BRB No. 12-0051

BILL B. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARATHON ASHLAND PETROLEUM	)	DATE ISSUED: 10/16/2012
	)	
and	)	
	)	
MARATHON ASHLAND PETROLEUM COMPANY, L.L.C., c/o FRANK GATES SERVICE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John J. Osterhage, Florence, Kentucky, for claimant.

John L. Duvieilh (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-LHC-1560) of Administrative Law Judge Alice M. Craft 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).

This is the second time this case is before the Board. Claimant, who had worked for employer for approximately 25 years, was working as a senior barge welder at employer's facility in Ashland, Kentucky, along the Ohio River, when he sustained an injury to his right shoulder on February 15, 2003. Claimant testified that his shoulder had been bothering him but that it "went out" that day after he had thrown a piece of "old barge" into a hopper. Claimant initially was placed on sick leave and received full pay for six months. Thereafter, he received long-term disability payments for 18 months at 75 percent of his wages.

Claimant filed a claim for compensation in November 2003, which employer controverted. Administrative Law Judge Thomas F. Phalen, Jr., found that claimant could not return to his usual work, his condition had reached maximum medical improvement on May 31, 2005, and employer did not establish the availability of suitable alternate employment. Judge Phalen awarded claimant temporary total disability benefits from February 15, 2003, through May 31, 2005, and permanent total disability benefits thereafter, and granted employer a credit for amounts already paid. Employer appealed Judge Phalen's decision, contending he erred in finding claimant entitled to total disability benefits and asserting that claimant can either return to his usual work or that it established the availability of suitable alternate employment and claimant did not diligently pursue employment. The Board affirmed Judge Phalen's findings that claimant cannot return to his usual work and that employer failed to show the availability of suitable alternate employment as there was no evidence from which Judge Phalen could ascertain whether the jobs listed in the labor market survey satisfied claimant's work restrictions. Accordingly, the Board affirmed the award. *B.W. [Williams] v. Marathon Ashland Petroleum*, BRB No. 08-0631 (Jan. 27, 2009) (unpub.).

Employer appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit. Finding Judge Phalen's reasons for concluding that claimant's condition reached maximum medical improvement on May 31, 2005, to be "inadequate to accommodate a thorough review," the court vacated the Board's decision and remanded the case to the administrative law judge for a more thorough explanation as to the onset of permanency. The court did not address whether substantial evidence supported Judge Phalen's other findings. *Marathon Ashland Petroleum v. Williams*, 384 F. App'x 476 (6th Cir. 2010).

On remand, the case was reassigned to Administrative Law Judge Alice M. Craft (the administrative law judge). The administrative law judge adopted Judge Phalen's findings that claimant suffered a right-shoulder injury on February 15, 2003, and could not return to his usual work, and that employer did not establish the availability of suitable alternate employment. She further found that claimant's condition reached maximum medical improvement on October 3, 2005, based on Dr. Goodwin's medical

opinion. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from February 15, 2003, through October 2, 2005, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). Employer appeals the administrative law judge's decision, asserting she erred in finding claimant entitled to total disability benefits and in finding that claimant's condition reached maximum medical improvement on October 3, 2005. Claimant responds, urging affirmance.

Employer first contends claimant is capable of returning to his usual work. In order to establish a prima facie case of total disability, a claimant must establish that he cannot return to his usual work. If he does so, the burden shifts to the employer to demonstrate the availability of suitable alternate employment that the claimant is capable of performing and could secure if he diligently tried. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *see also Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001).

Employer asserts that the opinion of Dr. Best demonstrates that claimant's injury fully healed with no residual impairment. The Board previously addressed employer's contention and affirmed Judge Phalen's finding, which was adopted by the administrative law judge on remand. As neither the facts of this case nor the administrative law judge's findings have changed, we reject employer's argument for the reasons previously provided. *See Williams*, BRB No. 08-0631, slip op. at 3-4. Specifically, as Dr. Best opined that claimant could return to a modified welder position, the description of which differed from claimant's work at the time of his injury, Dr. Best's opinion does not support a finding that claimant can return to the very heavy work he performed at the time of injury.[1] *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Additionally, given that claimant testified he was unable to return to his usual work, and the administrative law judge found that Dr. Goodwin's restrictions would not allow claimant to return to work as a welder, we again affirm, as supported by substantial evidence, the finding that claimant cannot return to his former job because of his injury. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Williams*, BRB No. 08-0631, slip op. at 4.

Similarly, for the reasons provided in our previous decision, we again reject employer's contention that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. *See Williams*, BRB No. 08-

[1]Although employer argued that it modified the welder position to reduce a welder's work load from very heavy to heavy, which Dr. Best opined claimant was capable of performing, claimant testified that when he returned to work on May 31, 2005, the welding position was the same as the one he had previously done. Tr. at 67; EX 5. Judge Phalen placed "great weight" on claimant's testimony, which he observed at the hearing.

0631, slip op. at 4-5. As claimant cannot return to his usual work, the burden shifts to employer to establish the availability of suitable alternate employment. *Riley*, 262 F.3d 227, 35 BRBS 87(CRT); *Washnock*, 135 F.3d 366, 32 BRBS 8(CRT). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine whether jobs are realistically available and suitable for the claimant. *See generally Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In this case, employer submitted the vocational report of its expert, Ms. Hathaway, in which she identified 20 specific jobs that ranged from sedentary to medium-duty. EX 1-2; Tr. at 101-103. As the Board explained in its prior decision, the administrative law judge rationally determined that Ms. Hathaway's labor market survey does not establish suitable alternate employment because she did not consider the work restrictions placed on claimant by Dr. Goodwin.[2] Although Ms. Hathway identified sedentary- and light-duty positions in her report, there is no evidence from which the administrative law judge could ascertain whether the jobs satisfied claimant's restrictions. Thus, employer did not supply sufficient information to establish the suitability of alternate employment in this case, and the administrative law judge properly so found. *Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT); *Washnock*, 135 F.3d 366, 32 BRBS 8(CRT); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). We therefore affirm the administrative law judge's determination that employer has not satisfied its burden of showing the availability of suitable alternate employment as well as the finding that claimant is totally disabled.

Employer also challenges the administrative law judge's finding that claimant's condition reached maximum medical improvement on October 3, 2005. Specifically, employer asserts that the administrative law judge erred in crediting Dr. Goodwin's opinion over that of Dr. Best. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). Maximum medical improvement is reached at that point where a physician believes that further treatment will not improve a claimant's condition. *Washnock*, 135 F.3d 366, 32 BRBS 8(CRT).

[2]The parties stipulated that Dr. Goodwin restricted claimant from lifting or carrying more than 20 pounds or performing overhead work. CX 15 at 11, 16, 26-27; JX 1. The inclusion of medium-duty jobs in Ms. Hathaway's labor market survey, and the fact that she defined medium work as requiring the exertion of between 20 and 50 pounds of force occasionally, supports the administrative law judge's conclusion. *See Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984).

In this case, the administrative law judge thoroughly addressed the evidence relevant to the issue of maximum medical improvement in accordance with the decision of the Sixth Circuit. *See* Decision and Order on Remand at 2-8. Moreover, she fully explained her reasons for finding that Dr. Best's opinion that claimant reached maximum medical improvement on March 1, 2005, is not entitled to any weight; the administrative law judge found that Dr. Best did not explain the basis for his determination and noted that Dr. Goodwin continued to treat claimant on several occasions after March 1, 2005. Decision and Order on Remand at 10; CX 3-F. Further, Dr. Goodwin's October 3, 2005, treatment note stated: "I don't anticipate that [claimant's] shoulder will ever improve." CX 3-F. The administrative law judge found that this opinion "falls squarely within the definition of MMI." Decision and Order on Remand at 10. As Dr. Goodwin treated claimant from February 18, 2003, to October 3, 2005, and factored claimant's treatment history into his determination that claimant's condition had reached maximum medical improvement,[3] the administrative law judge rationally gave Dr. Goodwin's opinion on the matter greater weight than Dr. Best's opinion. *Id*. at 11; *see Washnock*, 135 F.3d 366, 32 BRBS 8(CRT); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Dr. Goodwin's treatment notes and deposition support the administrative law judge's conclusion that claimant's condition was permanent by October 3, 2005; therefore, we affirm the administrative law judge's finding that claimant's condition reached maximum medical improvement on October 3, 2005, as it is rational and supported by substantial evidence. *See Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

[3]As the administrative law judge noted, Dr. Goodwin explained during his deposition that "I'd seen [claimant] for over two and a half years and there was no improvement, so I felt that I'd given him adequate time to improve if he was going to get better." Decision and Order on Remand at 10; CX 15-19.

Accordingly, 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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JUDITH S. BOGGS
Administrative Appeals Judge