BRB No. 98-0965

WILFRED BOONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING & DRYDOCK CORPORATION	)	DATE ISSUED: April 12, 1999
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order awarding benefits (97-LHC-781) of Administrative Law Judge Daniel A. Sarno, 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).

Claimant began working for employer in September 1986. He sustained an injury on May 18, 1991, while working as a second class welder. The duties of this position included setting up machines and other equipment necessary to perform the structural repair of ships. Tr. at 31. Claimant was required to climb stairs and vertical ladders. Claimant estimated that the lines he carried weighed approximately 55-60 pounds, that the MIG welding machine weighed approximately 60-70 pounds, and the attached roll of wire could weigh up to 30

pounds. In addition, he carried a tool bag which weighed about 25 pounds. Tr. at 35. According to claimant, it was possible to get assistance to lift these items, but such was not the general practice. Claimant injured his back carrying a MIG machine and other equipment while climbing a flight of stairs. Following his injury, claimant worked in a light duty position with employer until July 1994, when he was laid off. Tr. at 69.

Dr. Morales, claimant's initial treating physician, released claimant for work in September 1995 with a 25 pound lifting restriction on a sustained basis. Cl. Ex. 4. Dr. Shall stated claimant could lift 50 pounds occasionally, 20 pounds frequently, and ten pounds constantly, and could not carry large loads when climbing ladders. Cl. Ex. 17 at 3, 7.

George Davis, a Department of Labor (DOL) vocational rehabilitation counselor, began working with claimant in April 1995 to assist him in finding a job. Cl. Ex. 12 at 6. Mr. Davis administered various intelligence and skill tests, and attempted to place claimant in a job starting in September-October 1995. Mr. Davis described how he devised a strategy for a job search, the problems encountered, and how he finally placed claimant at Goodwill Industries on April 1, 1996, as a janitor and electronics tester for donated goods, where he was working at the time of the hearing. Cl. Ex. 12 at 12-18. Claimant has been working 35 hours per week, initially earning $4.25 per hour, and receiving hourly increases corresponding to increases in the minimum wage. Tr. at 51-53; Cl. Ex.10. Employer subsequently retained three vocational counselors, who attempted to place claimant in higher paying positions. Laura Yonke prepared a labor market survey on May 23, 1996. Cl. Ex. 7. Herman Broughton first met with claimant in February 1997 and continued to work with him until the time of the hearing. Tr. at 151-154. Finally, Barbara Byers initiated job placement assistance beginning in September 1997 and the following month prepared a retroactive labor market survey, listing job openings beginning in October 1995. Tr. at 168-169; Emp. Ex. 1. The vocational counselors agreed that claimant was cooperative and contacted the potential employers they suggested, but he did not receive any offers of employment.

The administrative law judge awarded claimant temporary total disability compensation from October 17, 1995 through March 25, 1996, finding that although employer identified suitable alternate employment, claimant established that despite his diligence in seeking alternate employment, he was unable to secure a position until he was placed at Goodwill Industries. In addition, the administrative law judge determined that claimant is entitled to temporary partial disability compensation from March 26, 1996, and continuing. Employer appeals the award of benefits. Claimant responds, urging affirmance.

On appeal, employer initially argues that there are no medical records which support claimant's contention that he could not perform his pre-injury job from October 17, 1995, to March 25, 1996. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Initially, we reject employer's argument that a medical opinion must state that claimant could not perform his pre-injury job in order for this requirement to be met.[1] In this case the administrative law judge properly compared the lifting restrictions imposed by Dr. Shall with the physical requirements of claimant's former welding position. *See generally Spinner v. Safeway Stores*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987); *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). In concluding that claimant could not meet the lifting requirements of his usual employment, the administrative law judge relied on Dr. Shall's opinion that claimant could not lift over 50 pounds, and he rationally rejected the testimony of Mr. Taylor, employer's welding engineer, that the 60-pound lifting requirement of claimant's pre-injury job is compatible with Dr. Shall's 50-pound lifting restriction. The administrative law judge reasoned that it was unrealistic to assume that in the daily course of doing his job claimant could always get help, as he credited claimant's testimony that assistance is available to lift things out of the ordinary, but that such assistance was not a general practice. He found, contrary to employer's argument, that it was not credible that a person could perform the duties of a position for which he does not meet the basic criteria. The administrative law judge reasoned that any time claimant had to move from site to site, he would have to disconnect all his tools and move them separately in order to be able to carry them, and that his job performance would be hampered. Tr. at 95-100. As employer has failed to establish any error committed by the administrative law judge in weighing the conflicting evidence, we affirm this determination, as it is supported by substantial evidence. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Once claimant establishes that he is unable to do his usual work, he has established a *prima facie* case of total disability, and the burden shifts to employer to establish the availability of suitable alternate employment which the claimant is capable of performing. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Newport*

[1]We reject employer's argument that the administrative law judge failed to address its summary argument below that claimant failed to establish a *prima facie* case of total disability. *See* Decision and Order at 8.

News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). Where employer has met its burden of showing the availability of suitable alternate employment, claimant may nonetheless prevail in his claim for total disability benefits if he can show that he diligently sought employment and was unable to secure a suitable position. *Tann*, 841 F.2d at 542, 21 BRBS at 13 (CRT).

Employer alleges that claimant did not rebut its showing of the undisputed existence of suitable alternate employment because he failed to look for work altogether between October 1995 and January 1996. The administrative law judge found this contention was not supported by the evidence, as claimant was working with Mr. Davis at this time. Employer relies on the rehabilitation report prepared by Ms. Byers dated October 13, 1997, which included a labor market survey, retroactively listing six positions available between October 30, 1995, and February 9, 1996, the period in dispute. Tr. at 168-169; Emp. Ex. 1. The administrative law judge did not specifically address the suitability of these positions, having previously found claimant diligently sought employment. He also stated, however, "Claimant is entitled to total disability benefits during his participation in a vocational rehabilitation program," citing *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1995). Decision and Order at 10.

We agree with employer that the instant case is factually distinguishable from the situation presented in *Abbott.* In *Abbott,* the jobs proffered by the employer were not realistically available because the claimant's government-sponsored rehabilitation program required his full-time participation and precluded his employment. *Cf. Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998). In the present case, claimant was not enrolled in a vocational training program, but rather was cooperating with a vocational counselor whose goal was to place claimant in a position as soon as possible. This effort ultimately resulted in a job for claimant, but at a lower wage level than his pre-injury wages. Accordingly, we agree that *Abbott* is inapplicable.

Nonetheless, any error committed by the administrative law judge in this regard is harmless. Mr. Davis, the DOL counselor claimant was working with in 1995, described how he pursued a job search strategy involving direct job placement. He looked for positions which incorporated job coaching, where someone would teach claimant the job, because claimant had no skills other than welding. During September-October 1995, he settled upon Elevare, a program which incorporated job coaching, to help claimant. Cl. Ex. 12. Mr. Davis deposed that "[claimant] followed through. He made all the appointments. He kept contact with everybody. He kept contact with me. . . with . . . the job coach." Cl. Ex. 12 at 12-13. Mr. Davis further deposed that when some problems developed with the personnel at Elevare, around December 1995, he realized that he would have to revise his approach and began actually doing direct job placement, and he tried to contact employers to see if claimant could be placed in a job. Cl. Ex. 12 at 13, 15,

20. He testified that he made contact with "quite a few places" and that he went to the Virginia Employment Commission with claimant on January 30, [1996], where claimant had already been at Mr. Davis's suggestion. Cl. Ex. 12 at 17. Mr. Davis deposed that he made contacts on claimant's behalf during this time period, and that he was actually following up on contacts claimant had himself initiated. Cl. Ex. 12 at 43-45.

The administrative law judge found that during the period in 1995-1996 covered by Ms. Byers's survey, claimant was working closely with Mr. Davis and that he "complied with" Mr. Davis's job search. Decision and Order at 9. Mr. Davis's testimony that claimant cooperated with his job strategy and that it did not work out through no fault of his own during the time period employer challenges, Cl. Ex. 12 at 26, 32, provides substantial evidence to support the administrative law judge's finding that claimant diligently sought alternate employment during the period at issue. Thus, employer's argument is rejected and the award of temporary total disability benefits is affirmed. *See generally DM & 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)(1st Cir. 1991).

Employer next challenges the award of total disability benefits for the period from February 13, 1996, through March 25, 1996, arguing that claimant failed to establish diligence during this period as well. We reject as without merit employer's allegation that the 15 job contacts by claimant during the 43 day period between February 13, 1996, through March 25, 1996, amounting to one contact every 2.87 days, does not establish due diligence. Under the circumstances presented, including claimant's continued cooperation with his vocational counselor, it cannot be said that the administrative law judge's finding that claimant established diligence in seeking employment is unreasonable. As employer has failed to demonstrate any error committed by the administrative law judge, we affirm his total disability award. *See generally Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998).

Employer also argues that claimant's wage-earning capacity is greater than his actual weekly post-injury earnings of $125.28 at Goodwill. Employer argues that Mr. Davis admitted that he sought jobs where claimant would not have to lift over 25 pounds, relying upon lifting restrictions imposed by Dr. Morales on September 20, 1995; that Mr. Davis conceded that in the last statement he had from Dr. Morales, the weight limit was increased to between 30 and 40 pounds; and that he was unaware that another physician had set the lifting restriction at 50 pounds. Cl. Ex. 12 at 82-86. Employer asserts that claimant's true wage-earning capacity is $10 per hour for 40 hours per week, or $400, as documented by Ms. Byers. She testified that claimant was qualified for many welding positions which paid about $10 per hour and she generated a labor market survey reflecting this opinion. Tr. at 171-172; Emp. Ex. 1. Ms. Byers testified, however, that she was originally retained by employer to place

claimant in a 40-hour per week job which paid at least $10 per hour, and was unable to do so in the three weeks she tried. Employer argues that the fact that it was unable to actually place claimant in a job at this pay rate does not undermine a finding that claimant's wage-earning capacity was higher than his earnings at Goodwill. We disagree.

An award of temporary partial disability benefits under Section 8(e) of the Act, 33 U.S.C. §908(e), is based on the difference between claimant's pre-injury average weekly wage and claimant's wage-earning capacity thereafter. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).

The administrative law judge in this case relied on claimant's actual post-injury earnings at Goodwill as representing his wage-earning capacity. The party contending that actual earnings are not representative of wage-earning capacity loss has the burden of establishing an alternative reasonable wage-earning capacity. *Avondale Shipyards, Inc v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). Employer retained three vocational rehabilitation counselors in an effort to establish a higher earning capacity; as discussed above, their efforts, with claimant's full cooperation, were not successful. As substantial evidence supports the administrative law judge's conclusion that claimant was unable to locate a higher paying job despite diligent effort, employer has not shown that claimant has a higher wage-earning capacity than that evidenced by his actual wages. Accordingly, on the basis of the record before us, the administrative law judge's award of temporary partial disability benefits from March 26, 1996, and continuing, is affirmed. *See Grage v. J. M. Martinac Shipbuilding,* 21 BRBS 66 (1988), *aff'd on other grounds sub nom. J. M. Martinac Shipbuilding v. Director, OWCP,* 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge