

BRB No. 89-1530

ETHEL GEORGE)	
(Widow of WILLIAM F. GEORGE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LOCKHEED SHIPBUILDING)	DATE ISSUED:
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order-Award/Denial of Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

Raymond H. Warns, Jr. (Faulkner, Banfield, Doogan & Holme), Seattle, Washington, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant, widow of William F. George, appeals the Decision and Order-Award/Denial of Benefits (87-LHC-2498) of Administrative Law Judge Ellin M. O'Shea 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

The decedent had been employed at Lockheed Shipbuilding Company as a pipefitter since 1969. He suffered a work-related right torn rotator cuff on October 18, 1984 and returned to light duty pipefitter work in November 1984, in employer's "pipe shop." Decedent settled his claim for this injury for a lump sum pursuant to 33 U.S.C. §908(i). While on light duty, decedent suffered an injury to his back on September 5, 1985. Employer paid temporary total disability benefits for the periods of October 7, 1985 to October 27, 1985, and February 24, 1986 to December 1, 1986.¹ A herniated disc was diagnosed on December 10, 1985 and surgery performed on February 28, 1986. On June 16, 1986, a re-exploration and microdiscectomy was performed by Dr. Burns who noted that significant scar tissue was present. At the time of his death due to a myocardial infarction in April 1987, decedent had not returned to work and was seeking permanent total disability benefits.²

The administrative law judge found that decedent could not return to his usual work at Lockheed due to the September 5, 1985 injury's residual effects. The administrative law judge also found that employer established the availability of suitable alternate employment that paid \$3.35 per hour from October 6, 1986, the date of permanency, to April 24, 1987, the date of death. Thus, the administrative law judge awarded claimant permanent partial disability benefits for the period between October 6, 1986 to April 24, 1987 based on decedent's loss in wage-earning capacity.

On appeal, claimant contends that the administrative law judge erred in finding that the positions identified by employer were sufficient to establish suitable alternate employment, as they were not compatible with decedent's physical requirements, job skills or interests. Claimant also contends that a post-mortem labor market survey is "absurd" and that employer did not establish that the positions were available while decedent was alive. Employer responds, urging affirmance of the administrative law judge's Decision and Order, contending he properly credited the testimony and reports of its vocational counselor in finding suitable alternate employment established.

We reject claimant's contention that the administrative law judge erred in finding suitable alternate employment established. Once claimant shows decedent's inability to return to his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must show the availability of job opportunities in the local community, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Id.*; *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991).

In the instant case, the administrative law judge reviewed the positions identified in the post-mortem labor market survey³ and found that they were within decedent's physical limitations.⁴ The

¹Decedent attempted to return to work from October 22, 1985 to February 1985, but because of increased pain he left work on advice of his treating physician.

²Claimant, decedent's widow, also filed a claim for Section 9, 33 U.S.C. §909, death benefits which were denied by the administrative law judge. This finding is not challenged on appeal.

³The positions identified in the labor market survey included cashier at a self-service gas station,

administrative law judge found the testimony and report of Mr. Miller, employer's vocational counselor, more persuasive than the testimony of Mr. Choppa, claimant's vocational expert, as Mr. Miller personally visited the job sites of the positions identified in the labor market survey to investigate whether they would fit decedent's physical requirements and Mr. Choppa only testified with regard to those positions based on general knowledge and some telephone contacts. The administrative law judge also considered the fact that Mr. Miller had interviewed the decedent prior to his death and discussed employment in positions such as these, and also discussed the availability of the positions with the employers.⁵

In addition, the administrative law judge noted that Mr. Miller's picture of decedent's capabilities and inclination for employment was more in line with the medical records, the deceased's statements to his treating physician, and the decedent's frame of mind as testified to by his widow. The administrative law judge particularly noted that one month prior to his death, the decedent stated that he was interested in a job that would supplement his Social Security benefits without affecting them.

Contrary to claimant's contention, a post-mortem labor market survey is acceptable evidence of positions available when decedent was alive; the fact of decedent's demise does not alter employer's burden to establish that suitable alternate employment was available during the period of decedent's life subsequent to the work-related injury. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.*, 26 BRBS 32 (1992); *Jones v. Jenco, Inc.*, 21 BRBS 12 (1988). Moreover, we reject claimant's assertion that the positions identified do not establish suitable alternate employment as they are temporary in nature. Although employer's and claimant's vocational experts noted that the positions identified traditionally have a high turnover rate due to their low pay, it is not indicated in the record that these positions were considered temporary. Finally, contrary to claimant's contention, the labor market survey identifies positions which were available during the period following the date of maximum medical improvement, October 6, 1986. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991).

Credibility determinations by the administrative law judge must be given great weight and claimant has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations. *See Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990); *Cordero v. Triple A Machine Shop*, 580 F.2d 1131, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, we hold that the administrative law judge's finding that employer established the availability of suitable

convenience store cashier, car wash attendant and parking lot attendant.

⁴Decedent's limitations were limited bending, stooping, squatting, and no lifting over 30 pounds. Following the September 1985 back injury, it was also necessary for decedent to have the ability to change his position at will.

⁵Mr. Choppa also interviewed decedent and tested his vocational aptitude. He essentially found him to be unemployable.

alternate employment is supported by substantial evidence, and thus we affirm the administrative law judge's award of permanent partial disability benefits.

Accordingly, the Decision and Order-Award/Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge