BRB No. 91-849

LUCIEN STARR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOPEMAN BROTHERS, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
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 on Remand of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Laurence Cohen (Morris Bart & Associates), New Orleans, Louisiana, for claimant.

Deborah B. Rouen (Adams & Reese), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-LHC-2953) of Administrative Law Judge Ben H. Walley awarding benefits 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 administrative law judge's findings of fact and conclusions of law if they 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).

This is the second time this case has been before the Board. Claimant worked for employer since 1965. He initially injured his back in 1966, but later returned to his usual work as a joiner. On January 15, 1981, claimant again injured his back. Employer paid temporary total disability and medical benefits, and the parties agreed that claimant has a permanent disability, but they disputed the extent of that disability. After a formal hearing, the administrative law judge awarded claimant permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21), for a 15-20 percent impairment, and he awarded employer Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. Decision and Order at 7, 12. Thereafter, the administrative law judge denied claimant's motions for reconsideration, and claimant appealed to Board.

In its initial decision, the Board vacated the administrative law judge's award of permanent partial disability benefits and remanded the case for the administrative law judge specifically to reconsider whether employer established suitable alternate employment given claimant's age, education and physical restrictions. *Starr v. Hopeman Brothers, Inc.*, BRB No. 86-2978 (February 28, 1989) (unpublished). On remand, the administrative law judge conducted a new hearing, considered the evidence from both hearings, and determined that claimant is permanently partially disabled, as employer presented credible evidence of suitable alternate employment and claimant did not diligently seek employment. Decision and Order on Remand at 7-8. Claimant appeals the decision on remand, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in awarding permanent partial, rather than permanent total, disability benefits. He argues that employer did not carry its burden of establishing the availability of suitable alternate employment because the jobs it identified are beyond his physical and mental capabilities. To establish a *prima facie* case of total disability, a claimant must show that he is unable to return to his usual employment due to his work-related disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990). Once claimant makes such a showing, the burden shifts to employer to establish the general availability of other jobs that claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, the evidence of record establishes that claimant was born in 1924 and has a fourth grade education, and that he worked, among other things, as a laborer, a gas station attendant, and an insulator prior to working for employer in 1965 when he started as an insulator and then became a joiner. Tr.1 at 18-23. After his 1981 injury, Drs. Culiccia and Fleming determined that claimant cannot return to his usual work. They restricted claimant to sedentary work where he could sit or stand as necessary, and they agreed that claimant should not lift more than 20 pounds and should bend only with his knees. Tr.1 at 62-63, 143-144. Vocational test results indicate that claimant can perform simple math but has great difficulty reading. Tr.1 at 85-86. Based on this information, Mr. Johnson, employer's vocational expert, identified jobs as a cashier at a self-service gas station and as a microfilm processor which he believes claimant is able to perform. Emp. Ex. 1; Tr.2 at 44-48.

The cashier position would require claimant to make change, process credit cards, stock shelves, and total the daily receipts. Claimant testified that he has experience as a service station attendant and has no trouble making change. Tr.2 at 29. The microfilm processor position would require claimant to receive materials, log in tapes, punch in data, load and unload film, perform quality control, and place tapes in the proper envelopes for delivery. In addition to considering claimant's age, education, and physical condition as they relate to claimant's ability to perform these jobs, Mr. Johnson testified that claimant's work experience as joiner would be beneficial in the performance of the duties of a microfilm processor because of the precision each of those jobs require. Further, the record indicates that Dr. Fleming approved both the cashier and microfilm processor positions as suitable for claimant, Emp. Ex. 1, and that Mr. Johnson visited the job sites to determine the suitability of the positions.

On remand, the administrative law judge discussed the medical and vocational evidence of record. Decision and Order on Remand at 3-4, 6. Further, the administrative law judge credited Mr. Johnson's opinion that claimant could perform the identified jobs, given his age, education, experience, and physical condition. *Id.* at 5-7. He discredited claimant's vocational expert, Dr. Gorman, because his opinion is "rooted in statistics and theory [whereas] Employer's expert opinion is based upon actual identification and location of specific available jobs." *Id.* at 7. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the record contains substantial evidence to support the administrative law judge's conclusion that employer established the availability of suitable alternate employment, we affirm his determination that claimant is permanently partially disabled. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Hogan v. Schiavone Terminals, Inc.*, 23 BRBS 290 (1990).

Claimant next contends that he diligently sought, but was unable to secure, post-injury employment and, therefore, is entitled to permanent total disability benefits. A claimant can rebut an employer's showing of suitable alternate employment if he establishes that he diligently sought alternate employment opportunities but was unsuccessful. *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). The administrative law judge noted that claimant applied for eight jobs which Mr. Johnson had identified at the time of the first hearing, and that claimant had failed in an attempt to work at a spice company. Nevertheless, the administrative law judge found that claimant did not make any effort to seek employment during the five years between the two hearings in this case, and he therefore rejected claimant's due diligence argument. Decision and Order on Remand at 4, 7-8. Although the record indicates that claimant cooperated with Mr. Johnson's initial vocational efforts in 1985, Tr.1 at 89, 119, claimant testified that, thereafter, he made no independent job search and did not follow-up on the jobs Mr. Johnson identified. Tr.2 at 19-20; *see also* Tr.1 at 89. Therefore, we affirm the administrative law judge's finding that claimant did not diligently pursue job opportunities, as that finding is rational and supported by substantial evidence. *See generally Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge