BRB No. 02-0216

MICHAEL T. BREMBY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 24, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-LHC-2640) 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 findings of fact and conclusions of law 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).

This case is before the Board for the second time. Claimant injured his left wrist on April 5, 1995, while grinding welds. The next day, claimant went to employer=s clinic complaining of wrist pain, and was given work restrictions that remained in place until July 6, 1995. Claimant was on and off restricted duty over the next several months and he underwent surgery for a non-work-related, ganglion cyst on October 31, 1995. Claimant returned to restricted duty on November 16,

1995; these restrictions were discontinued on February 16, 1996. Commencing on May 29, 1996, work restrictions were reinstituted and discontinued on several occasions. The last set of restrictions was placed on November 1, 1996, with an expiration date of February 20, 1998. On December 6, 1996, employer laid off claimant from his light duty job at employer=s facility for economic reasons. Thereafter, claimant commenced full-time employment with Norfolk Naval Shipyard on February 24, 1997. Claimant filed a claim against employer under the Act for temporary total disability benefits from December 6, 1996, through February 24, 1997.

In his first Decision and Order, the administrative law judge found that claimant failed to present sufficient evidence to establish invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. '920(a), and thus found that claimant=s wrist injury is not work-related. He alternatively found that if the presumption at Section 20(a) were invoked, employer did not present sufficient evidence to establish rebuttal. Consequently, the administrative law judge denied benefits. The administrative law judge denied claimant=s motion for reconsideration.[1]

Claimant appealed the administrative law judge=s decision to the Board, which reversed the administrative law judge=s finding of no causation, and held that claimant=s condition is work-related as a matter of law. Additionally, the Board vacated the administrative law judge=s denial of disability compensation, and remanded the case for the administrative law judge to reconsider claimant=s entitlement to disability benefits in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999), since claimant was employed in a light duty job in employer=s facility at the time of his layoff. *Bremby v. Newport News Shipbuilding & Dry Dock Co.,* BRB No. 99-0325 (Dec. 20, 1999)(unpub.). The Board denied employer=s motion for reconsideration. *Bremby v. Newport News Shipbuilding & Dry Dock Co.,* BRB No. 99-0325 (March 31, 2000) (order on reconsideration) (unpub.).

In his decision on remand, the administrative law judge found that claimant did

[1]The first hearing in this case was held on March 31, 1998, and the hearing after remand on May 16, 2001. The transcripts of the hearings will be referred to as Tr. 1 and Tr. 2 respectively.

not establish a *prima facie* case of total disability. In the alternative, the administrative law judge found that employer established the availability of suitable alternate employment. Consequently, the administrative law judge once again denied the compensation benefits sought by claimant.

On appeal, claimant challenges the administrative law judge=s denial of his claim, averring that the administrative law judge failed to follow the Board=s remand order and erroneously considered the issue of whether claimant established a *prima facie* case of total disability. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred on remand by initially addressing the issue of whether claimant established a *prima facie* case of total disability. Section 802.405(a) of the regulations, 20 C.F.R. '802.405(a), governing the operation of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." The Board=s first Decision and Order specifically stated that the administrative law judge was to consider claimant=s entitlement to disability benefits pursuant to the Fourth Circuit=s decision in *Hord.* Specifically, the Board stated that:

> [C]laimant is entitled to total disability compensation for the period of the layoff from the light duty job, unless employer shows the availability of other suitable alternate employment. *Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797 (4th Cir. 1999); *Mendez v. Nat=l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). In *Hord*, the United States Court of Appeals for the Fourth Circuit recently held that an employer may not satisfy its burden of demonstrating suitable alternate employment based solely on the post-injury internal light duty employment subjected to the layoff. In this case, claimant obtained a job with Norfolk Naval Shipyard on February 24, 1997, and employer introduced into evidence a labor market survey and the testimony of a vocational counselor regarding the availability of alternate work during the layoff period. *See* EX 22; Tr. at 84. Therefore, we remand the case for the administrative law judge to reconsider claimant=s entitlement to disability benefits under *Hord* as claimant was employed in a light duty job in employer=s facility at the time of his layoff.

See Bremby, slip opinion at 4.

On remand, however, the administrative law judge proceeded initially to address the issue of whether claimant established a *prima facie* case of total disability. *See Obert v. John T. Clark & Son of Maryland,* 23 BRBS 157, 159 (1990).

In this regard, the administrative law judge found that:

> Claimant testified that three times he was recalled by the shipyard [employer] after a layoff and on all three occasions was told that there was no work for him because of his restrictions. (Tr. 45). There is no other evidence that Claimant could not return to his previous employment because of his work-related injury. . . . As there is no corroborating evidence that Claimant was recalled, much less that he was denied work because of his restrictions, I must find that he has not made a *prima facie* case that he could not return to his previous job because of his work-related restrictions [cite omitted]. As a result, Mr. Bremby=s claim must be denied. . . .

Decision and Order on Remand at 2-3.

In its Decision and Order, however, the Board specifically stated that as claimant was working at a light duty job under restrictions at the time of his economic layoff, he is entitled to total disability compensation for the period of the layoff unless employer shows the availability of other, suitable alternate employment.[2] This statement is consistent with the facts presented in the case at bar; as claimant was undeniably performing light-duty work with restrictions at the time of his layoff, he was not performing his usual employment duties with employer and, thus, claimant has established a *prima facie* case of total disability.[3] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Accordingly, based

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[2]We note that employer, before the administrative law judge, conceded that claimant was performing light-duty employment at the time of his layoff on December 6, 1996. *See* Respondent=s Brief in Response to Petitioner=s Petition for Review at 29; Employer=s Brief on Remand at 7.

[3]After declining to credit claimant=s testimony that, based upon his work restrictions, he was denied re-employment with employer following the December 6, 1996, lay-off, the administrative law judge determined that as there was no corroborating evidence that claimant was in fact recalled, much less that he was denied work because of his restrictions, claimant failed to meet his burden on this issue. Whether claimant was recalled by employer after the layoff, which employer has denied, is not the dispositive issue. Once claimant was laid-off from his light-duty work, the burden shifted to employer to establish the availability of suitable alternate employment. It could meet this burden by recalling claimant, or by introducing other evidence, as it has done here.

upon the facts of this case, we hold that the administrative law judge erred in determining that claimant did not establish a *prima facie* case of total disability; that finding is thus reversed.

We next address claimant=s challenge to the administrative law judge=s finding that employer established the availability of suitable alternate employment. Once 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. *See Moore,* 126 F.3d 256, 31 BRBS 119(CRT). On remand, the administrative law judge in a footnote stated that:

> Claimant=s counsel stipulated that employer=s vocational expert=s labor market survey identified a sufficient number of suitable alternative jobs (I Tr. 89). I find that Claimant is bound by and cannot now withdraw from that stipulation. 20 C.F.R. '18.51.

Decision and Order on Remand at 3 n. 2. At the first hearing, during the testimony of Amy Lanman, a vocational counselor who had prepared a labor market survey in this case, claimant=s counsel stated: AYour Honor, in an effort to speed this hearing along, we don=t challenge this labor market survey, and [claimant] has been working since before this lady was ever retained, making more money than she says he is able to make in the labor market survey.@ *See* Tr. 1. at 89. Claimant=s counsel thereafter affirmatively acknowledged the administrative law judge=s statement that AI gather from [claimant=s counsel=s] statement that he=s willing to stipulate to the accuracy of this survey.@ *Id.* Based on this exchange, the administrative law judge, in his initial Decision and Order, included the stipulation AThe Labor Market Survey prepared by Amy Lanman is accurate.@ *See* Decision and Order at 3, Stip. 4. Pursuant to 29 C.F.R. '18.51, parties may enter into stipulations at any stage of the proceeding, but until such time as the stipulations are received into evidence at a hearing or prior thereto, they are not binding on the parties. *See Warren v. Nat=l Steel & Shipbuilding Co.,* 21 BRBS 149 (1988). In the instant case, the transcript of the initial hearing before the administrative law judge establishes the existence of a stipulation regarding the accuracy of the labor market survey prepared by Ms. Lanman. Accordingly, the administrative law judge acted within his discretion in holding claimant bound by the stipulation. *See generally Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff=d sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT)(4th Cir. 1994).

The administrative law judge then determined that even without claimant=s counsel=s stipulation, the labor survey prepared by Ms. Lanman was sufficient to

establish the availability of suitable alternate employment. Ms. Lanham=s August 1997 labor market survey identifies eight positions available between December 6, 1996, and February 24, 1997, and took into consideration the restrictions imposed by Dr. Freund, which included no lifting over ten-pounds, maximum carrying of 20 feet, no vertical ladders, no pushing or pulling with the left hand and no use of vibratory tools.[4] *See* EX 22; Tr. I at 84-88. Ms. Lanman verified with each employer that the position was appropriate, and Dr. Freund approved these positions as within claimant=s physical restrictions. EX 22 at 4-6; Tr. at 88.

Contrary to claimant=s argument, employer may meet its burden of establishing the availability of suitable alternate employment by relying on a retrospective labor market survey so long as the jobs were available during the "critical period" during which claimant was able to work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Therefore the mere fact that the survey in this case was compiled, in claimant=s words, Aafter the fact@ does not preclude it from establishing the availability of suitable alternate employment. Moreover, with regard to claimant=s argument that employer did not notify claimant about the openings and did not provide claimant assistance in obtaining the jobs, employer is under no obligation to inform claimant of positions it identifies as evidence of suitable alternate employment, *see Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), nor is employer required to act as an employment agency, *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165, or to place claimant in a specific job. *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT). Accordingly, as claimant stipulated to the accuracy of Ms. Lanman=s labor market survey, and Dr. Freund approved the identified positions, we affirm the administrative law judge=s finding that employer established the availability of suitable alternate employment.

Claimant additionally contends that the administrative law judge erred in failing to consider whether he diligently sought employment post-injury. A claimant may rebut employer=s showing of suitable alternate employment, and thus retain entitlement for total disability benefits, by demonstrating that he diligently tried but was unable to secure alternate employment post-injury. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger=s Terminal & Shipping*

[4]The jobs identified were: Map reader at AAA Tidewater, desk clerk at Econo Lodge, telephone order taker at Chancello=s Pizza, telephone interviewer at IPSOS-ASI, dispatcher assistant at Hampton Roads Transportation, and security guard positions at Wackenhut, Key Security and Coastal Security.

Corp. v. Director, OWCP, 781 F.2d 687, 18 BRBS 79(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In the instant case, the record reflects that after being laid off from his light duty job by employer on December 6, 1996, claimant found a job due to his own efforts on February 24, 1997. Claimant also testified that following his layoff on December 6, 1996, he applied for Aeverything available, laborer, anything.@ Tr. 1 at 50. The administrative law judge stated, however, that as claimant did not establish a *prima facie* case of total disability, it was not necessary to address the issue of whether claimant had been diligent in his job search efforts. *See* Decision and Order on Remand at 3. As we have reversed the administrative law judge=s finding that claimant did not establish a *prima facie* case of total disability, the administrative law judge=s failure to address this issue requires that we remand this case for the administrative law judge to consider all the evidence and testimony regarding claimant=s attempts to secure post-injury employment. *See Roger=s Terminal*, 784 F.2d 687, 18 BRBS 79(CRT); *Hooe v. Todd Shipyards Corp.,* 21 BRBS 258 (1988).

Accordingly, the administrative law judge=s finding that claimant did not establish a *prima facie* case of total disability is reversed, his finding that employer established the availability of suitable alternate employment is affirmed, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge