BRB No. 97-0475

HAYWOOD L. KNIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
ATLANTIC TECHNICAL SERVICES/ SEALAND TERMINALS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Granting Permanent Total Disability of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna L.L.P.), Norfolk, Virginia, for claimant.

Lynne M. Ferris and Robert A. Rappaport (Knight, Dudley, Clarke & Dolph, P.L.C.) Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Permanent Total Disability (92-LHC-3071, 93-LHC-797, 798) of Administrative Law Judge Richard K. Malamphy 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 conclusions of law of the administrative law judge if they 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 was employed by employer for approximately 16 years as a container

repairman, during which time the parties stipulated that claimant developed bilateral carpel tunnel syndrome. Additionally, claimant has a non work-related diabetic neuropathy which causes numbering of his fingertips, thereby impairing his fine motor skills. Employer voluntarily paid claimant temporary total disability compensation under the Act from April 16, 1992, to May 13, 1992, and from January 11, 1994, to February 20, 1995. 33 U.S.C. §908(b). Additionally, pursuant to the impairment rating of claimant's treating physician, Dr. Gwathmey, employer voluntarily paid claimant compensation for a 7 percent permanent partial disability of both hands. 33 U.S.C. §908(c)(3), (19). Claimant sought continuing permanent total disability compensation under the Act. *See* 33 U.S.C. §908(a).

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant is unable to return to his usual employment as a container repairman. Next, the administrative law judge determined that employer failed to establish the availability of suitable alternate employment, and thus awarded claimant permanent total disability compensation. In a subsequent Order, the administrative law judge granted employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends the administrative law judge erred in determining that it failed to establish the availability of suitable alternate employment. Claimant responds, urging affirmance.

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 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 his 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 determining claimant's physical restrictions, the administrative law judge credited the manual dexterity tests administered to claimant by Barbra Byers, which placed claimant in the first percentile of each test, and the initial physical capacities evaluation of Dr. Gwathmey, which restricted claimant to occasional lifting over 5 pounds, no lifting over 10 pounds, no use of vibrating tools, no climbing, no temperature extremes, and no repetitive reaching, handling or repetitive usage of a keyboard and cash register. *See* CX-3. Pursuant to these credibility determinations, the administrative law judge discredited employer's labor market survey, which was prepared by Eileen Bryant and which identified approximately 75 jobs that are allegedly within claimant's work restrictions. Moreover, the administrative law judge discredited Dr. Gwathmey's approval of 5 positions identified by Ms. Bryant on the basis that the job descriptions are not within the physical restrictions listed by Dr. Gwathmey in his initial physical capacities evaluation. Specifically, the administrative law judge determined that the 5 identified jobs failed to meet the lifting

limitations which Dr. Gwathmey established in his physical capacities evaluation. The administrative law judge next found that employer's labor market the survey is also flawed with regard to claimant's physical limitations. While the survey does correctly contain some of claimant's physical restrictions as stated in the physical capacities evaluation, the survey fails to note claimant's lack of manual dexterity, as demonstrated by the testing of Ms. Byers, or Dr. Gwathmey's limitation that claimant should not engage in repetitive use of a cash register or computer keyboard. The administrative law judge also found "glaring" the surveys statement that claimant is to never lift objects over 50 pounds, when Dr. Gwathmey restricted claimant to not lifting objects over 10 pounds. *See* Decision and Order at 6. Lastly, the administrative law judge noted Ms. Bryant's testimony conceding that many of the listed jobs in the survey are probably inappropriate for claimant, and he found other listed jobs equally questionable when compared to all of the restrictions listed in Dr. Gwathmey's initial physical capacities evaluation. Based on these findings, the administrative law judge concluded that employer's labor market survey contains too many inconsistencies concerning claimant's physical limitations and the jobs he is allegedly able to perform to meet employer's burden of establishing the availability of suitable alternate employment.

Initially, we hold that the administrative law judge acted within his discretion in crediting Dr. Gwathmey's initial physical capacities evaluation, and thereafter discrediting his subsequent approval of 5 specific jobs listed in employer's labor market survey because they required lifting greater than Dr. Gwathmey initially prescribed. It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the case at bar, the administrative law judge's decision to rely upon the initial physical capacities evaluation of claimant by Dr. Gwathmey, and his subsequent determination that Ms. Bryant's labor market survey is insufficient to establish the availability of suitable alternate employment since it does not accurately reflect claimant's physical limitations as contained in Dr. Gwathmey's initial physical capacities evaluation and in the manual dexterity testing performed by Ms. Byers is rational, and his findings are supported by the record. Accordingly, we affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, and his consequent award of permanent total disability compensation to claimant. *See generally Uglesich v. Stevedoring Services of America,* 24 BRBS 180 (1991).

Accordingly, the administrative law judge's Decision and Order Granting Permanent Total Disability is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge