving that his disability is work-related. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The administrative law judge found that Vortex rebutted the Section 20(a) presumption with regard to claimant's injuries to his elbows, shoulders and neck, but that it did not rebut the presumption with regard to claimant's low back and knee injuries. We need not address Vortex's specific contentions of error in this regard, as the administrative law judge's finding that claimant's employment with Vortex contributed to all of his orthopedic injuries is supported by substantial evidence on the record as a whole.

The administrative law judge stated he was not persuaded by Dr. London's opinion that claimant's work for Vortex did not aggravate his shoulder and elbow conditions because Dr. London did not provide any explanation for his opinion that claimant's cumulative low back and knee injuries were aggravated by his work for Vortex but that the shoulder and elbow conditions were not. Decision and Order at 28; Order Denying Recon. at 3; JX 26 at 1483. In this regard, the administrative law judge found that claimant performed essentially the same work, i.e., pile driving and other demanding physical labor, for all four employers, such that it would appear that if his work for one employer aggravated some of his orthopedic conditions then, logically, such work would have aggravated all of those conditions. The administrative law judge also accorded diminished weight to Dr. Farran's opinion that claimant's injuries were "more likely due to his employment with Kiewit" than with Vortex. JX 30 at 1517. The administrative law judge found that Dr. Farran did not squarely address whether claimant's work with Vortex aggravated his shoulder and elbow conditions. Decision and Order at 28.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is entitled to the Section 20(a) presumption that his orthopedic conditions are related to his covered employment. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

In contrast, the administrative law judge found most credible the opinions of Drs. Tse, Delman and Sutro, who opined that all of claimant's orthopedic injuries are the result of cumulative trauma claimant sustained during the entire course of his pile-driving career. JXs 3 at 966; 39 at 1656; 37 at 1929. Given the similarity in the work claimant performed for General Construction, Captain's Choice, Vortex and Kiewit, the administrative law judge found the conclusions reached by these physicians to be "sensible" and persuasive. Decision and Order at 28; *see also* Order Denying Recon. at 3. Therefore, crediting the opinions of Drs. Tse, Delman and Sutro over those of Drs. London and Farran, the administrative law judge concluded that the weight of the evidence establishes that it is more likely than not that claimant's injuries are due at least in part to his employment with Vortex.[4] The administrative law judge is entitled to weigh the medical evidence and to draw his own inferences therefrom. The Board is not empowered to reweigh the evidence. *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990). As the administrative law judge's weighing of the evidence is rational and his conclusion is supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant sustained cumulative orthopedic injuries as a result of his employment with Vortex. *See, e.g., Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010).

We next address Vortex's contention that it is not the responsible employer. In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of the natural progression or the aggravation of a prior injury. If the claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable, and the claimant's employer at that time is responsible. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in the claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is responsible. *See, e.g., Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986).

Vortex contends that either General Construction or Captain's Choice is the responsible employer, as the evidence establishes that claimant worked much longer (10-

[4] Thus, while the administrative law judge did not specifically address whether Dr. Farran's opinion rebuts the Section 20(a) presumption, any error is harmless because the administrative law judge rationally found Dr. Farran's opinion outweighed, based on the record as a whole. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

15 years out of his 32-year career) for General Construction and/or because Captain's Choice's decision to settle with claimant, establishes that it accepted liability as the responsible employer. These contentions lack merit. First, the aggravation rule applies even if the claimant sustained the greater part of his injury with a prior employer. *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT). Thus, the fact that claimant worked longer for General Construction is, standing alone, insufficient to preclude the administrative law judge from finding that Vortex is the responsible employer in this case. *Id.* Second, claimant's recovery in settlement with Captain's Choice has no bearing on Vortex's potential liability under the Act. *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006) (holding the responsible employer is fully liable to the claimant notwithstanding claimant's recovery in settlement from another potentially liable employer); *see also Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002). Accordingly, we reject these contentions.

Vortex further contends that claimant's disability is attributable entirely to his work with Kiewit. If a claimant sustains a subsequent injury outside of work or for a non-covered employer that is not the natural or unavoidable result of the original work injury, or if he subsequently develops an unrelated medical condition that has no causal connection to the work injury, any disability attributable to that intervening cause is not compensable. *See 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); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). However, the covered employer remains liable for any disability attributable to the work injury, or to the natural progression or unavoidable result of the work injury, notwithstanding the supervening injury. 33 U.S.C. §902(2); *Leach v. Thompson's Dairy, Inc.,* 13 BRBS 231 (1981). If there is evidence of record apportioning the claimant's disability between a covered injury and a subsequent non-covered injury, the covered employer is relieved of liability for disability caused by the subsequent non-covered injury. *Id.* However, if there is no apportionment between the injuries, the covered employer is liable for the claimant's entire disabling condition. *Tracy*, 43 BRBS at 102;[5] *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997).[6]

[5] In *Tracy*, the claimant had three periods of employment and sustained cumulative trauma injuries to his hands and elbows. With respect to the liable employer, the Ninth Circuit stated,

> It is undisputed that Tracy was covered by the Act during his previous employment with Keller Foundation, and that Tracy's disability stemmed from cumulative trauma he experienced during his separate stints with

In this cumulative trauma case, Vortex did not present evidence that claimant's non-covered work for Kiewit is the sole cause of claimant's present disabling orthopedic conditions. The administrative law judge found that claimant did not have any specific traumatic injury which served as the single cause of claimant's disability. The administrative law judge found that the credible medical evidence, instead, establishes that the totality of claimant's employment traumas disabled him. Drs. Tse, London, Sutro and Delman all opined that claimant sustained cumulative trauma of an orthopedic nature as a consequence of his pre-existing chronic degenerative conditions, as aggravated by the entirety of his work activities with multiple employers, including Vortex, which rendered claimant incapable of returning to his usual marine construction work. JXs 3, 26, 37, 39. On reconsideration, the administrative law judge properly explained that Vortex's intervening cause argument is flawed because a necessary element of its defense is missing, i.e., evidence apportioning claimant's disability between his covered and non-covered employment.[7] Order on Recon. at 4; *Plappert*, 31

> Keller and Global. Under the last employer rule, then, if Tracy were covered by the Act while working for Global, Global would be responsible for paying the full award owed to Tracy under the Act. If not, then Keller would be responsible.

696 F.3d at 838, 46 BRBS at 70(CRT). The Board and the Ninth Circuit affirmed the administrative law judge's finding that the claimant's employment with Global was not covered by the Act. Thus, the liability of Keller for the totality of the claimant's orthopedic injuries was affirmed.

[6] In *Plappert*, the claimant sustained a work-related neck injury which required surgery. The claimant left her employer for other non-covered employment and she suffered additional neck problems. The medical evidence established that the claimant's disabling neck condition was due to both the work-related injury and to an injury occurring in her subsequent non-covered employment. The Board affirmed the administrative law judge's finding that the covered employer was liable for benefits for the claimant's entire disability as there was no evidence of record apportioning the disability between the injury in covered employment and the injury in non-covered employment. *Plappert*, 31 BRBS at 15-16, 31 BRBS at 109-110.

[7] We disagree with the administrative law judge's suggestion that the last covered employer would remain liable for claimant's entire disability even if there were evidence of apportionment. The law cited by the administrative law judge, *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), holds that, in an *occupational disease* case, the last covered employer is liable for the totality of a claimant's disability notwithstanding subsequent injurious exposure. This case, however, is not an occupational disease case, *Port of Portland v. Director,*

BRBS at 15-16, 31 BRBS at 109-110. In the absence of such evidence, the last covered employer in whose employ the claimant sustained a disabling injury remains liable for claimant's entire disability. *Tracy*, 696 F.3d at 838, 46 BRBS at 70(CRT).

Furthermore, we reject Vortex's contention that claimant's decision to continue working in physically demanding jobs after he left Vortex in 2005 constituted negligence and/or recklessness sufficient to preclude Vortex's liability for benefits under the Act. A subsequent injury which is the result of an employee's intentional or negligent conduct, in appropriate circumstances, may serve as an intervening cause sufficient to relieve an employer of liability for the increased disability attributable to the intervening cause. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454 (9th Cir. 1954). However, the administrative law judge found that there is no evidence that any doctor told claimant that he was incapable of performing his pile driving work or that it would be negligent, if not reckless, to continue working in that capacity. The administrative law judge, instead, rationally found that claimant foreseeably continued to work in similar employment following his stint with Vortex "until he stopped due to the cumulative trauma that accumulated gradually over his career." Decision and Order at 30. Thus, the administrative law judge properly found that claimant's continued work after he left Vortex's employ is not an intervening cause of claimant's disability that relieves Vortex of liability. *Jones*, 977 F.2d 1106, 26 BRBS 64(CRT). Accordingly, as all of Vortex's responsible employer contentions are without merit, we affirm the administrative law judge's conclusion that Vortex, as the last covered employer in whose employ claimant sustained a traumatic injury, is liable for claimant's disability and medical benefits.

Vortex next contends that the administrative law judge erred in finding that claimant's hearing loss is attributable to his work with Vortex. Vortex asserts that the lack of any audiogram contemporaneous with claimant's work for it, along with claimant's testimony that he subsequently worked in noisy environments and the fact that claimant did not undergo audiometric testing until February 10, 2012, establishes that claimant did not sustain any hearing loss due to his work for Vortex.

A claimant is entitled to benefits for his work-related hearing loss based on the audiometric evidence found to be the most credible and probative. *R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Dubar v. Bath*

OWCP [Ronne II], 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000), and Vortex's liability turns on the fact that there is no apportionment of claimant's disability between his covered and subsequent non-covered injuries.

Iron Works Corp., 25 BRBS 5 (1991); *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991); *see also* 33 U.S.C. §908(c)(13). Specifically, an employee who leaves covered employment is entitled to benefits based on the audiogram found to be the most reliable evidence of the hearing loss he sustained during covered employment. *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991); *Dubar*, 25 BRBS 5.

