BRB No. 03-0154

ARTIS HARVEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ATLANTIC MARINE, INCORPORATED	)	DATE ISSUED: 09/30/2003
	)	
	)	
and	)	
	)	
ARM INSURANCE SERVICE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

James F. Moseley, Jr. (Moseley, Warren, Prichard & Parrish), Jacksonville, Florida, for employer-carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-3151) of Administrative Law Judge John C. Holmes 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, a sandblaster and painter, suffered injuries to his left foot, heel and ankle when he fell from a ladder on August 12, 2000, during the course of his employment. Claimant is incapable of performing his pre-injury job duties as he is restricted from prolonged standing or walking and is unable to climb. In his decision, the administrative law judge found that employer established the availability of suitable alternate employment and that claimant failed to exercise due diligence in seeking such employment. Accordingly, he denied claimant's claim for permanent total disability.[1]

Claimant appeals, arguing that the administrative law judge erred in finding that he is not totally disabled because he failed to diligently seek suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as in the instant case, a 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 demonstrate within the geographic area where claimant resides the availability of jobs which claimant, by virtue of his age, education, work experience and physical restrictions is capable of performing and for which he can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Claimant can rebut employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT)(2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

In order to establish suitable alternate employment, employer presented a labor market survey prepared in July 2001 by Ms. Potthast, a vocational specialist, based upon claimant's medical and work history. Although Ms. Potthast located thirty jobs she deemed within claimant's medical and vocational restraints, Dr. Carrasquillo, claimant's treating physician, approved five positions which were forwarded to claimant. Claimant does not contest the administrative law judge's findings that the approved positions constitute suitable alternate employment. Accordingly, in order to be totally disabled,

[1] Because claimant suffered an injury to a member listed in the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), if he is permanently partially disabled he is limited to a recovery provided in the schedule. *Potomac Electric Power Co. v. Director, OWCP [PEPCO]*, 449 U.S. 268, 14 BRBS 363 (1980); *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT)(4th Cir. 1999). In its reply brief, employer contends that it has paid permanent partial disability for the stipulated 17 percent impairment to claimant's left foot. Brief at 4.

claimant must establish that he was diligent, but unsuccessful, in attempting to obtain suitable alternate employment.

Of the five approved positions, Ms. Potthast alleged claimant failed to apply for two of them.[2] Although claimant concedes that he did not apply for the position as a parking lot sweeper/driver, he avers that he did apply for a position as a companion at ATS Health Services and could not explain why that company had no record of his inquiry. In addition, claimant presented evidence of his own job search conducted to meet the requirements for unemployment compensation for the state of Florida, CX 4, as well as documents issued by Work Source through which claimant also sought employment.

In finding that claimant did not exercise diligence in seeking employment, the administrative law judge acknowledged that claimant did search for job openings, "sometimes daily and documented dozens of attempts to obtain employment." Decision and Order at 5. However, the administrative law judge focused on the two job opportunities presented by employer's vocational specialist as a companion and parking lot sweeper for which Ms. Potthast stated claimant did not apply. He found that claimant's failure to pursue these two opportunities demonstrated his lack of due diligence, and he denied the claim for total disability. Based upon the record before us, we cannot affirm the administrative law judge's determination.

In finding that claimant failed to exercise diligence, the administrative law judge based his determination solely on claimant's alleged failure to apply for two positions identified by employer. Claimant reported that he in fact did apply for the position of companion. CX 4. The administrative law judge did not determine claimant's credibility in this regard or resolve the conflict between claimant's assertion and that of Ms. Potthast. On remand, the administrative law judge should address this issue.

While claimant does not challenge the administrative law judge's finding that claimant failed to apply for the position with Surface Management, the administrative law judge erred in limiting his analysis to whether claimant applied for every position listed by employer and requiring he do so in order to demonstrate a diligent job search. The inquiry into claimant's diligence in seeking alternative employment is not limited to or constricted by the jobs identified by employer. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). Claimant is not required to show that he pursued the exact jobs employer showed to be available. Rather, claimant must establish that he diligently sought work of the general type that employer showed to be available. *Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT).

[2] Ms. Potthast reported that one of the positions had been filled, one did not reply to her inquiry and the last would not respond without a release from claimant. Dep. at 61.

In this regard, claimant submitted a list of his job searches for unemployment purposes as well as through Work Source. The administrative law judge mentioned this evidence, stating that claimant "documented dozens of attempts to obtain employment," Decision and Order at 5, but he did not analyze it in relation to this issue as he focused solely on the two jobs identified by Ms. Potthast. Claimant's evidence of his ongoing efforts to secure alternative employment may be sufficient, if credited, to establish that he made diligent efforts to secure a position. *See DM & IR Railway Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998). The administrative law judge erred in failing to address and analyze all the relevant evidence on claimant's job search and concentrating only on two positions. *See generally McCurley v. Kiewest Co*., 22 BRBS 115 (1989). Therefore, we must remand this case for the administrative law judge to make specific findings regarding the nature and sufficiency of claimant's efforts to find alternative employment. *Palombo*, 937 F.2d at 74, 25 BRBS at 8-9(CRT).

Accordingly, the administrative law judge's finding that claimant did not seek work in a diligent manner 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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BETTY JEAN HALL
Administrative Appeals Judge