BRB No. 05-0262

THOMAS DON BUTLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORANDA ALUMINUM, INCORPORATED	)	DATE ISSUED: 10/26/200510/26/20052005
	)	
Self-Insured Employer-Petitioner	)	
		DECISION and ORDER

Appeal of Decision and Order – Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Lawrence H. Rost, New Madrid, Missouri, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2004-LHC-0937) of Administrative Law Judge Richard D. Mills 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 suffered work-related injuries to both ankles and his neck when he fell sixteen feet off a ladder while climbing out of a barge on the Mississippi River on January 16, 2002.[1] Claimant returned to work on March 24, 2004, allegedly to perform either his usual job as modified or other tasks within his physical limitations. EX 7. He worked sporadically in this position from March 29, 2004, up to the date of the hearing, May 14, 2004. Claimant sought compensation for permanent total disability, alleging the

[1] Claimant suffered severe crush injuries to both lower extremities, as well as neck pain, and subsequently underwent three surgeries to repair his tibia fractures.

positions proffered by employer within its facility are either beyond his physical restrictions or constituted sheltered employment.

In his Decision and Order, the administrative law judge found that none of the proffered positions at employer's facility are within claimant's physical restrictions. Thus, he found that employer failed to establish the availability of suitable alternate employment and that claimant is entitled to permanent total disability benefits.

Employer appeals, contending the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment at its facility. Claimant has not responded to this appeal.

It is uncontested that claimant cannot perform his pre-injury job duties because of his work injury. The burden therefore shifted to employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981); *Gacki v. Sealand Serv., Inc.*, 33 BRBS 127 (1998). Employer may meet this burden by offering claimant a suitable position in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Employer offered claimant five jobs within its facility that it alleged are within his physical restrictions or would be modified to do so. These positions are: material handling utility, *i.e.*, claimant's pre-injury job modified to fit his current limitations; confined space attendant; package trucker; ECL crane operator; and Ericson tow motor operator. The administrative law judge reviewed each of the positions in conjunction with claimant's physical restrictions as imposed by Drs. Ritter and Frauwirth. Dr. Ritter, claimant's treating physician, specified that claimant needed primarily sedentary, light-duty work, restricting him to a maximum of one to two hours of standing per day and stating that stair climbing should be avoided unless claimant was comfortable with this activity. RX 8. Dr. Frauwirth released claimant to non-strenuous work which allowed him to change his sitting position frequently and to work at a height below shoulder level. RX 12 at 1.

The administrative law judge found that the modified material handling utility job that claimant held post-injury was not suitable and was sheltered employment. The fact that claimant is working post-injury will not forestall a finding of total disability if the position is provided only through the beneficence of employer. *See, e.g., CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991). The administrative law judge found that the position of material handling utility constituted such sheltered employment because claimant is incapable of performing the job duties even as modified but was paid nonetheless. Decision and Order at 21. The administrative law judge found that the modified requirements of this job conflict with claimant's restrictions because the job requires his spending two to five hours per day sitting and confined to the cab of the

CAT, contrary to Dr. Frauwirth's restriction that claimant be able to change positions often. RX 6. Moreover, the administrative law judge credited claimant's testimony that although he is paid his full salary, since his return to work in this modified position he has seldom worked more than two hours per day and spends the remainder of his time reading or speaking with his colleagues. HT at 96-100. Based upon his determination that this position did not fall within claimant's restrictions and that claimant was being paid for work that was not being performed, the administrative law judge found this position did not constitute suitable alternate employment. This finding is rational and supported by substantial evidence and therefore is affirmed. *See Legrow*, 935 F.2d 430, 24 BRBS 202(CRT); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988).

The administrative law judge found similar problems with the position of confined space attendant, as it requires climbing at least one level of stairs, which is contraindicated by claimant's ankle restrictions. Although, as noted by the administrative law judge, Dr. Ritter approved this job "other than the need to walk stairs on the job," RX 9, the administrative law judge found the stair climbing requirement outside of claimant's restrictions based upon his subjective complaints of pain and his frequent use of a cane or walker, and occasionally a wheelchair. HT at 68-69; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Similarly the administrative law judge found the remaining positions, ECL crane operator, package trucker position and Ericson tow motor operator unsuitable based on a comparison of the job requirements and claimant's physical restrictions.[2] The administrative law judge gave less weight to Dr. Ritter's approval of these positions because Dr. Ritter observed these jobs for only a short period of time, did not review the written job descriptions, and, most significantly, failed to factor in the further restrictions imposed on claimant by Dr. Frauwirth. The administrative law judge found that employer's job descriptions listed these positions as requiring moderate to considerable physical demands making them outside of Dr. Frauwirth's limiting claimant to non-strenuous work. RX 5.

[2] The administrative law judge found that the ECL crane operator position would not only confine claimant to a suspended overhead cab for several hours limiting his ability to change positions frequently, RX 5 at 5, but also that the crane is located in an area with a strong magnetic field which would pull on claimant's ankle braces. HT at 142. The administrative law judge found that the package trucker job requires sitting in the forklift for extended periods of time which would not allow claimant to change positions frequently and involves traveling over rough ground. RS 5 at 6-9. The administrative law judge found that the Ericson tow motor position is vibratory and also travels over rough terrain which does not comply with claimant's limitation to non-strenuous work and the requirement that he be able to change positions often. RX 5 at 12.

We affirm the administrative law judge's finding that the positions proffered by employer are not suitable for claimant. The administrative law judge rationally relied on the opinions of Drs. Ritter and Frauwirth in setting claimant's restrictions and on claimant's testimony concerning his inability to perform some of that work. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board is not empowered to reweigh the evidence and employer has not demonstrated error in the administrative law judge's crediting of the evidence. *See Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT). As the administrative law judge's finding that the jobs proffered by employer are unsuitable is supported by substantial evidence, we affirm the administrative law judge's award of permanent total disability benefits. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits 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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JUDITH S. BOGGS
Administrative Appeals Judge