BRB No. 96-1304

RONALD G. FRANSEN	)	
	)	
Claimant-Respondent	)	DATE ISSUED: _____)
	)	
v.	)	
	)	
DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY	)	
	)	
and	)	
	)	
SIGNAL ADMINISTRATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

James Courtney, III, Duluth, Minnesota, for claimant.

Larry J. Peterson (Larry J. Peterson & Associates), St. Paul, Minnesota, for employer/carrier.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (94-LHC-1158) of Administrative Law Judge Robert G. Mahony 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 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 first injured his left knee while working for employer on October 13, 1973. As a result of a settlement agreement reached by the parties under the Federal Employer's Liability Act (FELA), employer paid claimant $16,750.00 in damages, plus all medical bills attributable to the 1973 knee injury. On December 8, 1992, claimant, who was employed as a composite mechanic, was burning bolts on a water pump when he slipped on the ice and injured his left knee. Claimant continued to work for the next four months, before undergoing surgery on his left knee on April 14, 1993. Claimant remained off from work until his orthopedic surgeon, Dr. Budd, released him to return to work on July 19, 1993. Upon his return to work, claimant did not perform the job of a composite mechanic, but testified he "just sat" as instructed. Hearing Transcript at 36. Two weeks later claimant was laid off because the position of composite mechanic had been abolished. He has not worked since that time. Employer voluntarily paid temporary total disability benefits from April 7, 1993, to June 17, 1993, and permanent partial disability benefits for a ten percent scheduled loss of use of the left leg pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2), of the Act.

Claimant thereafter filed a claim seeking permanent total disability benefits, or alternatively, a scheduled award for permanent partial disability based on a twenty-five percent loss of use of the left leg. Claimant also sought additional temporary total disability benefits.

In his Decision and Order, the administrative law judge initially concluded, based on his findings that claimant established a *prima facie* case of total disability, and that employer failed to meet its burden of establishing the availability of suitable alternate employment, that claimant is totally disabled. In addition, the administrative law judge determined that claimant reached maximum medical improvement with regard to his left knee on December 17, 1993, and found employer entitled to Section 8(f), 33 U.S.C. §908(f), relief, based on claimant's pre-existing injury to his left knee. Consequently, the administrative law judge awarded temporary total disability benefits from April 14, 1993, until December 16, 1993, less the two week period that claimant returned to work, and permanent total disability benefits commencing on December 17, 1993, to be paid by employer for 104 weeks, after which the Special Fund is to assume liability. Lastly, the administrative law judge found employer entitled to a credit for compensation already paid with regard to claimant's December 8, 1992 injury.

On appeal, employer challenges the administrative law judge's award of benefits. Claimant responds, urging affirmance.

Employer initially argues that the administrative law judge erroneously awarded claimant permanent total disability benefits since, it argues, the record clearly establishes that claimant has no more than a ten percent permanent impairment of the left leg as a result of his December 8, 1992, aggravation of his pre-existing injury. Employer further avers that pursuant to the decision of the United States Supreme Court in *Potomac Electric Power Co. [PEPCO] v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), claimant is restricted to a scheduled award. Lastly, employer contends that contrary to the administrative law judge's determination, it has sustained its burden of showing the availability of suitable alternate employment by presenting several specific jobs which were available to claimant. Employer specifically asserts that the administrative law judge drew improper inferences from the record in finding that employer has not shown the availability of suitable alternate employment.

In the instant case the administrative law judge rationally determined that claimant established a *prima facie* case of total disability, since his finding that all of the physicians who examined claimant, Drs. Budd, Kostamo,[1] Person and Barnett, agreed that his pre-injury job as a composite mechanic is beyond the scope of his physical restrictions, is supported by substantial evidence. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

Where, as in the instant case, claimant is unable to perform his usual employment duties with employer, the burden shifts to employer to demonstrate the availability of

[1]The administrative law judge specifically found that although claimant was released to return to work in July of 1993 without restrictions, he never actually performed the duties of his job prior to his being laid off, and both physicians who released him to work at that time, Drs. Budd and Kostamo, subsequently revised their opinions as to claimant's ability to return to his pre-injury job. Dr. Budd stated, by letter dated November 2, 1993, that claimant could not return to his pre-injury employment because of his knee injury "without great risk of increasing the damage to the knee joint." Claimant's Exhibit 6(E). Dr. Kostamo similarly restricted claimant to light duty work from August 6, 1993, until November 11, 1993, when she found claimant unable to work and then ultimately opined in July 1994 that claimant could return to work only in a limited duty capacity.

suitable alternate employment. *See Lentz v. The Cottman Co.,* 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock v. Tann,* 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992). In order for employment opportunities to be considered realistic, employer must establish their nature, terms, and availability. *See Reiche v. Tracor Marine, Inc.*, 16 BRBS 272 (1984).

The administrative law judge initially rejected the positions identified by employer involving telemarketing, answering the telephone at Town and Country Cable, and work as a security guard because of claimant's hearing impairment, which is, contrary to employer's contention, extensively documented in the record. Claimant's Exhibit 8; Employer's Exhibit 8(A); Employer's Exhibit 10, Deposition at 40. *See generally Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The administrative law judge next rationally rejected the sales positions identified by employer with Superior Air and North Wind, Incorporated, because they are not realistically available to claimant given his vocational history, *see generally Caudill v. Sea Tac Alaska Shipbuilding,* 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993), the record indicates that claimant diligently tried, without success, to obtain similar sales positions, *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991), and employer's vocational expert, Mr. Utities, did not establish the terms of employment (*i.e.*, the salary and the territorial range) with specificity. *Hoard v. Willamette Iron & Steel Co.*, 23 BRBS 38 (1989). Moreover, the administrative law judge found that the front desk position at Port Rehabilitation Center, a chemical dependency center is not suitable alternate employment because Mr. Utities could not say whether it required the applicant to have some familiarity with the problem of chemical dependency, and thus, the requirements of that job are not specific.[2] *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Lastly, the administrative law judge found that although claimant may be able to obtain the job as a line worker for PV Foods, he declined to credit that single position as "evidence of a range of jobs which is reasonably available and which claimant is realistically able to secure and perform." Decision and Order at 15, *citing Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); see also *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied.* Inasmuch as the administrative law judge's finding that employer has not met its burden of showing the availability of suitable alternate employment is supported by substantial evidence it is affirmed. Consequently, we affirm the administrative law judge's determination that claimant is totally disabled. As employer

[2]Employer's reliance on *Anderson v. Lockheed Shipbuilding & Construction Co*., 28 BRBS 290 (1994), in arguing that the job with the Port Rehabilitation Center meets its burden to show suitable alternate employment is misplaced, since the instant case is clearly distinguishable based on the facts. In *Anderson*, the administrative law judge's rejection of an alcohol abuse counselor position on the grounds that claimant lacked the necessary credentials was vacated, as the Board found that employer's vocational rehabilitation expert specifically testified regarding the background required for that position, notably only a high school diploma plus an intent to acquire certification within two years was necessary, and the record established that the claimant met the enumerated criteria, particularly since he had fours years of prior employment in the counseling field. In the instant case, Mr. Utities did not set out the background necessary for the Port Rehabilitation Center position and admitted that the employer might be looking for someone with chemical dependency experience, which claimant lacks.

failed to show the availability of suitable alternate employment, claimant is not limited to a scheduled award under the decision in *PEPCO*, 449 U.S. at 268 n.17, 14 BRBS at 363 n.17. *See, e.g., Manigault v. Stevens Shipbuilding Co.*, 22 BRBS 332 (1989). The administrative law judge's award of temporary total disability and subsequently permanent total disability benefits is therefore affirmed.[3]

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]We further note that contrary to its assertion, employer is not entitled to a credit for payments made to claimant under the FELA settlement agreement for the 1973 injury, since the injury which is the subject of the instant claim has rendered claimant permanently totally disabled. *See generally ITO Corp. V. Director, OWCP,* 883 F.2d 422, 22 BRBS 126 (CRT)(5th Cir. 1989); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(en banc).