BRB Nos. 06-0283
and 06-0283A

CHRISTOPHER SMOOT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NABORS OFFSHORE DRILLING, INCORPORATED	)	DATE ISSUED: 10/30/2006
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits, the Corrected Decision and Order, and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Cornelius, Sartin and Murphy), New Orleans, Louisiana, for claimant.

Kevin A. Marks (Galloway, Johnson, Tompkins, Burr & Smith), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Awarding Benefits, the Corrected Decision and Order, and the Supplemental Decision and Order Awarding Attorney Fees (2005-LHC-0942) 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, are supported by substantial evidence, 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 mudhand, suffered a fractured skull during the course of his employment when he was hit on the head by a pipe on January 4, 2004. Employer paid temporary total disability benefits from January 9, 2004, to December 20, 2004. Although claimant's physical injuries have resolved, claimant contends he remains totally disabled due to his psychological injuries, *i.e.*, an adjustment disorder, arising out of the injury.

In his Decision and Order, the administrative law judge awarded claimant compensation for temporary total disability from January 4, 2004, to May 25, 2005, and for temporary partial disability thereafter based upon a pre-injury average weekly wage of $1,087.47 and a residual wage-earning capacity of $306.09. The administrative law judge further found employer liable for a Section 14(e) assessment, 33 U.S.C. §914(e). Employer filed a Motion to Clarify Order asking for clarification of the type of medical benefits owed and to state the time period for which the Section 14(e) assessment was to be paid. In his Corrected Decision and Order, the administrative law judge held employer liable for the psychiatric treatment recommended by Dr. Richoux, *i.e.*, a three to four month course of supportive psychotherapy and anti-depressant medications. He also stated that the Section 14(e) assessment applies to the benefits owed for the period from December 20, 2004, through May 25, 2005. Subsequently, the administrative law judge found claimant's attorney entitled to an attorney's fee of $10,229.04, representing 45.45 hours of services at the rate of $210 per hour, payable by employer pursuant to Section 28(b), 33 U.S.C. §928(b).

Claimant appeals, contending that the administrative law judge erred in finding that he is only partially disabled. Employer cross-appeals, arguing that the administrative law judge erred in awarding claimant any disability benefits after January 4, 2004, as well as any medical benefits and a Section 14(e) assessment. Employer further appeals the administrative law judge's award of an attorney's fee of $10,229.04.

In addressing the extent of claimant's disability, the administrative law judge found that claimant was totally disabled from the date of injury through May 25, 2005, and partially disabled thereafter. Employer argues that the administrative law judge erred in finding that claimant's psychological condition is disabling at all. Claimant contends the administrative law judge erred in finding he is only partially disabled. It is claimant's burden to establish a *prima facie* case by demonstrating that he cannot perform his prior employment due to his work-related injury. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998).

The administrative law judge found that claimant could not return to his usual job based upon the opinion of Dr. Richoux that claimant's intense anxiety with accompanying distractability and impaired concentration would result in a risk to himself and other workers if he attempted to return to work involving heavy machinery and equipment. CX 22. He assigned greater weight to the opinion of Dr. Richoux than to that of Dr. Roniger who found that claimant suffered no psychological disability precluding his return to his usual job, RX 5, because Dr. Richoux had seen claimant more times and proffered the more recent opinion. Employer contends that the administrative law judge's reliance on Dr. Richoux is misplaced and fails to factor in claimant's lack of credibility. We reject this contention.

The opinion of Dr. Richoux regarding claimant's disability is supported by the opinions of Drs. Freiberg, RX 18, Palmer, CX 23, and Andrews, CX 26, that claimant's current condition precludes his return to his usual employment.[1] The administrative law judge noted Dr. Freiberg's finding that claimant's psychological conditions preclude his return to work and that claimant appeared to be a truthful patient. RX 18 at 54; Decision and Order at 6. Employer's disagreement with the administrative law judge's weighing of the evidence is not a sufficient reason for the Board to overturn it, as it is axiomatic that the Board is not permitted to reweigh the evidence but may ascertain only whether substantial evidence supports the administrative law judge's decision. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *see also Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). It is well established that the administrative law judge has the authority to address questions of witness credibility and to weigh the evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As the administrative law judge's finding that claimant cannot return to his usual job is supported by substantial evidence, we affirm the conclusion that claimant has established his *prima facie* case of total disability. *Bath Iron Works Corp. v. Preston*, 380 F.3d 597 38 BRBS 60(CRT) (1st Cir. 2004). Accordingly, employer's contention that claimant is not disabled after January 2004 is rejected, and the administrative law judge's award of total disability benefits commencing at this time is affirmed.

Claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment, thus reducing his disability to partial in May 2005. Where, as in the instant case, claimant is unable to perform his usual employment duties, the burden shifts to employer to demonstrate the availability of

[1] Dr. Palmer, a neurologist, stated that claimant's headaches preclude his return to his usual employment. CX 23 at 4. Dr. Richoux, a neuropsychologist, stated that claimant cannot return to his usual work due to his cognitive impairment, significant anxiety and personality changes. CX 26.

suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 36(CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F. 2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). In order to satisfy this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, the administrative law judge found that Dr. Richoux precluded claimant only from working with heavy machinery and equipment, and he therefore found that claimant is employable. The administrative law judge found that employer established the availability of suitable alternate employment based on the vocational report of Dr. Stokes, who, after reviewing claimant's medical records and meeting with claimant, proffered five suitable positions.[2] RX 15. Claimant contends that Dr. Stokes's labor market survey is invalid because he considered only the restrictions placed on claimant by Dr. Richoux and not those by the other physicians of record. We reject this contention, as Dr. Stokes's report reflects that he reviewed the medical reports of Drs. Freiberg, Bianchini, and Palmer, as well as that of Dr. Richoux. EX 15 at 1, 3.[3] CX 22.

Moreover, in determining whether employer has met its burden of establishing the availability of suitable alternate employment, the administrative law judge must compare the requirements of the identified jobs with claimant's physical restrictions and other vocational factors. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). In this case, the administrative law judge found that the only restriction placed on claimant's employability is that he not work in a heavy machinery environment. The positions identified by Dr. Stokes are sedentary to medium-duty jobs which the administrative law judge found are within claimant's restrictions. As the administrative law judge compared claimant's restrictions with the requirements of the proffered positions and rationally found them suitable, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. *Wheeler v. Newport News*

[2] Dr. Stokes opined that claimant could work as a loss prevention officer, in retail sales positions, and as a cashier, quality inspector, and laundry worker. RX 15.

[3] All of the physicians cited by claimant in his appeal found no physical restrictions on claimant's return to work and opined that claimant could not return to his former job involving heavy machinery, a finding already made by the administrative law judge.

Shipbuilding & Dry Dock Co., 37 BRBS 107 (2003). Therefore, we affirm the findings that claimant is totally disabled through May 25, 2005, and thereafter is only partially disabled.

Employer also contends that the administrative law judge erred in awarding claimant medical benefits for his psychological condition. We reject this contention. The administrative law judge rationally relied on the opinion of Dr. Richoux that claimant requires weekly therapy sessions for three to four months, and a trial period of anti-depressants/anti-anxiety medications. *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Contrary to employer's contention, Dr. Richoux stated this treatment was necessary for claimant's work injury. CX 18. Moreover, the administrative law judge was entitled to give greater weight to this opinion than to the opinions of Drs. Roninger and Bianchini who stated that claimant is not in need of psychological treatment. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We affirm the award of medical benefits per Dr. Richoux's opinion, as it is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §907(a); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993).

Employer further contends that the administrative law judge erred in awarding a Section 14(e) assessment against it. Section 14(e) provides that employer is liable for an additional 10 percent assessment if any installment of compensation is not paid within 14 days of its becoming due, unless employer has timely filed a notice of controversion. 33 U.S.C. §§912(d)(1), 914(b), (d), (e). Thus, employer must pay compensation within 28 days after such compensation becomes due or file a notice of controversion within 14 days of its gaining knowledge of claimant's injury. *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Failure to pay or controvert in a timely manner results in employer's liability for an additional 10 percent of the amount of compensation untimely paid. 33 U.S.C. §914(e).

The administrative law judge found that employer ceased paying disability payments on December 20, 2004, and did not file a Notice of Controversion until May 26, 2005. JX 1. Employer contends that it is not liable for this penalty as claimant suffered no work-related disability after December 20, 2004. As we have affirmed the award of disability benefits after December 20, 2004, we affirm the award of a Section 14(e) assessment.

Finally, employer appeals the administrative law judge's award of an attorney's fee. Employer raises no arguments on appeal concerning the amount of the attorney's fee award; its only argument is that if the administrative law judge's award of compensation is vacated, then it is not liable for claimant's attorney's fee. As we have affirmed the award of benefits, we also affirm the attorney's fee award. 33 U.S.C. §928.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits, Corrected Decision and Order, and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge