BRB No. 98-0388

LEON E. ELLISON, JR.	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
ALABAMA SHIPYARD, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Additional Benefits and Decision Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frazier (Huey & Leon), Mobile, Alabama, for claimant.

Walter R. Meigs, Mobile, Alabama, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Additional Benefits and Decision Denying Employer's Motion for Reconsideration (96-LHC-1131) of Administrative Law Judge Richard K. Malamphy 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 welder, suffered an injury to his right arm and shoulder during the course of his employment on July 14, 1994; claimant, who subsequently underwent surgeries for his work injury and for unrelated cerebral blood clots, has not returned to work since that time.

In his Decision and Order, the administrative law judge found *inter alia*, that claimant was unable to perform his pre-injury employment duties with employer and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from January 25, 1996, through March 7, 1996, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b). On reconsideration, the administrative law judge reiterated his conclusion that employer failed to establish the availability of suitable alternate employment.

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

Employer, on appeal, challenges only the administrative law judge's determination that it failed to establish the availability of suitable alternate employment. Where, as in the instant case, claimant is unable to return to his usual employment duties due to a work-related injury, 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 and for which he can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied,* 479 U.S. 826 (1986).

In the instant case, employer, in support of its contention that claimant's disability is partial rather than total, relied upon the testimony of its vocational consultant, Ms. Russo. Ms. Russo testified as to the general availability in the local job market of work for claimant as a dispatcher, parking valet or security guard, the descriptions of which were approved by Dr. Freeman. CX 3. Ms. Russo identified, however, only one specific position, that of night dispatcher with Hackbarth Delivery. HT at 28. Pursuant to this testimony, employer urges the Board to apply the holding of the United States Court of Appeals for the Fifth Circuit in *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), to the instant case, which arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. In *P & M Crane,* the Fifth Circuit stated that an employer can meet its burden of establishing the availability of suitable alternate employment by demonstrating the existence of only one suitable job opportunity, and the general availability of other suitable positions, where "an employee may have a reasonable likelihood of obtaining such a single employment

opportunity under appropriate circumstances." *See P & M Crane*, 930 F.2d at 431, 24 BRBS at 121 (CRT). Thus, employer asserts that, pursuant to *P & M Crane*, the single employment opportunity identified by Ms. Russo meets its burden of establishing the availability of suitable alternate employment.

In addressing this issue, however, the administrative law judge concluded, based upon claimant's physical restrictions and subjective complaints, that the one specific job opportunity identified by employer was insufficient to establish the availabilty of suitable alternate employment. Specifically, the administrative law judge found that employer's expert, Ms. Russo, acknowledged that the identified dispatcher position required using the dominate hand for extensive writing and log keeping, and that Dr. Freeman had previously prohibited claimant from performing that task. *See* Decision Denying Employer's Motion for Reconsideration at 2; CX 3. Based upon the foregoing, the administrative law judge concluded that the identified position of dispatcher did not satisfy employer's burden.

We hold that the administrative law judge acted within his discretion in relying upon Dr. Freeman's restrictions and claimant's complaints in concluding that the identified position of dispatcher was not suitable for claimant, *see Mijangos v. Avondale Shipyards, Inc.,* 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), as 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). As it is uncontroverted that employer did not proffer any evidence of additional specific job opportunities that claimant is capable of performing, employer has failed to meet the standard elucidated by the Fifth Circuit in *P & M Crane;* 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 total disability benefits to claimant. *See generally Uglesich v. Stevedoring Services of America,* 24 BRBS 180 (1991).

Accordingly, the Decision and Order Awarding Additional Benefits and the Decision Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge