

T.M.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GREAT SOUTHERN OIL & GAS)	DATE ISSUED: 09/29/2009
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Robert K. Guillory (Robert K. Guillory & Associates), Lafayette, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2006-LHC-1226) of Administrative Law Judge C. Richard Avery 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). This is the second time this case is before the Board.

Claimant, a derrick man, severely injured his left leg on May 28, 1994, when it was crushed between two barges. Employer paid compensation and medical benefits pursuant to the Louisiana workers' compensation statute until 2006. Claimant then

sought compensation under the Act for his work injury. In his initial Decision and Order, the administrative law judge found that the barge on which claimant was injured was a fixed platform, such that claimant's work was not covered under the Act pursuant to *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). See 33 U.S.C. §§902(3), 903(a).

Claimant appealed the denial of the claim. The Board held that the administrative law judge erred in finding that claimant was injured on a fixed platform. Claimant's injury occurred while he was crossing between two floating barges. Thus, the Board held that claimant is covered under the Act pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). *T.M. v. Great Southern Gas & Oil*, 42 BRBS 21 (2008).¹ The case was remanded to the administrative law judge for the entry of an award of benefits.

On remand, the administrative law judge noted employer's concession that claimant was totally disabled from May 1994 through June 30, 2005. The administrative law judge found that claimant remained unable to perform any work after that date, and thus is entitled to ongoing temporary total disability compensation, as well as all reasonable and necessary past and future medical expenses arising out of this injury.

Employer appeals, contending that it established suitable alternate employment and that, therefore, the administrative law judge erred in finding claimant was totally disabled after June 30, 2005.² Claimant responds, urging affirmance of the award of total disability benefits. Claimant contends, however, that he is entitled to permanent, rather than temporary, total disability benefits.

Where, as in this case, claimant has established that he is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to establish the availability of realistically available jobs which claimant is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); see also *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS

¹ The Board also rejected employer's contention that claimant worked an insufficient amount of time on navigable waters to confer coverage. *T.M.*, 42 BRBS at 23-24.

² Employer also notes its intention to preserve its right to appeal the Board's prior decision to the United States Court of Appeals.

79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Employer contends it established suitable alternate employment for claimant, as Dr. Cobb approved several jobs paying at least minimum wage. Mr. Arceneaux, employer's vocational counselor, identified available positions as a clerk, cashier, dispatcher, receptionist and service writer which were approved by Dr. Cobb in June 2005. EX 2a.

The administrative law judge found that, as of July 2006, Dr. Cobb stated that claimant was unable to work at all. CX 4. Similarly, at his deposition in October 2008, Dr. Hodges stated that claimant is not "truly employable" due to his pain and limited functionality. CX 1 at 16, 22. Thus, the administrative law judge addressed whether claimant was only partially disabled in the one-year period between July 2005 and July 2006. The administrative law judge noted Dr. Cobb's approval of alternate positions identified by Mr. Arceneaux, but found that claimant remained totally disabled during this period. The administrative law judge relied on claimant's testimony concerning his pain level and medication usage,³ claimant's reports of pain to his physicians, and Dr. Cobb's opinion that in July 2005 claimant needed quadriceps surgery. Decision and Order at 7; Tr. at 26-27, 30; CX 4 at 5. The administrative law judge also relied on claimant's testimony that he attempted to obtain some of the jobs employer identified, without success. Tr. at 33-34. Claimant reported his job search to Dr. Hodges, who opined in August and October 2005, and in January 2006, that claimant was essentially unemployable. EX 1a at 38, 41, 43.

We reject employer's contention that claimant has been only partially disabled since July 2005. If claimant is unable to work at all, employer's vocational evidence is moot. *See, e.g., J.R. v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008).⁴ In this case, substantial evidence supports the administrative law judge's finding that claimant has been incapable of performing any work, despite Dr. Cobb's approval of certain jobs in June 2005. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). In reaching this conclusion, the administrative law judge rationally credited claimant's description of his pain and the medications he requires, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), along with the opinions of physicians regarding claimant's physical condition and employability. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 741 (5th Cir. 1962). As

³ Claimant has been prescribed Lortab, Lexapro, Mobic, Elavil and Xanax. EX 1a.

⁴ Moreover, assuming *arguendo* that employer established suitable alternate employment, claimant may rebut this showing by demonstrating a diligent yet unsuccessful job search. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998).

the administrative law judge's finding that claimant is entitled to total disability benefits is rational and supported by substantial evidence, it is affirmed. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT); *see also SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

In his response brief, claimant contends the administrative law judge erred in awarding temporary rather than permanent total disability benefits. We decline to address this issue. As the contention does not support the administrative law judge's decision below, claimant should have filed a cross-appeal if he wished to challenge the award of temporary disability benefits. *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998), *modifying on recon.* 32 BRBS 118 (1998); *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988). Claimant may file a petition for modification based on a mistake in fact pursuant to Section 22, 33 U.S.C. §922, in order to have this issue addressed.⁵ *See generally Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2^d Cir. 2003); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002).

⁵ The administrative law judge identified the nature of claimant's disability as a contested issue, but then declined to address it because he stated that both parties asserted in their post-hearing briefs that claimant's disability remains temporary as claimant needs additional surgery. Decision and Order at 2 and n.3, 6. Claimant's post-hearing brief, however, asserts entitlement to permanent disability benefits, *see* Cl. Post-hearing Br. at 5, 12 and Ex. A, and alternatively to temporary disability benefits. *Id.* at 11, 18. As the injury occurred in 1994, the test for permanency set out in *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), may be applicable in this case notwithstanding claimant's need for additional surgery.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge