BRB Nos. 92-2092

MARCUS JOB	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS	)	
CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order On Petition For Reconsideration of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Decision and Order On Petition For Reconsideration (91-LHC-711, 91-LHC-712) of Administrative Law Judge Martin J. Dolan, 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).

On July 22, 1987, claimant, who had suffered prior back and leg injuries, re-injured his lower back while working for employer as a carpenter. The injury occurred as claimant was attempting to lift a piece of plywood. Thereafter, employer provided claimant with a light duty cabinetmaker job within its facility which claimant continued to perform until July 1, 1988, when his union went on strike. Several days after the strike began, claimant obtained light duty work with White Oak Construction Company. Claimant continued to perform this work until October 28, 1988, when he sought a job with employer upon learning that employer was rehiring the striking workers.

Claimant was not rehired by employer, and returned to work with White Oak on February 14, 1989. He continued to work there until July 14, 1989, when he was laid off due to a lack of available light duty work. Claimant thereafter worked for Gilles Dube, constructing cabinets on a bench until August 18, 1989, when he was again laid off. Claimant, who has not been gainfully employed since that time, sought permanent partial and permanent total disability compensation under the Act.

The administrative law judge found that although claimant was unable to perform his usual work as a carpenter, employer had satisfied its burden of establishing the availability of suitable alternate employment through a labor market survey performed by Ms. Hilary Bradshaw, its vocational expert, on January 19, 1989, identifying bench assembler and machine operator positions. The administrative law judge noted the requirements of these jobs were consistent with the light duty restrictions recognized by employer's expert, Dr. Joseph P. Zeppieri, who found that claimant could perform light bench work if he could periodically get up and walk around, if it did not require lifting more than 40 pounds, lifting from floor level, bending, crawling, climbing up and down ladders, or working around uncontained machinery. The administrative law judge further noted that Dr. Hong, claimant's internist, had imposed essentially the same restrictions as those outlined by Dr. Zeppieri, except that Dr. Hong felt that claimant could lift up to 50 pounds.[1] Crediting Dr. Zeppieri's opinion that maximum medical improvement was reached in September 1988, the administrative law judge awarded claimant permanent total disability benefits from October 29, 1988, the date he was laid off by White Oak Construction, until January 19, 1989, the date of Ms. Bradshaw's labor market survey. In addition, the administrative law judge awarded claimant permanent partial disability benefits from January 20, 1989 until February 8, 1989, when he returned to work for White Oak Construction, and from August 18, 1989 and continuing.

Claimant requested reconsideration of the administrative law judge's award of permanent partial disability benefits subsequent to August 18, 1989. Citing *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991), claimant asserted that he is entitled to permanent total disability compensation as of August 18, 1989, because he diligently tried without success to obtain suitable alternate employment.

[1]The administrative law judge rejected the security guard positions identified in Ms. Bradshaw's labor market survey as inconsistent with claimant's physical limitations and rejected the quality control inspector position because no evidence had been presented that claimant had the chemistry background this job required.

The administrative law judge summarily denied claimant's motion. Claimant appeals the administrative law judge's denial of permanent total disability compensation subsequent to August 18, 1989, reiterating the due diligence argument he made below. Employer responds that the administrative law judge properly denied claimant permanent total disability compensation because suitable alternate employment was identified and claimant's efforts at searching for alternate work have been limited to inquiring at employer's facility and the unemployment office in Norwich, Connecticut about light duty carpentry and truck driving jobs which he is physically incapable of performing.

Once claimant establishes that he is unable to perform his usual work, he has established a *prima facie* case of total disability, and the burden shifts to employer to establish the existence of realistically available job opportunities within the geographic area where claimant resides, which he is capable of performing considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the present case, claimant does not challenge the administrative law judge's finding that suitable alternate employment was established based on the bench assembler and machine operator jobs identified in Ms. Bradshaw's labor market survey. Rather, claimant argues that pursuant to *Palombo*, he is nonetheless entitled to permanent total disability benefits because he has rebutted employer's showing of suitable alternate employment by demonstrating that he diligently tried but was unable to secure a job "within the compass of employment opportunities shown by employer to be reasonably attainable and available." *Palombo*, 937 F.2d at 74, 25 BRBS at 8 (CRT).

We are unable to affirm the administrative law judge's denial of permanent total disability compensation, as he did not fully analyze the extent of claimant's disability consistent with *Palombo*. As claimant avers, in *Palombo* the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, explicitly held that claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement to permanent total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment. *See also Rogers Terminal and Shipping Corp. v. Director, OWCP*, 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). Moreover, the *Palombo* court indicated that when claimant offers evidence that he diligently tried to find a suitable job, the administrative law judge must consider this evidence and make specific findings regarding the nature and sufficiency of claimant's efforts. *Id.*, 937 F.2d at 75-76, 25 BRBS 8-9 (CRT).

In the present case, the administrative law judge stated that claimant had conducted an unsuccessful search for a job which consisted of monthly visits to the local unemployment office and to employer's facility in search of a light duty position in setting forth his findings of fact. *See* Decision and Order at 3.[2] However, the administrative law judge did not make specific findings

[2]Claimant testified at the hearing that since being laid off by Gilles Dube on August 11, 1989, he has returned to employer's plant on a monthly basis, visited the unemployment office on a monthly basis, and has tried to secure other forms of light duty employment in addition to light duty

regarding the nature and sufficiency of claimant's alleged efforts and whether they amounted to due diligence as is mandated by *Palombo*. We therefore vacate his denial of permanent total disability compensation subsequent to August 18, 1989, and remand to allow him to make these findings. On remand, if the administrative law judge is persuaded that claimant diligently tried without success to find a job within the sphere of jobs shown to be available by employer and has rebutted employer's showing of suitable alternate employment, claimant will be entitled to an award of permanent total disability compensation. *See Palombo*, 937 F.2d 75, 25 BRBS at 9 (CRT). If, however, he does not find claimant exercised due diligence, his prior award of permanent partial disability compensation should be reinstated.

Accordingly, the administrative law judge's denial of permanent total disability compensation subsequent to August 18, 1989, is vacated, and the case is remanded for further consideration of the extent of claimant's disability consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order On Petition for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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carpentry, to no avail. Tr. at 31, 34, 42.