BRB No. 10-0286

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| PATRICK STEWART | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| UNIVERSAL MARITIME SERVICE CORPORATION | ) | DATE ISSUED: 10/27/2010 |
| | ) | |
| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Mario L. Perez and Jo Ann Hoffman (Hoffman, Moore & Perez, P.A.), Lauderdale-by-the-Sea, Florida, for claimant.

Laurence F. Valle and Michael F. Kelley (Valle, Craig & Vazquez, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-LHC-01567) of Administrative Law Judge Daniel F. Sutton 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries to his neck and back while in the course of his work for employer as a mule operator on July 29, 2006. Employer voluntarily paid claimant temporary total and partial disability benefits. Employer's reduction in its payment of benefits prompted claimant to seek adjudication of his claim. The administrative law judge found that claimant is incapable of returning to his pre-injury employment as a mule operator, that employer did not establish the availability of suitable alternate employment, and thus, that claimant is entitled to temporary total disability benefits to February 2, 2007, and permanent total disability benefits from that date forward.[1]

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment and his resulting conclusion that claimant is entitled to an ongoing award of total disability benefits. Claimant responds, urging affirmance. Employer has also filed a reply brief, reasserting its position on appeal.

Employer contends that it was error for the administrative law judge to refuse to admit its post-hearing evidence regarding another injured longshoreman who is restricted to light duty work and who is capable of performing work as a top loader (hereinafter referred to as the Mortimer evidence).[2] After its initial effort to reopen the record post-hearing was denied by the administrative law judge,[3] employer attempted to submit several new exhibits with its post-hearing brief, *i.e.*, the Mortimer evidence, to which claimant objected and moved to strike. The administrative law judge granted claimant's motion to strike and denied employer's motion to vacate and reconsider his non-admissibility ruling. Specifically, the administrative law judge rejected employer's request to reopen the record because employer had "not claimed or shown that the exhibits offered for the first time in their post-hearing brief could not have been offered

[1] The parties agreed that claimant reached maximum medical improvement with regard to his work injuries as of February 2, 2007.

[2] The Mortimer evidence consists of a settlement agreement dated March 19, 2009, a transcript of a deposition dated April 29, 2008, and various medical records generated in 2008, developed for a case involving a different claimant in which the parties were represented by the same counsel. Decision and Order at n. 6 at 4. Employer alleged that this evidence establishes that the top loader position it offered to claimant post-injury is light-duty work.

[3] By Order dated July 20, 2009, the administrative law judge denied employer's request to reopen the record as employer provided no reason as to why this evidence could not have been identified prior to the closing of the record.

prior to the closing of the record."[4] Order dated August 10, 2009, at 2. In his decision, the administrative law judge again rejected employer's request to submit the Mortimer evidence, concluding that employer did not demonstrate that a reopening of the record, and the accompanying inevitable delay, was warranted.[5] Decision and Order at 4.

An administrative law judge has considerable discretion in ruling on requests for the admission of evidence into the record. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); 20 C.F.R. §§702.338, 702.339. Thus, the Board may overturn such determinations only if they are arbitrary, capricious, or an abuse of discretion. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, a party seeking to admit evidence must exercise due diligence in developing it prior to the hearing. *See Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989). In this case, the administrative law judge acted within his discretion in declining to reopen the record on three separate occasions, and he provided rational reasons for excluding the evidence employer offered. Decision and Order at 4. On appeal, employer has not demonstrated that the administrative law judge's decision not to reopen the record is arbitrary, capricious, or an abuse of discretion. The exclusion of this evidence is therefore affirmed. *See Williams v. Marine Terminals Corp.*, 14 BRBS 728 (1981).

Employer next argues that the administrative law judge's analysis of the suitable alternate employment issue is not in accordance with the "two pronged" standard espoused in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991), which, employer maintains, requires the administrative law judge to discern initially both whether employer established that jobs are reasonably available to claimant and whether claimant exercised due diligence in seeking alternative employment. We reject this contention, as employer's position is inconsistent with the appropriate standard.

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[4] While employer alleges that the important dates with regard to the Mortimer evidence occurred after the last date of the hearing in this case, *i.e.*, on March 24, 2009, two of these three "important" dates, argued by employer as March 19, April 9, and May 18, 2009, as well as all of the evidence it sought to introduce, preceded the April 27, 2009, date upon which the record was closed.

[5] The administrative law judge found, in any event, that this excluded evidence is of marginal relevance since it involves a different claimant whose circumstances, including his injuries, treatment regimen, physical restrictions, and vocational factors, are not akin to those of claimant in this case.

Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Del Monte Fresh Produce v. Director, OWCP* [*Gates*], 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *Turner*, 661 F.2d 1031, 14 BRBS 156; *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT) (5th Cir. 1991). In *Turner*, 661 F.2d at 1043, 14 BRBS at 165, the court explicitly rejected the argument that claimant must show a diligent job search as part of his initial burden, stating that claimant's burden in this regard does not arise until after employer has shown suitable alternate employment. Once it has done so, the employer's burden has been met, and the claimant can then prevail on the claim for total disability if he demonstrates that he diligently tried and was unable to secure such employment. *Id.* Thus, contrary to employer's contention, claimant does not have to establish diligence in seeking employment until after employer establishes suitable alternate employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). As the administrative law judge determined that employer did not meet its burden of establishing the availability of suitable alternate employment, it was unnecessary for the administrative law judge to evaluate whether claimant demonstrated that he diligently tried and was unable to secure such employment. *Id.*

Employer next argues that the administrative law judge erred in his evaluation and weighing of the evidence pertaining to claimant's post-injury ability to work, and thus, erred in finding that it did not establish the availability of suitable alternate employment. Employer contends that the administrative law judge erred by crediting the opinions of Dr. Garcia and claimant's vocational expert, Mr. Adato, over the contrary opinions proffered by Dr. Jarolem and employer's vocational expert, Ms. Marvin. Additionally, employer argues that the administrative laws judge unreasonably relied on evidence concerning claimant's attitude, demeanor, and temperament in finding that claimant is incapable of performing the alternate employment identified by employer.

The administrative law judge reviewed employer's labor market survey and concluded that while claimant is physically capable of performing most of the alternative jobs listed therein,[6] he does not possess the requisite skills to realistically enable him to compete for those positions. In reaching this conclusion, the administrative law judge rationally credited the vocational testimony of Mr. Adato over that of Ms. Marvin since Ms. Marvin did not take into account several factors relevant to claimant's vocational background, *i.e.*, claimant's need for unscheduled absences from work due to exacerbations of pain and/or medical treatment directly related to his work injuries, as well as his lack of typing, computer, and public contact skills. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). Relying on Mr. Adato's opinion, the administrative law judge found that claimant's lack of typing, computer, and public contact skills essentially precludes the suitability of positions which might otherwise be physically suitable. *See generally Ceres Marines 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. 1999).

Additionally, the administrative law judge credited Mr. Adato's opinion that claimant's need for injury-related absences from work, which Dr. Jarolem conceded was likely,[7] precludes work other than sheltered employment provided by a benevolent employer or family member. Furthermore, the administrative law judge found that claimant's criminal record might be incompatible with jobs requiring an ability to interact

[6] The administrative law judge found that claimant is physically capable of working as a cashier, assembler, telephone solicitor, information clerk, appointment clerk, and dispatcher. The administrative law judge, however, found that claimant was physically incapable of performing the light-duty positions as a top loader and forklift operator identified by employer.

[7] Dr. Jarolem stated it would be reasonable to expect that claimant will suffer exacerbations of back pain which on some days could be severe enough to cause him to miss time from work. EX 1, Dep. at 39-40. Dr. Jarolem added that in some months claimant might not miss any days, while in other months he might be out the entire month. EX 1, Dep. at 40-41. Moreover, Dr. Jarolem conceded that claimant would likely miss work time to attend his monthly treatment visits with Dr. Garcia, as well as days when he received injections. EX 1, Dep. at 43-44.

with customers, and thus, would further hinder his ability to obtain the positions identified by Ms. Marvin.[8] *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988) (a claimant's criminal record which is part of his pre-injury history is included as his "background" and must be taken into consideration in evaluating suitable alternate employment); *Piunti*, 23 BRBS 367.

As for the forklift and top loader operator positions, the administrative law judge noted that while Dr. Jarolem and Ms. Marvin opined that claimant was capable of such employment, Dr. Garcia opined that claimant's lumbar and cervical spine conditions would prevent him from performing these specific positions or any other commercial driving positions. Decision and Order at 14; *see also* CX 15A at 12-13. Addressing this conflicting evidence, the administrative law judge credited Dr. Garcia's opinion because of his superior credentials as a highly qualified orthopedic surgeon,[9] his objectivity, and because, as claimant's treating physician, he had a substantially greater familiarity with the course of claimant's medical history and level of functioning. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005).

The administrative law judge is entitled to weigh the evidence and draw his own inferences therefrom. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge's weighing of the conflicting medical and vocational evidence is rational, and his finding that employer did not establish the availability of suitable alternate employment is supported by substantial evidence and in accordance with law. *See James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Burns v.*

[8] Contrary to employer's argument, the administrative law judge explicitly excluded "claimant's attitude and demeanor" from his consideration as to whether claimant was realistically capable and likely to secure the suitable alternate employment identified by Ms. Marvin. Decision and Order at 15; *see Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence, J., dissenting).

[9] In this regard, the administrative law judge found that Dr. Garcia is a board-certified orthopedic and spine surgeon with a distinguished academic and professional record, Decision and Order at 7; CX 16 at 195-202, whereas Dr. Jarolem is board-certified in orthopedic surgery. EX 4.

*Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Consequently, we affirm that finding and the resulting award of total disability benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge