BRB No. 99-0146

DURWARD ANDERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/7/99
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC 2747) of Administrative Law Judge Fletcher E. Campbell, Jr., 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, a general foreman, injured both knees when he slipped and fell on oil residue on a ship floor. The parties stipulated that claimant is unable to return to his pre-injury employment as a result of the work-related accident on September 10, 1993. Employer voluntarily made various payments to claimant of temporary partial and temporary total disability benefits. Claimant reached maximum medical improvement with regard to his left knee on August 12, 1994, and on May 22, 1996, with regard to his right knee, after surgeries performed by Dr. Nevins on January 17, 1994, and February 14, 1996, respectively. Dr. Nevins assigned claimant a permanent partial disability rating of 45 percent of each knee, for which employer also voluntarily paid compensation. Thereafter, employer assigned claimant to a desk job in its facility which claimant contended did not constitute suitable alternate employment, alleging that he was working outside his restrictions and only through employer's beneficence. Thus, claimant filed a claim for permanent total disability benefits.

The administrative law judge found that claimant's light duty job in employer's facility constituted suitable alternate employment, and he therefore denied further benefits. On appeal, claimant challenges the administrative law judge's finding that employer established suitable alternate employment, and therefore erred in denying his claim for permanent total disability benefits. Employer responds, urging affirmance.

Where, as here, it is undisputed that claimant is physically unable to return to his pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. In order to meet its burden, employer must demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical capacity and restrictions is capable of performing. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT)(4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet its burden of showing suitable alternate employment by offering claimant a necessary job which he can perform within its own facility. *See 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).

Claimant's contention that administrative law judge erred in finding suitable the desk job provided in the Double Eagle project is without merit. Dr. Nevins imposed work restrictions which included prohibitions on standing or walking in excess of 15 minutes, climbing one or more flights of stairs going to and/or from the job site, and lifting more than 20 pounds and carrying such a weight 10 feet. The administrative law judge rationally found that although claimant suffered some pain at work, there is no evidence of record that claimant had to work outside these restrictions. The administrative law judge specifically noted claimant's testimony that he has no difficulty performing his job, Tr. at 42, and his

supervisors' testimony that the job is within his restrictions. The administrative law judge further noted that to accommodate his restrictions, employer provided claimant with a parking space near his building which claimant chose not to utilize. The administrative law judge found further, contrary to claimant's testimony that he cannot drive to work because it hurts his knees forcing him to take a bus, that Dr. Nevins testified that claimant can and should drive to work.[1] Inasmuch as the administrative law judge's finding that the light duty job is suitable for claimant is supported by substantial evidence, we affirm this determination. *See generally McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989); *Darden*, 18 BRBS at 224.

Next, we reject claimant's contention that his job is sheltered and is provided only through the beneficence of employer, and that therefore he is entitled to total disability benefits. The administrative law judge found that although claimant, as a 37-year employee, believes his job involving structural planning is demeaning, there is no evidence that employer created this job as a charitable exercise. The administrative law judge rationally credited the testimony of claimant's supervisor that the job is absolutely necessary, and claimant's supervisors testified about his importance to the Double Eagle project because of his experience with employer in structural planning. Mr. Butler specifically testified that if claimant left employer he would need to be replaced immediately, and even claimant acknowledged that someone would have to perform his job if he left. Thus, the administrative law judge conclusion that claimant is not entitled to total disability benefits because he is not working at the beneficence of employer is affirmed as it is supported by substantial evidence and in accordance with law. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

[1]The administrative law judge noted that on one occasion claimant had to descend 40 steps to exit his building when the elevator was locked. The administrative law judge noted further that this isolated incident did not violate Dr. Nevins's restrictions because the prohibition was against climbing stairs, not descending them.

Finally, we reject claimant's contention that his present job duties force him to work in excruciating pain such that he is entitled to permanent total disability benefits. While the administrative law judge acknowledged that claimant worked in some pain, the administrative law judge rationally found that neither claimant's hearing testimony nor the deposition testimony of his doctor demonstrated that claimant continued to work only due to claimant's extraordinary efforts and through excruciating pain.[2] We affirm this finding as supported by substantial evidence and in accordance with law. *See Haughton Elevator Co. v. Lewis*, 572 F.2d 477, 7 BRBS 838 (CRT) (4th Cir. 1978); *Ezell*, 33 BRBS at 26-27; *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Therefore, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment, and the consequent denial of permanent total disability benefits.

Accordingly, the administrative law judge's Decision and Order denying permanent total disability benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[2]The administrative noted that claimant never used the term "excruciating pain," nor did he provide evidence of the intensity of his pain, although he testified that "he hurt all the time."