The administrative law judge found that claimant established he has a work-related 1.9 percent binaural hearing impairment based on the only audiogram of record, administered by Dr. Schindler on February 10, 2012.[8] The instant case is akin to *Labbe*, 24 BRBS 159, *Dubar*, 25 BRBS 5, and *Steevens*, 35 BRBS 129, in which the Board affirmed the administrative law judges' decisions to credit later audiograms and project the results back to the last covered employment.[9] In this case, the record contains no evidence indicating the extent of claimant's hearing loss at the time he last worked for Vortex in 2005. In this regard, the administrative law judge correctly found that there were no audiograms conducted between 1990 and 2010 and that the only audiogram of record was the one administered by Dr. Schindler on February 10, 2012. 33 U.S.C. §908(c)(13)(C); 20 C.F.R. §702.441. Thus, the administrative law judge rationally relied on the results of the February 10, 2012 audiogram and projected those results back to

[8] This audiogram establishes that claimant sustained a hearing loss, and Vortex conceded, at the hearing, that claimant was "exposed to loud noise at Vortex." HT at 53. This is sufficient to entitle claimant to the Section 20(a) presumption that his hearing loss is due to noise exposure at Vortex. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Moreover, the record does not contain any evidence to rebut the Section 20(a) presumption that claimant's hearing loss is due to his work at Vortex. Dr. Schindler, who conducted the February 10, 2012 audiogram, opined that claimant's hearing loss "is the result of cumulative noise exposure." JX 8.

[9] In *Labbe*, claimant left covered employment in 1963. The Board held that the administrative law judge rationally discredited an interpreted 1967 audiogram that lacked evidence of the credentials of the tester and rationally relied on a 1986 audiogram in awarding benefits. *Labbe*, 24 BRBS at 162. In *Dubar*, the Board held that the administrative law judge rationally relied on a 1988 audiogram, as the record contained no evidence of a hearing loss in 1971 when the claimant left covered employment, and as he found that the 1988 audiogram was more reliable than one conducted in 1984. *Dubar*, 25 BRBS at 7-8. Similarly, in *Steevens*, the Board affirmed the administrative law judge's determination that the audiograms conducted in 1985 and 1992 were not as probative as the ones conducted in 1998, and it affirmed his decision to award benefits based on an averaging of the result of the 1998 audiograms, despite there being a 23-year gap between the 1998 audiograms and the claimant's last year of covered employment. *Steevens*, 35 BRBS at 130, 133.

claimant's last covered employment with Vortex.[10] Accordingly, the administrative law judge's finding that claimant sustained a 1.9 percent binaural hearing loss for which Vortex is liable is affirmed. *See* n. 2 *supra*.

Vortex lastly contends that it demonstrated the availability of suitable alternate employment via a customer service position with Sears and an attendant position with Allied Barton. Vortex specifically avers that Mr. Stauber's labor market survey establishes that claimant is physically and mentally capable of performing both of these jobs and that the administrative law judge erred by crediting claimant's expert, Mr. Yankowski, over Mr. Stauber, in addressing claimant's ability to perform such work.

Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to return to his usual employment as a pile driver due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *Hernandez v. Nat'l Steel & Shipbuilding Co.,* 32 BRBS 109 (1998).

The administrative law judge addressed whether Vortex established the availability of suitable alternate employment in terms of the jobs identified by Mr.

[10] Contrary to Vortex's assertion, *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991), and *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989), do not preclude the administrative law judge's use of the February 10, 2012 audiogram; rather, these cases, which included evidence that the claimants did not have compensable hearing losses at the time they left covered employment, merely reinforce the long-established principle that it is within the administrative law judge's discretion to determine which audiogram is most probative of the degree of hearing loss sustained by claimant at the time he left covered employment.

Stauber, claimant's post-injury restrictions,[11] and the vocational reports of Mr. Yankowski. Specifically, the administrative law judge found that the jobs identified by Mr. Stauber as a bench assembler/tester, the Sears customer service representative, and yard attendant, do not constitute suitable alternate employment because, as Mr. Yankowski noted, they required prior experience which claimant did not have, and/or they had physical requirements which exceeded claimant's restrictions. JX 10. The administrative law judge rationally accorded greater weight to the conclusions reached by Mr. Yankowski because his contacts with the potential employers appeared to be more recent, more thorough, and better documented than Mr. Stauber's contacts. Decision and Order at 34. The administrative law judge further rejected the attendant position with Allied Barton, because the Allied Barton recruiter reported very few openings and because the job had physical requirements, i.e., prolonged standing and walking while patrolling work sites, beyond the scope of claimant's physical limitations. Thus, based on his review of the vocational reports, and after according greater weight to the report authored by Mr. Yankowski, the administrative law judge determined that employer did not establish the availability of suitable alternate employment. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). As this finding is rational, in accordance with law, and supported by substantial evidence, it is affirmed. We, therefore, affirm the consequent award of total disability benefits to claimant. *Beumer*, 39 BRBS 98; *Wilson*, 30 BRBS 199; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

[11] The administrative law judge found that the restrictions used by both vocational experts, which he added comported with the medical evidence, consisted of: no sitting or standing for prolonged periods of time; no lifting more than ten pounds; no repetitive pushing, pulling, bending, stooping, kneeling, squatting, crawling, or neck flexing; and no work above shoulder level.

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge