BRB No. 98-1097

GERALD COMEAUX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
M.G. MAYER YACHT SERVICE	)	DATE ISSUED: May 5, 1999
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Donald B. Cameron (Anderson & Anderson, L.L.P.), Slidell, Louisiana for claimant.

Patricia H. Wilton (Egan, Johnson & Stiltner), Baton Rouge, Louisana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order awarding benefits (97-LHC-1688) of Administrative Law Judge C. Richard Avery 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).

The parties stipulated that claimant, a welder/fitter, suffered an injury in the

course and scope of his employment on November 16, 1994. Joint Exhibit 1. Employer paid temporary total disability benefits from November 16, 1994, to August 17, 1995. Thereafter, employer ceased payment, and claimant filed his claim, contending that he is permanently totally disabled due to pain resulting from his work-related back injury.

The administrative law judge found that it is undisputed that claimant cannot return to his pre-injury employment and that claimant reached maximum medical improvement on December 15, 1995. The administrative law judge found further that employer produced insufficient evidence to establish the availability of suitable alternate employment. The administrative law judge therefore awarded claimant temporary total disability benefits from November 16, 1994 to December 15, 1995, and permanent total disability benefits from December 15, 1995, and continuing, as well as medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. Finally, the administrative law judge denied claimant a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

Contrary to employer's contention, the administrative law judge rationally found that employer failed to sustain its burden of proving the availability of suitable alternate employment. When, as here, it is undisputed that claimant is unable to perform his usual pre-injury work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 1031, 14 BRBS 156 (5th Cir. 1981). The United States Court of Appeals for the Fifth Circuit held in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1239 (5th Cir. 1991), that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one actual job opportunity, where it also establishes the general availability of other suitable positions or that the employee has the realistic likelihood of obtaining such a single employment opportunity under

appropriate circumstances.[1] *See also Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998).

[1]The court stated that such a likelihood could exist where, for example, the employee is skilled, employer identifies a specialized job and the number of highly qualified employees is small. *P & M Crane*, 930 F.2d at 431, 24 BRBS at 121-122 (CRT).

In the instant case, the administrative law judge found that Ms. Adair, employer's rehabilitation consultant, identified five light to medium physical labor positions which she deemed suitable for claimant, as well as the general availability of light and medium duty jobs, under the mistaken assumption that his treating physician, Dr. Manale, had released claimant for such work in accordance with a functional capacities evaluation, when in fact both Drs. Manale and Mimeles found the evaluation "equivocal." EX 1, 8. The administrative law judge noted that Dr. Manale's 1997 chart notes state that claimant cannot work an 8 hour day and is permanently totally disabled. CX 6-8. The administrative law judge also stated that Dr. Mimeles, employer's expert, who examined claimant once on March 14, 1995, approved claimant unequivocally for only one identified job. EX 1.[2] The administrative law judge found further that Ms. Adair admitted that claimant would not be suitable for any work based on Dr. Manale's assessment of claimant as permanently and totally disabled. Decision and Order at 5-6; Post-hearing, February 5, 1998, Adair deposition at 20. The administrative law judge, within his discretion as the trier of fact, credited the opinion of claimant's treating physician, Dr. Manale, that claimant is totally disabled from his work-related injury. *See, e.g., Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *see generally Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983)(if the administrative law judge finds, based on medical opinions, that claimant cannot perform any employment, employer has not established the availability of suitable alternate employment). As the credited evidence establishes that claimant is unable to perform any work, which necessarily includes the jobs identified by employer's vocational expert, employer has failed to establish the availability of suitable alternate employment, and we consequently affirm the administrative law judge's award of benefits as it is supported by substantial evidence and in accordance with law.

[2]Dr. Mimeles approved the Bench/Tig/Welders position, disapproved the Welder (Aluminum), Welder/Fitters, and Welder positions, and found the Benchwork Helper/Assembly Helper and Small Part Assembler positions questionable.

Accordingly, the administrative law judge's decision awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge