BRB No. 99-0972

RANDY YORK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY/NAF	)	DATE ISSUED:
	)	
and	)	
	)	
ALEXSIS, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Randy York, Lebanon, Missouri, *pro se*.

Raymond J. Flunker and Jeffrey M. Proske (Evans & Dixon), St. Louis, Missouri, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-LHC-804, 97-LHC-805) of Administrative Law Judge Donald W. Mosser rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a *pro se* claimant, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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); 20 C.F.R. §§802.211(e), 802.220. If they are, they must be affirmed.

Claimant, employed as a maintenance technician for employer at Fort Leonard Wood,

Missouri, sustained injuries to his head, neck and low back when, on March 15, 1994, he was struck on the head by a steel-framed door. Claimant returned to his usual employment without any restrictions on November 28, 1994. On April 12, 1995, claimant sustained a work-related back injury after he collapsed and fell approximately four or five feet. While claimant was recuperating from his second injury, his position with employer was eliminated as a result of a reduction in force. Claimant declined employer's offer of another position elsewhere, and eventually obtained employment as a maintenance technician with Breech Medical Center of Missouri in June 1995. Following an initial training period, claimant became maintenance director on October 15, 1995, and continued in this capacity for approximately three years until he was replaced as a result of a change in ownership at the facility. The new ownership offered claimant a position as a maintenance technician which he declined because he felt he was unable to perform the physical requirements of the job, which included heavy lifting. Employer voluntarily paid temporary total disability benefits for six or seven weeks for each injury, as well as medical benefits associated with claimant's work-related injuries.

In his Decision and Order, the administrative law judge found that claimant is unable to return to his usual employment following his second injury, but that suitable alternate employment was established by virtue of the job at Breech Medical Center. As claimant held this job for about three years, the administrative law judge found that claimant is not entitled to total disability benefits following his termination from that employment. The administrative law judge, however, awarded claimant permanent partial disability benefits for the period that claimant trained for the maintenance director position at Breech Medical Center, *i.e.*, between June 1, 1995, and October 15, 1995,[1] 33 U.S.C. §908(c)(21), as well as all reasonable and necessary medical benefits associated with claimant's work-related injuries. 33 U.S.C. §907.

[1]As there are no wage records after October 1995, the administrative law judge could not determine whether claimant sustained a loss in wage-earning capacity while working at Breech Medical Center subsequent to that date. The administrative law judge's determination in this regard is rational as it is claimant's burden in this case to prove that his actual post-injury wages are not representative of his post-injury wage-earning capacity. *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

On appeal, claimant, representing himself, challenges the administrative law judge's denial of total disability benefits. Employer responds, urging affirmance.

The administrative law judge initially determined that claimant reached maximum medical improvement with regard to his two work-related injuries, and that therefore any continuing disability sustained by claimant would be permanent in nature. Specifically, relying upon the parties' stipulations, the administrative law judge found that claimant reached maximum medical improvement for the March 15, 1994, injury on November 28, 1994. With regard to the injury sustained on April 12, 1995, the administrative law judge credited Dr. Hackett's opinion that claimant reached maximum medical improvement on June 1, 1995. The administrative law judge's finding that claimant reached maximum medical improvement with regard to his work-related injuries is therefore affirmed as it is supported by substantial evidence. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989).

The administrative law judge then determined, based on claimant's testimony regarding his continuing physical problems as documented in the medical evidence of record, that claimant is unable to return to his previous employment, and therefore concluded that claimant established a *prima facie* case of total disability. *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998). Where, as in the instant case, claimant is unable to perform his usual employment, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides which claimant, by virtue of his age, education, work experience, and physical restrictions, is realistically able to secure and perform. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (CRT) (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992).

With regard to this issue, the administrative law judge found suitable alternate employment established by virtue of the maintenance director position at Breech Medical Center, which claimant secured and performed for approximately three years. In reviewing the job itself, the administrative law judge determined that claimant was physically capable of the work, as evidenced by claimant's testimony that this job did not require physical work and that his work in that position received "rave reviews." Hearing Transcript at 45-46. In addition, the administrative law judge observed that Dr. Hackett stated that this position was appropriate for claimant. The administrative law judge therefore rationally concluded that the medical director position was suitable for claimant.

In finding that this job constituted suitable alternate employment, the administrative law judge also considered *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81

(CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994), wherein the United States Court of Appeals for the Ninth Circuit held that short-lived post-injury employment is insufficient to meet employer's burden with regard to suitable alternate employment, as it does not establish that alternate work was realistically and regularly available to claimant in the open market. *Cf. Norfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797 (4th Cir. 1999) (where employer provides claimant a light duty job in its facility and thereafter he is laid off from that job, claimant is entitled to total disability benefits unless employer shows availability of other suitable alternate employment). The administrative law judge concluded that suitable alternate employment was established by the maintenance director position held by claimant at Breech Medical Center despite the fact that claimant eventually lost that job, since he successfully performed it for about three years and his departure from that position was not related to his work injuries. Inasmuch as claimant's performance of this job for three years establishes that alternate work was "realistically and regularly available" to claimant, *Edwards*, 999 F.3d at 1375, 27 BRBS at 83 (CRT), we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment.

Thus, employer does not bear the renewed burden of showing the availability of suitable alternate employment following claimant's release from the position at the medical center.[2] This, however, does not end the inquiry regarding claimant's entitlement to total disability benefits. A claimant can rebut an employer's showing of suitable alternate employment by demonstrating that he diligently tried but was unable to secure alternate employment, thereby establishing his entitlement to total disability benefits. *See DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 781 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). We therefore must remand this case to the administrative law judge to make specific findings regarding the nature and sufficiency of claimant's alleged efforts to find other suitable work following his discharge from the suitable post-injury job. *See Palombo*, 937 F.2d at 74-75, 25 BRBS 8-9 (CRT); *Fox*, 31 BRBS at 122. In the instant case, claimant testified that after he lost his position as maintenance director at Breech Medical Center, he was offered and accepted a position as a maintenance person at that facility, but left this employment because he felt he

[2]In contrast to *Hord*, where the burden to establish the availability of suitable alternate employment returned to the employer after the claimant lost a post-injury light-duty job within employer's facility, employer, in the instant case, was not in control of claimant's post-injury employment, and thus should not bear responsibility for establishing other suitable alternate employment following his dismissal from that job. *See generally Hord*, 193 F.3d at 797.

was unable to perform the physical requirements of the job, which included heavy lifting. Hearing Transcript at 42-43. In addition, claimant testified that he has been looking, albeit unsuccessfully, for work within his medical restrictions. Hearing Transcript at 71. In light of this evidence, and inasmuch as the administrative law judge did not consider this particular issue, we must vacate the administrative law judge's denial of total disability benefits and remand this case for a determination as to whether claimant diligently, but unsuccessfully, sought employment within his restrictions subsequent to leaving the suitable alternate employment at Breech Medical Center. *See generally Livingston v. Jacksonville Shipyards,* 32 BRBS 123 (1998).

Moreover, if, on remand, the administrative law judge determines that claimant is not entitled to total disability benefits, he should then consider claimant's entitlement to a nominal award of benefits in this case. The United States Supreme Court has held that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *see also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 n.9, 18 BRBS 11 n.9 (CRT) (4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). In the instant case, claimant, through no fault of his own, lost his suitable alternate employment, and that, coupled with his diminished physical capacity as a result of his work-related injury, has adversely affected his wage-earning capacity thus potentially entitling claimant to a nominal award. For example, in *Hole,* 640 F.2d at 769, 13 BRBS at 237, the fact that the claimant was working post-injury under only a five-year contract which was to end in 1981 was found relevant in determining whether there was a significant possibility that he might suffer some future economic harm as a result of his injury. *See also Randall,* 725 F.2d at 800 n.12, 16 BRBS at 69 n.12 (CRT). Thus, this issue should be addressed by the administrative law judge on remand. *See generally Ward v. Cascade General, Inc.*, 31 BRBS 65 (1995).

Accordingly, the administrative law judge's finding that claimant is not entitled to total disability benefits subsequent to his dismissal from his post-injury employment as a maintenance director is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge