

ALBERT THOMAS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	DATE ISSUED: _____
I.T.O. CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Scott E. Silbert (Silbert & Garon, L.L.P.), New Orleans, Louisiana, for claimant.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-1207) of Administrative Law Judge Lee J. Romero, Jr., 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as longshoreman for employer until June 1, 1988, when he fell and injured his left wrist. Claimant underwent two surgeries to repair the problem, but prior to the first surgery in November 1988, his orthopedic surgeon, Dr. Habig, discovered that claimant had heart irregularities, and he referred claimant to a cardiologist until his condition was stabilized. Claimant underwent the second wrist operation in June 1990. *Jt. Ex. 3* at 13-16. His wrist condition reached maximum medical improvement on February 17, 1991, and Dr. Habig assessed claimant with a 30 percent permanent impairment and

prohibited him from returning to longshore work. Jt. Ex. 3 at 18-22. Claimant and employer stipulated that claimant has a permanent partial disability to his wrist, and employer paid disability compensation for the wrist injury and medical benefits, including the cost of the initial cardiac evaluation.

Thereafter, claimant filed a claim for permanent total disability benefits due to the combination of his cardiac and wrist conditions. Alternatively, claimant contended his cardiac condition was aggravated by stress caused by his lifestyle change due to his wrist injury. Employer controverted the claim, arguing that claimant's heart condition is not work-related. Employer also argued that claimant impeded its efforts to determine the availability of suitable alternate employment. The administrative law judge discussed the opinions of two doctors on the issue of whether claimant's heart condition was caused or aggravated by his work.¹ He determined that these opinions warrant equal weight; therefore, he concluded that this claim cannot succeed under the holding of the Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994), and that claimant's cardiac problems are not related to his work. Decision and Order at 12-13. The administrative law judge deemed the remaining issues between the parties moot, and he denied benefits. *Id.* at 13. Claimant appeals the denial of benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in addressing only one of the issues presented to him. Specifically, he contends he is permanently totally disabled due to the combination of the pre-existing cardiac condition and the work-related wrist injury; therefore, employer must demonstrate the availability of suitable alternate employment taking into account both of these conditions in order to establish that he is at most partially disabled. In response to claimant's appeal, employer avers that: 1) claimant did not cooperate with its vocational counselor; 2) claimant stated a desire to retire and did; and, 3) it was not bound to consider the non-industrial heart condition in determining the availability of suitable alternate employment because the condition did not limit claimant's activities at the pertinent time.

Initially, although claimant notes his disagreement with the administrative law judge's conclusion, he concedes that, based on the evidence, the administrative law judge could

¹Dr. Cook, claimant's cardiologist, stated he was uncertain what caused claimant's heart condition but that stress from the wrist injury was "probably" a factor. Jt. Ex. 2. Dr. O'Meallie, employer's expert, testified there is no connection between stress and claimant's illness because the cardiac condition is degenerative due to age (it is due to a microscopic structural abnormality). Jt. Ex. 4.

find that his condition is not work-related. As claimant does not appeal this determination, we affirm the finding that claimant's cardiac condition is not work-related.

However, we agree with claimant that the administrative law judge erred in failing to address the issue of suitable alternate employment.

To establish a *prima facie* case of total disability, a claimant must show that he is unable to return to his usual employment due to his work-related injury. Once a claimant demonstrates a *prima facie* case of total disability, an employer may show that the disability is at most partial by establishing the availability of realistic job opportunities which the claimant is capable of performing given his age, education, work experience, and physical restrictions. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115 (CRT) (D.C. Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining whether suitable alternate employment is established, the administrative law judge must consider a claimant's limitations due to pre-existing conditions as well as those due to the work injury. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988); *Fox v. West State, Inc.*, ___ BRBS ___, BRB Nos. 96-1781/A (Sept. 29, 1997).

In this case, Dr. Habig definitively stated, and it is undisputed, that claimant cannot return to his usual work due to his wrist injury alone. Jt. Ex. 3 at 18-22. Thus, claimant has established a *prima facie* case of total disability, and the burden shifts to employer to show that, at most, claimant's disability is partial. Claimant contends that he cannot return to any work because of the combination of his wrist and heart conditions. After a review of the record, we conclude that the case must be remanded for the administrative law judge to determine which, if any, of claimant's coronary conditions pre-existed the work injury, and to address the conflicting evidence regarding claimant's ability to perform alternate work if the administrative law judge's finds that a pre-existing coronary condition restricts his ability to work. For example, Dr. Cook testified that claimant is unemployable in light of his wrist injury and his serious heart ailments. Jt. Ex. 2. Dr. O'Meallie on the other hand concluded that claimant can perform sedentary work because he has no physical restrictions related to his cardiac condition. Jt. Ex. 2 at 70-71; Jt. Ex. 4. Employer's vocational counselor identified jobs which Dr. Habig approved, giving consideration only to claimant's wrist-related restrictions. Jt. Ex. 5. As the administrative law judge did not consider suitable alternate employment when the case was before him, we vacate his denial of benefits. On remand, the administrative law judge must address the suitable alternate employment issue, determining whether a pre-existing heart condition affects his ability to obtain and perform alternate work and whether employer demonstrated the availability of suitable alternate employment if claimant has restrictions due to his heart condition. Additionally, the administrative law judge must address employer's contentions regarding claimant's alleged refusal to cooperate with its rehabilitation efforts, *see Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (Ramsey, C.J., dissenting on other grounds), *recon. denied*, 17 BRBS 160 (1985)(Ramsey, C.J., dissenting on other grounds), as well as its contention that claimant voluntarily left the workforce. *See Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

Accordingly, the administrative law judge's finding that claimant's heart condition is

not work-related is affirmed. The denial of benefits is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge