BRB No. 98-0289

ROSCOE MITCHELL	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

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

Robert E. Walsh (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-2237) 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 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a crane operator, sustained an injury to his back on August 15, 1985, during the course of his employment with employer; claimant subsequently

performed light duty work for employer during various periods of time until he was passed out in February 1995. Claimant, who has not been employed since that time, was awarded temporary total disability compensation for various periods of time from August 17, 1985, and continuing, in a district director's order. Employer thereafter sought modification of the district director's order, alleging that claimant retains a residual wage-earning capacity and, therefore, is only partially disabled.

In his Decision and Order, the administrative law judge determined that claimant is unable to return to his usual employment duties with employer. Next, the administrative law judge determined that employer failed to establish the availability of suitable alternate employment, and thus awarded claimant permanent total disability compensation. Lastly, the administrative law judge granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

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

Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of 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.[1] *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992).

[1]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).

In support of its contention that claimant retains a residual wage-earning capacity, employer presented the labor survey and testimony of Ms. Lanman, a vocational consultant. Ms. Lanman identified six part-time positions which she opined were suitable for claimant and which claimant's treating physician, Dr. Svihila, opined that claimant could attempt on a trial basis.[2] *See* CX 2c. Based upon the testimony of claimant regarding his ongoing pain and sleep deprivation, the totality of Dr. Svihila's opinion, and the testimony of Mr. DeMark, claimant's vocational consultant, the administrative law judge in the instant case concluded that the positions identified by employer were insufficient to establish the availability of suitable alternate employment. Specifically, the administrative law judge, after weighing the relevant evidence, found the identified positions to be unsuitable based upon claimant's lack of money-handling experience and the physical restrictions placed on claimant by Dr. Svihila.

Initially, we hold that the administrative law judge acted within his discretion in crediting the testimony of Mr. DeMark, claimant's vocational expert, over the testimony of Ms. Lanman. Specifically, the administrative law judge, in discussing the testimony of these two individuals, found Mr. DeMark to be more qualified to render an opinion regarding claimant's employment prospects based upon Mr. DeMark's greater experience both as a certified vocational counselor and in the geographic area wherein claimant resides.[3] *See Mendez v. National Steel and Shipbuilding Co.,* 21 BRBS 22 (1988). The administrative law judge additionally relied upon claimant's complaints of pain and sleep depravation in concluding that the identified positions were not suitable for claimant. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). Claimant's complaints are supported by the opinion of Dr. Svihila who, although he approved the identified positions on a trial basis, concluded that he believed that claimant was totally disabled and would not be able to perform any job for an extended period. CX 2c.

It is well-established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and is not bound to accept the opinion or

[2]Specifically, Ms. Lanman identified three cashier positions, a front-desk clerk, a donation scheduler/solicitor, and a pizza phone order taker, as being suitable for claimant.

[3]Mr. DeMark, a certified Department of Labor vocational rehabilitation counselor since 1983, opined that the positions identified by employer were in fact unsuitable for claimant.

theory of any particular witness. *See Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, in the case at bar, the administrative law judge's decision to rely upon the testimony of claimant, Mr. DeMark, and Dr. Svihila, and his subsequent determination that Ms. Lanman's labor market survey is insufficient to establish the availability of suitable alternate employment is rational, and his findings are supported by the record. Accordingly, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, and his consequent award of permanent total disability compensation to claimant. *See generally Uglesich v. Stevedoring Services of America,* 24 BRBS 180 (1991).

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

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge