BRB No. 96-1506

WALTER F. BOUNDS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Order Denying Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Bobby G. O'Barr (Bobby G. O'Barr), Biloxi, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits and Order Denying Claimant's Motion for Reconsideration (94-LHC-1289) of Administrative Law Judge Richard D. Mills 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 the 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 worked for employer as a chipper from 1965 to 1992. Claimant suffered a variety of work-related and non-work related injuries during this period, including two broken thumbs, crushed thighs, and a gall bladder operation. In March 1991, claimant suffered a work-related repetitive stress injury while operating power tools within the course of his employment; claimant underwent surgery for this condition. Employer voluntarily paid claimant temporary total disability benefits from April 18, 1991, until December 17, 1991,

permanent partial disability benefits for a 10 percent permanent impairment of the left hand thereafter, and medical benefits. Claimant sought permanent total disability compensation under the Act. Employer argued that claimant was limited to the scheduled permanent partial disability benefits it had previously paid.

In his Decision and Order Awarding Benefits, the administrative law judge denied the claim for permanent total disability compensation, finding that although it was undisputed that claimant is unable to perform his usual work, employer established the availability of suitable alternate employment through the testimony of its vocational expert, Ms. Tiblets, who identified several security guard positions consistent with Dr. Enger's restrictions which she felt that claimant could realistically perform. In light of the parties' stipulations that claimant has a 10 percent permanent physical impairment of the hand, the administrative law judge found that claimant was not entitled to further disability compensation. The administrative law judge, however, held employer liable for reasonable and necessary medical expenses, and denied claimant's counsel an attorney's fee.

In an Order Denying Claimant's Motion for Reconsideration, the administrative law judge rejected claimant's contention that the reports of Dr. Enger established that claimant was permanently totally disabled, explaining that his finding that claimant could perform suitable alternate employment was based on Dr. Enger's January 1992 and June 1993 reports wherein Dr. Enger stated that claimant would be able to go back to work provided that he did not use power tools. The administrative law judge also reaffirmed his reliance on Ms. Tiblets's vocational testimony, rejecting claimant's contention that Ms. Tiblets failed to consider claimant's prior injuries in assessing his ability to perform alternate employment. Finally, he rejected claimant's argument that he erred in finding that claimant's total disability became partial retroactive to the date of maximum medical improvement, explaining that although Ms. Tiblets's vocational reports identifying specific suitable job opportunities are dated May 26 and June 2, 1992, she stated in a June 10, 1992, vocational report and a May 26, 1992, letter to claimant that jobs of a security nature have been periodically available dating back to the date of maximum medical improvement.

Claimant appeals, reiterating the arguments he made before the administrative law judge on reconsideration. Specifically, claimant contends that the administrative law judge erred in failing to consider Dr. Enger's opinion in its entirety, because, when properly considered, these reports indicate that claimant is permanently totally disabled. Claimant further alleges that the administrative law judge erred in relying upon Ms. Tiblets's vocational opinion because she did not account for any physical restrictions resulting from claimant's prior injuries in finding that suitable alternate employment was available to claimant. Alternatively, claimant asserts that the administrative law judge erred in finding that suitable alternate employment was available as of the date of maximum medical improvement because Ms. Tiblets's vocational assessment was prepared several months after that date. Employer responds, requesting affirmance of the decision below.

As it is uncontested that claimant is unable to perform his usual work as a chipper, claimant established a *prima facie* case of total disability. *Blake v. Bethlehem Steel Corp.*,

21 BRBS 49 (1988). Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience, and physical restrictions, which he could realistically secure if he diligently tried. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d. 1031, 14 BRBS 156 (5th Cir. 1981).

After review of the Decision and Order - Awarding Benefits and Order Denying Claimant's Motion for Reconsideration in light of claimant's arguments and the evidence of record, we affirm the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment because it is rational and supported by substantial evidence. *See O'Keeffe,* 380 U.S. at 359. Contrary to claimant's assertions, it is evident from the face of the administrative law judge's decisions that he considered Dr. Enger's medical records in their entirety but, as he explained in his Order Denying Claimant's Motion for Reconsideration, chose to accord greater weight to Dr. Enger's January 2, 1992, and June 2, 1993, medical reports. In these reports, Dr. Enger stated that although claimant probably could not return to work in the shipyard, he could return to some other type of work that did not involve the use of power tools. EX-12 at 7,8, 20.[1]

[1]We note that Dr. Enger provided essentially the same opinion in his August 19, 1991 and April 7, 1992, medical reports. EX-12 at 5, 10.

Moreover, claimant's assertion that the administrative law judge erred in relying on the vocational opinion of Ms. Tiblets is similarly without merit. Claimant avers that this testimony cannot properly support a finding of suitable alternate employment because her opinion was based on the erroneous assumption that claimant's only restrictions were that he not perform work involving the use of power tools, whereas Dr. Enger stated in his June 2, 1993, report that there was no question but that claimant's March 1991 injury combined with his prior injuries would render claimant substantially and materially more disabled than if he had one injury alone. The vocational reports which Ms. Tiblets submitted, however, explicitly reflect that she considered claimant's other health problems, including his hearing loss, gastric staple procedure, obstructive pulmonary disease, osteoarthritis, and multiple prior injuries in exploring alternate job opportunities. EX-13 at 3-4, 5-6.[2] Furthermore, in conducting her vocational surveys, Ms. Tiblets relied on Dr. Enger's opinion. As claimant's treating physician, he was clearly aware of claimant's pre-existing conditions, yet nonetheless opined that claimant was capable of working provided it did not involve the use of vibrating tools. Although Dr. Enger did, as claimant asserts, state that claimant's multiple health problems rendered him more disabled than he otherwise would have been based on his hand injury alone, he did not state any other restrictions based on claimant's other health problems. Given her reliance on Dr. Enger's assessment of claimant's capabilities, the fact that Ms. Tiblets indicated that she did not have the documents available to review regarding the severity of claimant's health problems does not, contrary to claimant's assertions, undercut the validity of her opinion. EX-13 at 3 - 4. Inasmuch as the administrative law judge's crediting of Ms. Tiblets's testimony is neither inherently incredible nor patently unreasonable, we affirm this crediblity determination, and consequently his finding that employer established the availability of suitable alternate employment based on the entry level security guard jobs[3] Ms. Tiblets identified as suitable.

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[2]Contrary to claimant's assertions, in assessing the extent of claimant's disability, the administrative law judge did consider claimant's testimony as to why he did not apply for the security and cashier jobs Ms. Tiblets identified. Moreover, he also considered the fact that Dr. Enger recommended that claimant seek Social Security disability benefits because of his multiple health problems. *See* Decision and Order at 3.

[3]Inasmuch as the administrative law judge did not rely on the cashier positions in finding that employer established suitable alternate employment, we need not address claimant's arguments relating to these positions.

See Mendoza v. Marine Personnel Co., Inc., 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Claimant's alternate argument that the administrative law judge erred in finding that claimant's total disability became partial as of the date of maximum medical improvement, December 18, 1991, because suitable alternate employment was not shown to be available until at the earliest May 26, 1992, is also without merit. An injured employee's total disability becomes partial on the earliest date that an employer shows suitable alternate employment to be available. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F. 2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration). Employer, however, is not precluded from establishing the availability of suitable alternate employment retroactive to the date of maximum medical improvement. *Id.*, 25 BRBS at 131. Inasmuch as Ms. Tiblets indicated in a June 10, 1992, rehabilitation summary sheet that security jobs have been available periodically since the time that claimant reached maximum medical improvement, EX-13, p.12, and sent a letter to claimant to the same effect on May 26, 1992, the administrative law judge rationally concluded based on this evidence that employer established that suitable alternate employment was available retroactive to the date claimant reached maximum medical improvement. *See P& M Crane* Co., 930 F.2d at 430-431, 24 BRBS at 120-121 (CRT). Accordingly, we reject claimant's argument and affirm the administrative law judge's finding that as of December 18, 1991, the stipulated date of maximum medical improvement, claimant was entitled to permanent partial disability compensation under the schedule. *See generally Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., dissenting on other grounds). The administrative law judge's denial of permanent total disability is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL
Chief Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge