BRB No. 03-0184

MELVIN L. DAVIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 30, 2003
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (98-LHC-0982) 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 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).

This is the second time this case is before the Board. Claimant, a rigger, injured his back on March 11, 1987. Claimant returned to light duty work but was terminated on May 8, 1989. A compensation order, based on the parties= stipulations, was issued by the district director on October 24, 1990, awarding claimant various periods of temporary total and partial disability benefits. On June 23, 1995, employer sought modification of this

order, asserting that claimant=s 1987 injury had resolved by October 24, 1990. *See* 33 U.S.C. '922. In his initial decision, the administrative law judge modified the 1990 compensation order to reflect claimant=s reaching maximum medical improvement as of November 10, 1989, and employer=s establishing suitable alternate employment on November 17, 1993. Accordingly, the administrative law judge awarded claimant permanent total disability benefits from November 10, 1989, to November 16, 1993, and permanent partial disability benefits thereafter. Subsequently, the administrative law judge denied employer=s motion for reconsideration.

Employer appealed, challenging the administrative law judge=s finding that claimant=s injury had not completely resolved and that it established the availability of suitable alternate employment only as of November 1993. In its decision, the Board affirmed the administrative law judge=s finding that employer failed to establish a change in claimant=s physical condition but vacated his summary finding that employer established the availability of suitable alternate employment only as of November 17, 1993. *Davis v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0549 (Mar. 15, 2002)(unpublished). The Board remanded the case for the administrative law judge to discuss and weigh the evidence supporting employer=s contention that it established suitable alternate employment in 1990.

On remand, the administrative law judge reviewed the vocational evidence of record and found that employer failed to meet its burden of establishing the availability of suitable alternate employment prior to November 1993. Accordingly, he reaffirmed his previous award. Employer again appeals, arguing that the administrative law judge erred in failing to find that it established the availability of suitable alternate employment as of October 24, 1990. Claimant responds, urging affirmance.

Employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment prior to November 1993. Once, as here, claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must show the realistic 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 Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *Trans-State*

[1] The standards for establishing entitlement to disability compensation are the same in modification proceedings, such as in the instant case, as they are in the initial adjudication. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Dredging v. Benefits Review Board, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may rely on a retrospective labor market survey if the jobs identified were available during the Acritical 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); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Claimant=s entitlement to total disability benefits ends as of the date suitable alternate employment is established. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In the instant case, based on evaluations of claimant=s physical restrictions as determined by claimant=s treating physician, Dr. Phillips, CX 15, and his vocational abilities, which included testing results and interviews with claimant, employer submitted labor market surveys prepared by Susan Williams, Gary Klein, and Laura Whitfield. The administrative law judge rejected the report of Ms. Williams, dated November 20, 1990, finding that she failed to state when the jobs were available, that she merely listed suitable occupations and their identification number from the *Dictionary of Occupational Titles,* and that she did not include pay scales for the positions. EX 36. Mr. Klein prepared a labor market survey in 1997, which he amended in 1999 to identify specific employers who were likely hiring in 1990. EX 33, 34. The administrative law judge rejected this survey because Mr. Klein=s survey failed to fully describe the nature of each position or its pay scale. EX 34, 42. Ms. Whitfield identified 21 jobs within claimant=s physical and vocational limitations that were available as of the date of the survey. EX 31. Ms. Whitfield testified that the positions likely were available in 1990 because many of these employers hire Afrequently,@ and she further relied on old want ads for similar positions. HT at 174-183. The administrative law judge found that employer did not persuasively establish that such positions were actually available in 1990. In addition, the administrative law judge rejected the classified advertisements presented by Ms. Whitfield as they lack critical information from which the administrative law judge could determine the jobs= suitability, such as the jobs= requirements, their pay scales, or the name of the employer. The administrative law judge therefore concluded that employer did not establish the availability of suitable alternate employment in 1990. Decision and Order on Remand at 4-7.

We affirm the administrative law judge=s rejection of the surveys prepared by Ms. Williams and Ms. Whitfield. Ms. Williams identified only occupations listed in the *Dictionary of Occupational Titles* which she believed to be suitable for claimant. She did not identify any actual job openings. Employer cannot establish the availability of suitable alternate employment by offering only general job categories that may be suitable for the claimant. *Price v. Dravo Corp.*, 20 BRBS 94 (1987); *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987); *see also Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Moreover, although a vocational consultant may use the *Dictionary of Occupational Titles* to flesh out job descriptions, *Moore*, 126 F.3d 256, 31 BRBS 119(CRT), the consultant must, as a threshold matter, show that arguably suitable jobs are reasonably available in claimant=s community. *See v. Washington Metropolitan*

Area Transit Authority, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). As Ms. Williams did not identify any actual jobs, but only categories of allegedly suitable work, her report does not establish the existence of Aa range of jobs@ which are reasonably available and which claimant could realistically secure and perform. *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). As his finding is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge=s rejection of Ms. Williams=s vocational report.

With regard to the survey prepared by Ms. Whitfield, the administrative law judge rationally found that she did not persuasively establish that the jobs she identified were reasonably available in 1990. When asked at the April 2000 hearing if the jobs were available in 1990, Ms. Whitfield testified only that these employers hire frequently and that she had placed some workers with these employers within the last five years. HT at 174-183. Employer has not demonstrated error in the administrative law judge=s refusal to infer from this testimony that the positions were actually available in 1990. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT). Moreover, the administrative law judge did not err in rejecting Ms. Whitfield=s proffer of jobs culled from classified advertisements dating back to 1988. Ms. Whitfield=s addendum states that these positions are similar to the ones she identified as being available in 2000. The administrative law judge did not err in rejecting these jobs due to a lack of information, in either the advertisement or the addendum, concerning the jobs= requirements. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff=d*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). Contrary to employer=s contention, Ms. Whitfield did not attempt to utilize the *Dictionary of Occupational Titles* to flesh out the requirements of the positions identified. Thus, the administrative law judge=s rejection of the classified advertisements as lacking information from which he could ascertain the jobs= suitability is affirmed. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

We cannot, however, affirm the administrative law judge=s rejection of the jobs identified by Mr. Klein. In letters dated November 25, 1998, and October 19, 1999, Mr. Klein identified two employers who were hiring in 1990, and, contrary to the administrative law judge=s statement, he also identified the wage rates for the positions.[2] CX 2 at 54-55; EX 34A. Moreover, Mr. Klein identified several other employers who were likely hiring in 1990 based on the length of time they have been business and the frequency of hiring, but who no longer had records from which this information could be ascertained.[3] EX 34A.

[2] These employers are Goodwill Industries and Piccadilly Cafeteria. CX 2 at 54-55; EX 34A. Mr. Klein stated that these jobs paid $3.80 per hour in July 1990. CX 2 at 54-55.

[3] These employers are Jack Massie Contractors, Griffin Executive Protective Agency, Chanello=s Pizza, and Clemons Courier Service. EX 34A.

Contrary to the administrative law judge=s finding, Mr. Klein=s 1997 survey includes the physical requirements of the positions, EX 34, and the jobs were approved by Dr. Phillips, EX 42, a fact which the administrative law judge did not discuss.

Therefore, we must vacate the administrative law judge=s finding that employer did not establish the availability of suitable alternate employment in 1990. In order to determine if employer has met its burden, the administrative law judge must ascertain if employer established the existence of a range of suitable jobs available in 1990. *Lentz*, 852 F.2d 129, 21 BRBS 109(CRT). He should compare the specific requirements of the jobs identified with claimant=s physical restrictions, *see Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992), and also determine if the jobs are educationally and vocationally suitable for claimant. *See generally Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998).

Accordingly, we vacate the administrative law judge=s finding that employer did not establish suitable alternate employment prior to 1993, and we remand the case for reconsideration of the vocational evidence provided by Mr. Klein, in accordance with this decision. In all other respects, the administrative law judge=s Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge