BRB No. 91-1300

BARBARA L. HARRELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Shannon T. Mason and Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order denying benefits (90-LHC-951) of Administrative Law Judge Daniel A. Sarno, 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 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 began working as a grinder for employer on July 11, 1977. After performing this work for six years, claimant developed carpal tunnel syndrome. Dr. Knauft performed surgery on both of claimant's hands and opined that she reached maximum medical improvement on March 31, 1989, and was unable to perform her previous work. Dr. Knauft imposed restrictions regarding lifting, climbing, crawling and repetitive grasping and assigned her a permanent impairment rating of five percent to each arm. When claimant began experiencing problems with her hands, she was transferred to employer's Material Reclamation Assembly (MRA) shop, a facility for people who were injured and on work restrictions. Claimant continued to work in the MRA shop until September 9, 1989, when employer informed her that there was no more work available for her. Tr.

at 17. In September 1989, employer referred claimant to a vocational rehabilitation counselor, Carl Hanbury, to help her find work. Employer voluntarily paid claimant for various periods of temporary total and temporary partial disability from September 29, 1983, until April 8, 1990, and for permanent partial disability from May 1, 1990, until October 22, 1990. Cl. Ex. 1; Tr. at 19. Claimant, who has not worked since leaving employer's employ, sought permanent total disability compensation under the Act.

The administrative law judge denied the claim for permanent total disability compensation, finding that although claimant could not return to her former employment as a grinder, employer had identified suitable alternate employment which claimant was capable of performing. In addition, the administrative law judge determined that claimant failed to establish due diligence in seeking alternate employment. Claimant appeals the denial of benefits. Employer responds, urging affirmance.

On appeal, claimant initially contends that in denying her total disability compensation, the administrative law judge erroneously found that the jobs identified by employer's vocational counselor, which were located between fifteen and forty miles from her home, were sufficient to meet employer's suitable alternate employment burden. Claimant avers that inasmuch as she lives in a rural area without public transportation and lacks other means of transportation,[1] these job opportunities are not realistically available to her and employer has failed to establish the availability of work in the relevant geographic area in which she resides.

We reject claimant's argument. Once a claimant establishes that [s]he is physically unable to return to [her] pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, has held that employer must establish jobs available to claimant "in the community in which [s]he lives." *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT) (4th Cir. 1994).

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge credited the testimony of Carl Hanbury, employer's vocational consultant. After evaluating claimant, Mr. Hanbury identified a number of positions located from two to forty miles from claimant's home, which he felt claimant was capable of performing with her background of two years of secretarial science classes in college and her work restrictions. The jobs identified included telemarketing representative, sales clerk,

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[1]Claimant and her husband owned two cars; her husband used one to commute to work in Norfolk, and her son used the other to attend school and work in Hampton. When claimant worked for employer, someone would drop her off and pick her up at a bus stop located two to three miles from her house, where she was picked up with other employees by a privately owned bus and transported to employer's place of business.

dispatcher, cashier, glass blower, file clerk and library assistant positions. Tr. at 64, 66, 74. In determining that employer demonstrated the availability of suitable alternate work within the relevant geographic area, the administrative law judge noted that several of these positions were located close to claimant's home. The administrative law judge specifically identified employment opportunities available with The Limited, Leggett's, and Things to Remember (Things Remembered) in Chesapeake Square Mall, cashier positions at Wilco Food Mart, dispatcher and library assistant positions for the city of Chesapeake and a file clerk position with Amanda Hoffler, as being located in Chesapeake or within a close radius of claimant's residence. Decision and Order at 13-14.

Claimant argues on appeal that the jobs identified at Chesapeake Square Mall, located two miles from her house, are not sufficient to establish the availability of suitable alternate employment because the mall was still under construction at the time the jobs were identified. We disagree. Inasmuch as the record reflects that the stores listed by the administrative law judge were scheduled to open in Spring 1990, after the date of maximum medical improvement and prior to the January 28, 1991 hearing, it was not unreasonable for the administrative law judge to view these positions as sufficient to meet employer's burden. *See Trans-State Dredging v. Tarner*, 695 F.2d 508, 15 BRBS 60 (CRT)(4th Cir. 1982).

Claimant also argues that employer failed to establish the availability of suitable alternate employment within the relevant geographic area because the dispatcher job which employer identified was located 17 miles from her home and the file clerk position was 30 miles away. While recognizing that these jobs were located in Chesapeake, claimant points out that the City of Chesapeake is 353 square miles in size. Claimant's geographic locality argument is without merit. The administrative law judge reasonably concluded, based on the testimony of Mr. Hanbury, that suitable alternate work opportunities existed for claimant within a reasonable proximity to her home. Claimant argued below, as she does on appeal, that her inability to travel to and from work constitutes a continuing disability which precludes her from performing the alternate work identified. The administrative law judge, however, reasonably concluded that the alleged disability was self-imposed and was not compensable. Claimant is not unable to travel due to the medical restrictions imposed by her injury.[2] As the administrative law judge stated, while it is laudable that claimant has provided transportation for her child, it is not employer's responsibility to provide claimant with a substitute car to take her to work. Inasmuch as the testimony of Mr. Hanbury

[2]Claimant cites *Sampson v. F.M.C. Corp.*, 10 BRBS 929 (1979), and *Kilsby v. Diamond M Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M Drilling Co. v. Marshall*, 577 F.2d 1033, 8 BRBS 658 (5th Cir. 1978), in support of her argument that her inability to travel to and from work constitutes a disability. In *Sampson*, the Board, noting that although claimant's work opportunities were limited to hypothetical situations, expressed the opinion that based on physicians' testimony, due to claimant's continuing chest wall pain and angina attacks, claimant would be unable to drive the 130-mile per day round trip to Portland. In *Kilsby*, claimant also had a heart condition, and was advised not to drive to available jobs 65 and 200 miles away because of stress. In these cases, however, unlike the present case, it was the claimants' physical impairments which impeded their ability to travel to work rather than absence of a car.

provides substantial evidence to support the administrative law judge's finding that employer established the availability of suitable alternate work within the relevant geographic area where claimant resides and the transportation difficulties alleged by the claimant do not mandate a contrary finding, we affirm this determination. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 16 (CRT)(4th Cir. 1988)(employment located 20-25 miles from claimant's home is geographically available where physical disability did not prevent him from driving that distance).

Claimant's assertion that the administrative law judge erred in finding that she was not diligent in seeking suitable alternate employment is also without merit. Once employer shows that suitable alternate employment exists, claimant can still prevail if she demonstrates that she diligently tried and was unable to secure such employment. *See Tann*, 841 F.2d at 542, 21 BRBS at 13 (CRT). Claimant argued below, as she does on appeal, that because she contacted 93 employers, she was reasonably diligent in attempting to secure alternate employment. While recognizing that claimant did report contacting 93 employers during the approximately 68-week period subsequent to September 20, 1989, when she registered with the Virginia Employment Commission for unemployment benefits, the administrative law judge found that the weight of the relevant evidence supported the notion that claimant was merely doing the minimum required for receiving unemployment insurance. In concluding that claimant had not made a diligent effort to obtain suitable alternate employment, the administrative law judge noted initially that claimant had not been overly responsive to Mr. Hanbury's suggestions. Although Mr. Hanbury requested that claimant call him weekly to keep him abreast of what she was doing, *see* Emp. Exs. 7(c),7(d), the administrative law judge noted that claimant had not done so. In addition, the administrative law judge credited Mr. Hanbury's testimony that claimant canceled numerous appointments and characterized the job application process as an "aggravation." Tr. at 67, 70, 85; Emp. Ex. 7(d).

The administrative law judge also determined that claimant failed to display any flexibility in working with the vocational expert's leads. He based this conclusion on claimant's refusal to even consider many of the job leads because of the distance, the type of work, or the pay involved. Mr. Hanbury testified that claimant refused to go to interviews because she did not feel it would be worthwhile as her transportation problems would continue to plague her even if she got the job. Tr. at 71. The administrative law judge also recognized that on a few occasions Mr. Hanbury had set up interviews with claimant which she failed to attend and that claimant failed to mail in applications which Mr. Hanbury sent to her. *See, e.g.*, Tr. at 76. Claimant indicated that she would not consider working as a cashier in a food market because she considered such work unsafe, Tr. at 33, 88, or working with children because her nerves were not up to it. Tr. at 33, 51. Finally, the administrative law judge concluded that claimant had not adequately utilized the community services which Mr. Hanbury had informed were available to her, citing claimant's failure to register with the Southeastern Virginia Job Training Administration[3] and her failure to go to the Virginia

[3]Mr. Hanbury had recommended that claimant register with this agency to receive a Job Training Partnership Act certification. The day that claimant went to register, however, the facility was temporarily closed. Mr. Hanbury testified that he apologized to claimant and attempted to

Employment Commission frequently enough to allow her to check on the daily job listing changes made there in support of this finding.[4]

Under these circumstances, it cannot be said that the administrative law judge's finding that claimant failed to demonstrate diligence in seeking employment is unreasonable. The administrative law judge essentially characterized claimant's attempts at securing alternate employment as ineffective and haphazard, noting that prior to going out to look for a job, claimant did not check the newspaper to see who might be hiring, and did not consider whether a position would be within her work restrictions. Tr. at 26, 40. The administrative law judge's finding that claimant failed to exercise due diligence is rational

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reschedule a second appointment, but claimant was not receptive. Tr. at 76-77.

[4]Mr. Hanbury testified that although he had recommended that claimant go to the Virginia Employment Commission weekly to see what new job listings had been posted, when he followed up on this recommendation on several occasions, he was informed by claimant that it had been at least two weeks since she had last been there. Tr. at 61.

and supported by substantial evidence, particularly the testimony of Mr. Hanbury. As claimant has failed to establish any reversible error made by the administrative law judge in weighing the conflicting evidence and making credibility determinations, we affirm this determination. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge