BRB No. 95-2132

RONALD E. GIBBS Claimant-Petitioner v. ARMY & AIR FORCE EXCHANGE SERVICE and THOMAS HOWELL GROUP Employer/Servicing Agent-Respondents	)	DATE ISSUED:____________ DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Roscoe E. Long, Clearwater, Florida, for claimant.

Elisa A. Roberts (Hamilton, Westby, Marshall & Antonowich, L.L.C.), Atlanta, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2434) of Administrative Law Judge Paul H. Teitler denying benefits 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by

[1]By Order dated October 11, 1995, claimant's appeal was dismissed as untimely filed. Upon claimant's motion for reconsideration, the Board reinstated claimant's appeal in an Order dated April 11, 1996. The Board thus considers April 11, 1996 to be the controlling date for purposes of the one-year period referenced in Public Laws 104-134 and 104-208.

substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant started work for employer in 1980 at the Army and Air Force Exchange Service at MacDill Air Force Base in Florida as a commissioned mechanic. Claimant suffered a back injury on April 12, 1990, when he was placing a tire on a balancer. He finished work that day, but then was in pain by the time he returned home. Claimant missed approximately two weeks of work following this accident, and then worked intermittently at times, and for other periods was out of work altogether. Claimant sought benefits under the Act, and was paid temporary total disability benefits by employer from April 15, 1990, to October 9, 1992, and then temporary partial disability benefits for the intervals from October 15, 1992, to December 20, 1993, and June 7 to November 30, 1994. Joint Ex. 1.

Before the administrative law judge, claimant advanced three distinct claims for additional entitlement. Claimant first sought total disability benefits for the period between February 11 and June 7, 1994. Claimant next averred that he was not paid any compensation for his temporary partial disability for a period in October and November, 1993. Claimant's last argument was that he is entitled to "additional temporary partial disability" from November 30, 1994, to the present. After a formal hearing which was conducted on February 28, 1995, Administrative Law Judge Paul H. Teitler denied further benefits and claimant brought this appeal, raising the same contentions before the Board. Upon consideration of the briefs submitted by the parties, the Decision and Order of the administrative law judge and the administrative record as a whole, we conclude that the findings of the administrative law judge in this case are supported by substantial evidence and accord with applicable law. Nevertheless, because these findings establish that claimant suffered a loss in wage-earning capacity after November 30, 1994, we modify the administrative law judge's decision to provide for claimant's continuing entitlement to temporary partial disability benefits based on the difference between claimant's stipulated average weekly wage and the administrative law judge's findings with respect to claimant's post-injury wage-earning capacity.

Once a claimant demonstrates that he is unable to perform his former employment because of a job-related injury, he has made a *prima facie* case of total disability. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 126, 29 BRBS 22, 26 (CRT) (5th Cir. 1994). It is uncontested in this case that claimant cannot return to his usual work. The burden then shifts to the employer to establish that the employee is capable of performing other realistically available and suitable jobs. *Id.* A job in employer's facility may constitute suitable alternate employment, provided that it is actually available. *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 24 (1988). This position may be light duty work, and will constitute suitable alternate employment, provided it is necessary to employer's operation and tailored to comply with an employee's restrictions. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). Thus, an employer's offer of a suitable job within claimant's place of work is sufficient to discharge its burden of establishing suitable alternate employment. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688 (5th Cir. 1996).

The administrative law judge found that employer met its burden of demonstrating necessary suitable alternate employment because it provided claimant a specific job at its facility within the

medical restrictions outlined by Dr. Davis.[2] Although claimant asserted that employer transferred him to a job at the tire desk during the period between February 11 and June 7, 1994, and this position did not meet Dr. Davis' restrictions, the administrative law judge reasonably found otherwise. The administrative law judge disbelieved the assertion that claimant was prohibited from moving or walking around at will, and thus discounted Dr. Davis' disability assessment that was derived from this misrepresentation. Decision and Order at 23, 26; *see* Er. Ex. D-10 at 21 (4/6/94 Davis deposition). Acknowledging that complaints of pain may be sufficient to show an inability to perform work, *see, e.g., Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989), the administrative law judge nonetheless rationally found that claimant was not a credible witness, and ruled that he was not totally disabled from February 11 to June 7, 1994.

Furthermore, Dr. Davis' subsequent deposition testimony provides substantial evidence to support the finding that claimant was not totally disabled between February 11 and June 7, 1994. *See Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). On February 7, 1994, employer informed claimant by letter that "the position of Customer Service Representative [meets] the physical limitations set by [Dr. Davis and that t]his job does not require you to remain in one position for any length of time. You are free to move around as needed[.]" Er. Ex. 13; *see* Tr. at 85. Dr. Davis testified in his first deposition that he would not have placed claimant on total disability status had he been aware that claimant could indeed move around. Er. Ex. 10 at 20-21 (4/6/94 Davis deposition). Moreover, while the administrative law judge was concerned that the chair provided claimant by employer did not meet Dr. Davis' requirements for adequate support, *see* Decision and Order at 23, he rationally determined that claimant did not cooperate with employer, or a union official, about which type of orthopedic chair would be sufficient to comply with the need for lumbar-sacral support. Decision and Order at 24; *see* Tr. at 174-75; Er. Ex. D-11 at 12 (2/22/95 Davis deposition). Because his determinations are supported by substantial evidence based on the record as a whole, and his credibility assessments are "neither patently unreasonable nor inherently incredible," *see Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm the administrative law judge's determination that claimant was not totally disabled between February 11 and June 7, 1994.[3]

We likewise reject claimant's challenge to the finding by the administrative law judge that

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[2]Dr. Davis, on May 23, 1993, restricted claimant to lifting 35 lbs., and directed that he should do only minimal bending, climbing and squatting activities. Er. Ex. D-1, 1-15. On September 24 of that year, Dr. Davis restricted claimant from repetitive lifting, lifting over 25 lbs., and climbing. Claimant was not to perform excessive standing, walking, pushing or pulling. Er. Ex. D-1, 1-18. On January 5, 1994, he modified the lifting restriction to 15 lbs. Er. Ex. D-1, 1-19. On September 20, 1993, Dr. Davis reviewed the position description and reported that claimant could perform that work with his then current restrictions. *See* Er. Ex. D-1, 1-16; Er. Ex. D-10 (4/6/94 Davis deposition).

[3]Temporary partial disability during this period is not at issue, as employer ultimately tendered these benefits. *See* Decision and Order at 22.

claimant's post-injury wage-earning capacity for the period commencing November 30, 1994 should be based on an eight-hour workday.[4] *See* 33 U.S.C. §908(h). The administrative law judge found that claimant's part-time earnings with employer did not fairly and accurately reflect his post-injury wage-earning capacity, because the administrative law judge deemed claimant to be capable of full-time work in the same position, and employer offered this employment.[5] Decision and Order at 27. The administrative law judge rationally credited the opinions of Drs. Davis and Eckart, each of whom reported that claimant could work an eight-hour day within his restrictions, to find claimant capable of full-time work. *See* Er. Ex. D-11, p. 7 (2/22/95 deposition of Dr. Davis); Er. Ex. D-14, pp. 16-17 (2/22/95 deposition of Dr. Eckart).[6] Because the administrative law judge, based on the record as a whole, rationally found that employer met its burden of establishing that claimant was capable of working full-time for employer, *see Swain*, 17 BRBS at 147, and this finding is supported by substantial evidence, it is affirmed.[7]

While we affirm the findings of the administrative law judge, we nevertheless modify the Decision and Order to reflect that claimant, while not entitled to additional temporary partial disability, is in fact entitled to a temporary partial award of $96.36 per week commencing November 30, 1994 and continuing. Claimant's full-time employment during the period after November 30, 1994, still results in a loss in his post-injury wage-earning capacity. The parties stipulated that claimant's average weekly wage at the time of his injury was $429.34. Decision and Order at 2. The administrative law judge later determined that claimant's "wage-earning capacity is the hourly rate of $7.12 multiplied by a forty hour work week, totalling $284.80." Decision and Order at 27. Thus, based on the findings in the Decision and Order, claimant established entitlement to temporary partial disability benefits for the loss in his wage-earning capacity based on two-thirds of the difference between claimant's average weekly wage and his post-injury wage-earning capacity of $284.80 per week. 33 U.S.C. §908(e). Claimant states in his brief that he is receiving benefits of $96.36 per week, which equals the amount due pursuant to these findings. We therefore modify the administrative law judge's decision to provide that claimant is entitled to benefits of $96.36 per week for temporary partial disability commencing November 30, 1994, and continuing.

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[4]At some point in this period, claimant returned to work at the service desk. *See* Tr. at 158.

[5]The administrative law judge also found that, in addition, employer demonstrated the availability of suitable alternate employment in the Tampa, Florida, area. Decision and Order at 27-8.

[6]Dr. Eckart testified that he reviewed letters from Dr. Davis, dated 7/20/94 and 11/27/94, that reported that claimant was capable of full-time work. Er. Ex. D-14 at 14. Dr. Eckart also reviewed the description of claimant's service position and concluded that claimant could perform this work. Er. Ex. D-14 at 15, 17. Dr. Davis, in his second deposition, testified that the new restriction to part-time employment was based on claimant's representations that employer was not meeting the restrictions. Er. Ex. D-11 at 6-7.

[7]Claimant's argument with respect to whether he was paid for a three-week period in October and November 1993 lacks merit. The administrative law judge rationally rejected this contention, and determined that employer's risk manager indeed paid claimant for the period in question, and that claimant failed to present any evidence that any payment was improperly made. The administrative law judge's findings are supported by substantial evidence.

Accordingly, the administrative law judge's decision is modified to provide for compensation for temporary partial disability in the amount of $96.36 per week commencing November 30, 1994. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge