BRB No. 04-0374

GEORGE KABOUREK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	
	)	
and	)	
	)	
LEGION INSURANCE COMPANY	)	
	)	DATE ISSUED: 11/30/2004
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Granting Special Fund Relief and the Decision and Order Denying Petition for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Frank B. Hugg (Law Offices of Frank B. Hugg), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits and Granting Special Fund Relief and the Decision and Order Denying Petition for Reconsideration (2003-LHC-00046, 11147, 00048) of Administrative Law Judge Gerald M. Etchingham 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 commenced employment with employer as an inside machinist in 1989. On April 10, 1996, claimant sustained a work-related injury to his left hand and wrist.[1] On August 13, 1996, claimant sustained a work-related low back injury. Thereafter, claimant alleged that he sustained cumulative injuries to his upper extremity, shoulder and psyche through June 6, 1997. Employer voluntarily paid claimant temporary total disability compensation from August 23, 1996 through September 12, 1996, June 9, 1997 through September 14, 1997, September 29, 1997 through November 18, 1997, March 27, 1998 through April 18, 1998, and June 17, 1998 through October 25, 1998. 33 U.S.C. §908(b). Claimant subsequently sought ongoing permanent total disability compensation.

The only issues presented for adjudication before the administrative law judge were claimant's entitlement to permanent total disability compensation and employer's entitlement to relief pursuant to Section 8(f) of the Act. In his Decision and Order, the administrative law judge initially accepted the parties' stipulations that claimant is incapable of resuming his usual employment duties with employer, that claimant's condition reached maximum medical improvement on October 26, 1998, and that claimant's average weekly wage was $779.73. Next, the administrative law judge determined that employer established the availability of suitable alternate employment as of September 1, 2000, that the average of the wages in the positions identified as being suitable for claimant established claimant's post-injury wage-earning capacity, and that claimant did not establish that he had undertaken or pursued a diligent search for employment. Accordingly, the administrative law judge awarded claimant permanent total disability compensation for the period of October 26, 1998 to August 31, 2000, and permanent partial disability compensation at the weekly rates of $210.40 from September 1, 2000 to May 24, 2002, and $135.20 thereafter. 33 U.S.C. §908(a), (c)(21). Lastly, the administrative law judge found employer entitled to relief pursuant to Section 8(f) of the

[1]The parties entered into a Section 8(i), 33 U.S.C. §908(i), settlement agreement regarding this incident. *See* EX 8 at 226-234.

Act, 33 U.S.C. §908(f). Claimant's petition for reconsideration was summarily denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's denial of his claim for continuing permanent total disability benefits. Employer responds, urging affirmance.

Where, as in the instant case, it is uncontroverted that claimant has established that he is unable to perform his usual employment duties due to a work-related injury, claimant has established a *prima facie* case of total disability; the burden then shifts to employer to establish the availability of suitable alternate employment within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT)(9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In concluding that employer met its burden of establishing the availability of suitable alternate employment as of September 1, 2000, the administrative law judge credited the testimony and labor market surveys of David Morgan, an OWCP-certified vocational rehabilitation counselor. Specifically, the administrative law judge concluded that claimant was capable of performing the identified positions of technical support specialist and network control operator,[2] based upon his findings that Dr. Levine, claimant's treating orthopedic physician, opined that these positions were within claimant's physical abilities,[3] that claimant at the formal hearing did not deny that he was capable of performing either of these positions, and that claimant's age, accent, and work history would not negatively affect his ability to perform the positions.[4] Decision and

[2]Commencing in September 1999, claimant was enrolled at Coleman College where he took classes in computer networking pursuant to a DOL-approved vocational rehabilitation plan. Claimant completed this technical training in April 2000.

[3]Regarding claimant's alleged psychological condition, the administrative law judge acknowledged Dr. Zink's testimony that claimant's psychological condition had been in remission since May 1999 and that claimant stopped seeking psychotherapy soon thereafter. Decision and Order at 9.

[4]Claimant was born in 1941 in Czechoslovakia; he emigrated to the United States in 1985. The record supports the administrative law judge's conclusion that although claimant speaks with an accent, he is capable of speaking and communicating effectively in English.

Order at 10-11. As the administrative law judge's finding that employer established the availability of suitable alternate employment based upon the testimony of Mr. Morgan and Dr. Levine is rational and is supported by substantial evidence, it is affirmed. *See Seguro v. Universal Maritime Serv. Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Next, both claimant and employer aver that the administrative law judge's mathematical calculation of the weekly permanent partial disability award due claimant is in error. Specifically, both parties assert that the difference between the claimant's stipulated average weekly wage of $779.73, and his post-injury wage-earning capacity of $464 as of September 2000, and $576.80 as of May 2002, results in weekly permanent partial disability benefits of $210.49 and $135.29 respectively, not the weekly benefits of $210.40 and $135.20 calculated and awarded by the administrative law judge. Therefore, both parties request that the Board modify the administrative law judge's respective permanent partial disability awards to reflect the proper mathematical result. In his Decision and Order, the administrative law judge accepted the parties' stipulation regarding claimant's average weekly wage, and he used that figure in calculating claimant's permanent total disability award. Additionally, neither party challenges the administrative law judge's findings regarding claimant's post-injury wage-earning capacity. We therefore modify the administrative law judge's award to reflect claimant's entitlement to permanent partial disability benefits in the weekly amount of $210.49, from September 1, 2000 to May 24, 2002, and $135.29 from May 25, 2002 and continuing.[5]

[5]Claimant's weekly permanent partial disability award for the period September 1, 2000 to May 24, 2002 is calculated as follows:

[$779.73 – ($11.60/hr. x 40 hrs.)] x 2/3 = $210.49

Claimant's weekly permanent partial disability award for the period May 25, 2002 and continuing is calculated as follows:

[$779.73 – ($14.42/hr. x 40 hrs.)] x 2/3 = $135.29

Lastly, claimant challenges the administrative law judge's determination that claimant did not demonstrate due diligence in attempting to secure employment post-injury. Specifically, claimant alleges that the evidence of record affirmatively establishes that he diligently but unsuccessfully sought employment post-injury.

In addressing this issue, the administrative law judge found that, although the record implies that claimant initially submitted his resume to and contacted employers post-injury, claimant failed to sufficiently follow through with these contacts. Decision and Order at 12. Specifically, the administrative law judge found that claimant's credibility was undermined by his failure to specify who he contacted or to whom he sent resumes, that claimant's log of faxed resumes fails to corroborate his alleged employment efforts and diligence, that claimant failed to offer evidence of his job search efforts subsequent to May 2000, and that claimant's alleged follow-up activities to the resumes that he mailed, the online applications that he submitted, or the cover letters that he sent to potential employers are not documented by the record. *Id.* Based upon these findings, the administrative law judge concluded that claimant did not establish that he conducted or pursued a diligent search for post-injury employment. For the reasons that follow, we remand this case for further consideration, as the record contains evidence which was not discussed.

Once an employer establishes the availability of suitable alternate employment, claimant can nevertheless establish that he remains totally disabled if he demonstrates that he diligently tried and was unable to secure such employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2(CRT) 9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Palombo v. Director, OWCP*, 937 F.2d 70, 73, 25 BRBS 1, 5-8(CRT) (2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997). In addressing this issue, the administrative law judge must make specific findings regarding the nature and sufficiency of claimant's alleged efforts in order to determine whether claimant did in fact diligently try, without success, to find another job. *Palombo*, 937 F.2d at 74-75, 25 BRBS at 8-9(CRT). The claimant is not required to demonstrate that he sought the specific jobs relied on by employer in establishing suitable alternate employment, but may meet his burden by showing he was reasonably diligent in attempting to obtain jobs similar to those shown to be reasonably available. *Id.*

In the instant case, the administrative law judge essentially concluded that claimant did not conduct or pursue a diligent search for employment due to his insufficient efforts and lack of follow-up with the employers that he allegedly contacted. Decision and Order at 12. An administrative law judge's inquiry into this issue, however, must address all of the evidence presented before him in order to determine whether

claimant was reasonably diligent in seeking alternate employment "within the compass of employment opportunities shown by employer to be reasonably attainable and available." *See Palombo,* 937 F.2d at 74, 25 BRBS at 8(CRT), *quoting New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the case at bar, claimant submitted into evidence the testimony of Mssrs. Gastrich and Cusick, career counselors, both of whom testified that they assisted claimant in his search for employment subsequent to May 2000.[6] *See* CXs 32, 33. Additionally, claimant submitted into evidence copies of e-mail applications, as well as cover letters, that he submitted to various employers in his search for employment subsequent to May 2000. [7] *See* CX 32. Thus, contrary to the administrative law judge's finding, there is evidence in the record corroborating claimant's testimony that he sought employment subsequent to May 2000. Since the administrative law judge did not consider the testimony of Mssrs. Gastrich and Cusick, both of whom assisted claimant in his quest for employment subsequent to May 2000, or the relevant documentary evidence submitted by claimant, the case must be remanded for him to do so. On remand, the administrative law judge must assess the credibility of and the weight to be accorded to this evidence. We, therefore, vacate the administrative law judge's determination that claimant did not conduct or pursue a diligent search for employment, and we remand this case for the administrative law judge to address the totality of the evidence on this issue. *See Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

[6] Mr. Gastrich, the acting interim Director of Career Services at Coleman College, testified he assisted claimant in his search for employment and that claimant, in his opinion, was honestly interested in finding employment. CX 32. Mr. Cusick, a certified rehabilitation counselor, testified, *inter alia*, that claimant did in fact apply for employment post-injury, that claimant utilized his office telephone and computer when applying for employment, and that he accompanied claimant to a job fair. CX 33.

[7] In concluding that claimant did not adequately follow up with prospective employer, the administrative law judge specifically noted that claimant lacked documentation as to his follow-up efforts. However, the administrative law judge acknowledged claimant's testimony that, while he used the Internet to search and apply for employment, the limitations of that technology precluded his follow-up with employers by that method of communication, and that he would follow-up many of his sent resumes with a "Thank You" note; additionally, claimant testified that he would follow through with a telephone call 20 percent of the time. This testimony, if credible, could support a finding that claimant did follow up on his initial contacts.

Accordingly, the administrative law judge's award of permanent partial disability benefits to claimant is modified to reflect claimant's entitlement to weekly benefits in the amount of $210.49 from September 1, 2000 through May 24, 2002, and $135.29 per week thereafter. The administrative law judge's determination that claimant did not diligently seek employment post-injury is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge