BRB No. 96-1000

MARK W. WILSON		
Claimant-Respondent	)	
v.	)	
JOTORI DREDGING, INCORPORATED	)	DATE ISSUED:
and	)	
FIREMAN'S FUND INSURANCE	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James E. Parrot and Richard E. Schwartz (Richard Schwartz & Associates, Ltd.), St. Louis, Missouri, for claimant.

Raymond J. Flunker (Evans & Dixon), St. Louis, Missouri, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1142) of Administrative Law Judge Rudolf L. Jansen awarding 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*. (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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back on June 23, 1989, when he attempted to move a wire cable while working as a deckhand for employer. Dr. Cole diagnosed a herniated disc and, on September, 26, 1989, performed a laminectomy and discectomy. Claimant continued to

experience back pain and was treated through physical therapy and injections. In 1991, claimant was diagnosed as suffering from depression related to his continuing pain. Claimant received temporary total disability benefits from June 24, 1989, through the time of the July 13, 1995, hearing.

In his Decision and Order, the administrative law judge noted that employer conceded that claimant is unable to return to his usual work. The administrative law judge found that employer failed to establish the availability of suitable alternate employment and that therefore claimant is entitled to permanent total disability benefits. The administrative law judge also found that employer is responsible for payment of treatment claimant received at the Mayo Clinic, the DePaul Pain Center, and the St. Louis County Department of Health, if proper documentation is provided for the latter treatment.

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment, and in holding it liable for specific medical treatment. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer first contends the administrative law judge erred in finding that the vocational evidence presented by its counselor, Karen Kane, is insufficient to establish the availability of suitable alternate employment. Once, as here, claimant establishes that he is unable to return to his usual work, the burden shifts to employer to establish the availability of realistic job opportunities that claimant can perform given his physical restriction, his age, his educational and vocational background, and other relevant considerations. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Ms. Kane prepared a labor market survey identifying specific jobs she believed claimant could perform given his physical restrictions. The administrative law judge rejected the survey in its entirety because Ms. Kane based her report on the physical restrictions outlined by Dr. Petkovich, to which the administrative law judge gave less weight due to ambiguities and discrepancies between Dr. Petkovich's written report and his deposition testimony.[1] The administrative law judge's credibility determination concerning the opinion of Dr. Petkovich is a rational exercise of his discretion, *see generally Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), and the Board has held that if the jobs identified by a vocational counselor are based on the

[1]Dr. Petkovich stated he relied on the functional capacity evaluation of a physical therapist who limited claimant's lifting to 30 to 35 pounds. Nevertheless, the administrative law judge noted, Dr. Petkovich stated in a written evaluation that claimant could occasionally lift up to 74 pounds, but stated in his deposition that he would not recommend it. In a letter, Dr. Petkovich stated that claimant could occasionally lift up to 50 pounds, but stated in his deposition that he would recommend that claimant not accept any job requiring the lifting of 50 pounds. Emp. Exs. A, D. Moreover, the administrative law judge found that although Dr. Petkovich stated that depression can alter one's work capacity, he also stated he did not consider claimant's depression in setting claimant's capabilities.

restrictions of a physician whose opinion has been discredited by the administrative law judge, employer has failed to establish the availability of suitable alternate employment. *Dygert v. Manufacturer's Packaging Co.,* 10 BRBS 1036 (1979).

In this case, however, upon discrediting the opinion of Dr. Petkovich, the administrative law judge did not otherwise determine what physical and psychological restrictions claimant has as a result of the work injury. Claimant told Ms. Kane that his lifting limit is 20 to 25 pounds, Tr. at 167, and the functional evaluation by Tuckey & Associates stated claimant could lift 30-35 pound objects. Some of the jobs identified by Ms. Kane fall within these ranges. Emp. Ex. C. In view of the administrative law judge's finding that "it appears obvious that [claimant] is willing and able to do some type of light-duty work," Decision and Order at 14, we must vacate his finding that suitable alternate employment was not established. On remand, the administrative law judge must consider the remaining opinions of record concerning claimant's post-injury work capabilities and determine the extent of his restrictions. Then, the administrative law judge must consider whether the jobs identified by Ms. Kane satisfy these restrictions and whether they are otherwise realistic job opportunities available to claimant. *See generally Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). If the administrative law judge finds suitable alternate employment established, he must consider the parties' contentions pertaining to the diligence of claimant's search for alternate employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991).

Employer also contends that the administrative law judge erred in holding it liable for treatment claimant received at the Mayo Clinic and the St. Louis County Department of Health as claimant did not satisfy the reporting requirement of Section 7(d)(2) of the Act, 33 U.S.C. §907(d)(2), and as this treatment offered claimant only temporary, not curative, relief.

We decline to address employer's argument with regard to Section 7(d)(2), as employer has raised this issue for the first time on appeal. *Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96 (1989); *see also Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994) (McGranery, J., dissenting) (decisions concerning the reporting requirement of Section 7(d)(2) are solely within the district director's authority). Moreover, we reject employer's contention that it is not liable for claimant's treatment at the Mayo Clinic and the St. Louis County Department of Health. The administrative law judge specifically found that employer refused to approve the treatment at the Mayo Clinic, and employer does not challenge this finding on appeal. Once employer refuses to authorize treatment, claimant is released from the obligation to seek employer's approval and need only establish that the treatment was reasonable and necessary for the work injury to be entitled to such treatment at employer's expense. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). The administrative law judge found that the treatment at the Mayo Clinic was reasonable and necessary as claimant was referred there by his surgeon to analyze claimant's continued pain following the surgery. This finding is rational, and we therefore reject employer's contention that the treatment was not necessary because it did not cure claimant's pain.

With regard to the treatment at the St. Louis County Department of Health, the administrative law judge properly found that employer's refusal of authorization for the Mayo Clinic treatment negated claimant's need to seek authorization for treatment at the county facility, but stated that employer is liable for the bill only upon receipt of a physician's report specifying that such treatment was necessary. As the administrative law judge's finding is premised on a showing that the treatment was necessary, we reject employer's contention that the administrative law judge erred in holding it liable for this treatment.

Accordingly, the administrative law judge's finding that employer did not establish the availability of suitable alternate employment is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge