BRB No. 02-0130

JOHNNY MACK CHISHOLM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: Oct. 15, 2002
	)	
SOUTHERN TOWING COMPANY	)	
	)	
and	)	
	)	
CNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (1998-LHC-2592) 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 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).

Claimant, a shop mechanic, injured his back at work on April 2, 1996, and had back surgery in September 1996. Employer did not pay claimant any disability compensation but instead paid claimant his full salary post-injury for any periods he was unable to work. Claimant returned to work shortly after the 1996 work injury, and retired on June 15, 1999. The administrative law judge found that claimant involuntarily retired because he could no longer perform his usual work. The

administrative law judge awarded claimant permanent total disability benefits from June 15, 1999, and continuing, finding that employer did not establish the availability of suitable alternate employment either at its facility through a purchasing agent job or on the open market. The administrative law judge denied employer a credit against compensation due for $84,000 in retirement benefits, and $5,000 in severance pay that employer paid to claimant.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment and his denial of a credit in the amount of $89,000. Claimant did not file a response brief.

Employer initially contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment at its facility through the purchasing agent position it offered claimant. Once, as here, claimant establishes an inability to perform his usual employment because of a job-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a suitable position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). A job which claimant is not educationally or physically qualified to perform is not suitable. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT)(5th Cir. 1999); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment at its facility through the purchasing agent position. During the time of this job's availability from December 1998 through April 1999, it was not within the restrictions imposed by claimant's treating physician, Dr. Kellett, as Dr. Kellett restricted claimant from lifting more than 30 pounds and constant bending, and this job required the ability to lift 50 pounds and to bend. Finding that the record did not establish how often the purchasing agent would be required to lift 50 pounds or to bend, the administrative law judge rationally found that employer did not establish that this job was suitable for claimant at the time of its availability. *See Ledet*, 163 F.3d 901, 32 BRBS 212(CRT); *Cooper*, 33 BRBS 46; Decision and Order Awarding Benefits at 22; Cl. Ex. 4 (note dated November 7, 1996); Emp. Ex. 15 at 27-32, 44; Tr. at 55-56. Moreover, at the time this job may have become suitable for claimant, upon Dr. Kellett's release of claimant to full duty work on December 29, 2000, this job was not available to claimant as someone had been hired for this position. *See Darby*, 99 F.3d 685, 30 BRBS 93(CRT); *Ezell*, 33 BRBS 19; Decision and Order Awarding Benefits at 22; Emp. Exs. 11, 12, 15 at 26.

Employer next contends that the administrative law judge erred in finding that it did

not establish the availability of suitable alternate employment on the open market through a labor market survey identifying 12 jobs. Employer contends that the administrative law judge selectively chose any one set of restrictions to find a certain job not suitable for claimant and erred in not discussing and weighing Dr. Kellett's release of claimant to full duty work on December 29, 2000, in his findings regarding the availability of suitable alternate employment. In the instant case, the administrative law judge discussed and weighed the two labor market surveys prepared by employer's vocational expert, Ms. Favaloro: one in 2000 based on the 1996 restrictions imposed by Dr. Kellett still in effect in 2000 and a second survey in 2001 based on Dr. Kellett's subsequent release of claimant to full duty work. The administrative law judge found that none of the jobs identified is suitable as they are not within any one of five sets of restrictions of record.

The five sets of restrictions include the following. On November 7, 1996, Dr. Kellett restricted claimant from lifting more than 30 pounds and constant bending. Cl. Ex. 4 (note dated November 7, 1996). Dr. Kellett subsequently released claimant to full duty work on December 29, 2000. Emp. Exs. 11, 12. At the hearing on February 8, 2001, claimant testified to certain limitations and stated that he could not maintain any job identified by Ms. Favaloro on a sustained basis. Tr. at 64-65, 68-69, 71-76. On March 21, 2001, claimant underwent a functional capacity evaluation which indicated that claimant could occasionally lift 55 pounds and frequently lift 35 pounds, has a tolerance of driving approximately 30 minutes to one hour, and has a limited tolerance for bending and stooping. Emp. Ex. 16. On April 12, 2001, Dr. Boals restricted claimant from lifting more than 20-25 pounds and from repetitive lifting, and stated that claimant must alternate standing and walking with time off to rest. Cl. Ex. 7 at 14, 16, 18, 26-27.

We affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment on the open market. Although the administrative law judge may have erred in not crediting any one set of restrictions, especially in light of their differences, and in not discussing and weighing Dr. Kellett's release of claimant to full duty work on December 29, 2000, *see, e.g., Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998), we hold that any error is harmless. Aside from Dr. Kellett's release of claimant in December 2000, the medical evidence, including the evaluation performed after Dr. Kellett's releases, is consistent in restricting claimant's activities. Regardless of the specific restrictions imposed, the administrative law judge chose to accept as credible claimant's testimony that he cannot perform any job identified by Ms. Favaloro.[1] Decision and Order Awarding Benefits at 23, 24. As the administrative law judge acted within his discretion in crediting claimant's testimony, *see Cordero v. Triple A*

[1]Employer concedes that the administrative law judge found claimant's testimony credible. Emp. Br. at 6.

Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm his finding that employer did not establish the availability of suitable alternate employment on the open market as it is rational and supported by substantial evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); Decision and Order Awarding Benefits at 22-24; Tr. at 64-65, 68-69, 71-76. Consequently, we affirm the administrative law judge's award of permanent total disability benefits.

Employer lastly contends that the administrative law judge erred in denying it a credit against compensation due for $85,000 in retirement benefits and $5,000 in severance pay. Employer asserts that the statement made by its owner, Mr. Stegbauer, to Mr. Tilley, claimant's former supervisor, that claimant is due some amount of payment because of the pain he went through indicates that the $89,000 payment by employer is an advance payment of compensation. Section 14(j) of the Act, 33 U.S.C. §914(j), provides that "[i]f the employer has made advance payments of compensation, [it] shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). The payments for which employer seeks a credit must be intended as compensation. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT)(5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). We affirm the administrative law judge's denial of a credit as employer has not established that the retirement benefits and severance pay were advance payments of compensation under the Act.[2] *See Shell Offshore*, 122 F.3d 312, 31 BRBS 129(CRT); 33 U.S.C. §914(j); Decision and Order Awarding Benefits at 25; Emp. Ex. 15 at 38, 39; Tr. at 77-78.

[2]The administrative law judge rationally found that severance pay is not compensation benefits for an injury suffered while an employee of an employer, and that retirement pay is generally based upon longevity of employment for which entitlement by an employee is met based on an age and years worked criteria established by an employer, and is not compensation for a work injury. Decision and Order Awarding Benefits at 25.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge