BRB No. 04-0913

ROBERT THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATED ISSUED: AUG 30 2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Charlene Parker Brown (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-550) of Administrative Law Judge Larry W. Price 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).[1] 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).

[1] On May 27, 2005, the Board consolidated this appeal with BRB No. 05-0686. As the briefing schedule in BRB No. 05-0686 has yet to be completed, that case is hereby severed from the instant appeal. The Board will issue a decision in BRB No. 05-0686 separately.

On July 11, 2001, claimant sustained an injury to his right knee while working for employer as a sheet metal mechanic. Dr. Stiles subsequently performed two surgical procedures on claimant's knee and ultimately placed work restrictions on claimant. Claimant has not returned to work with employer, and employer voluntarily paid claimant temporary total disability compensation from July 12, 2001, through September 14, 2003. 33 U.S.C. §908(b). Claimant subsequently sought permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that employer presented evidence of a range of suitable alternate employment opportunities that were available to claimant and that claimant did not establish that he had undertaken a diligent job search post-injury. The administrative law judge thus denied claimant's claim for ongoing permanent total disability benefits. Crediting the opinion of Dr. Luck, the administrative law judge found claimant was entitled to permanent partial disability compensation pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2), for a two percent impairment to his right lower extremity.

On appeal, claimant challenges the administrative law judge's denial of his claim for continuing permanent total disability benefits. Alternatively, claimant contends that the administrative law judge erred in determining that he is entitled to permanent partial disability compensation based on a two percent impairment to his right leg. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *see also Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). Employer may meet its burden by showing the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d 129, 21 BRBS 109(CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In attempting to satisfy its burden, employer need not contact prospective employers to inform them of the qualifications and limitations of the claimant and to determine if they would in fact consider hiring the candidate for their position. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT). Moreover, employer need not contact the prospective employers in its labor market survey to obtain their specific requirements before determining whether the claimant would be qualified for such work. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In *Moore*, the Fourth Circuit stated that although such a specific description of an alternate employment opportunity might increase the precision of vocational surveys, such precision is not necessary since the claimant is able to correct any overbreath in a survey by demonstrating the failure of his

good faith effort to secure employment. 126 F.3d at 264-265, 31 BRBS at 125(CRT); *see also Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge credited the labor market survey of Barbara Harvey, employer's vocational expert. Although Ms. Harvey identified nine employment positions for claimant, the administrative law judge initially noted that, as employer no longer relied upon the identified unarmed security guard position, he would not consider that position; additionally, the administrative law judge, in light of claimant's driving restrictions, disregarded any position found to be in excess of 20-25 miles from claimant's home.[2] Based upon the information contained in Ms. Harvey's labor market survey, which identified five additional employers who indicated that they would train and if necessary accommodate an employee's lifting restrictions, and the approval of those five remaining identified positions by Dr. Stiles, claimant's treating physician, the administrative law judge determined that employer established the availability of suitable alternate employment which claimant is capable of performing.[3] Decision and Order at 5–10; Cl. Ex. 7. In rendering this determination, the administrative law judge declined to rely upon the contrary opinion of claimant's vocational expert, Mr. DeMark, finding that Mr. DeMark provided no specific evidence to substantiate his opinion that the job descriptions contained in Ms. Harvey's labor market survey were inaccurate and that claimant would experience "quiet" age discrimination when seeking employment. Thus, contrary to claimant's position on appeal, the administrative law judge fully discussed the evidence of record and his finding that employer established the availability of suitable alternate employment based upon the labor market survey of Ms. Harvey and the positions' approval by Dr. Stiles is rational and is supported by substantial evidence; accordingly, that finding is affirmed. *See Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

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[2] Claimant testified that three of the positions identified by employer were outside of his driving restrictions. Tr. at 21-22.

[3] Contrary to the statement contained in claimant's brief, Dr. Stiles, who claimant acknowledges is his treating physician, approved five of the six positions identified by Ms. Harvey. *See* Cl. br. at 3; Tr. at 12; Cl. Ex. 7. Additionally, without citation to the record, claimant avers that the administrative law judge erred in failing to consider the affect of his prescribed medication upon his ability to perform post-injury work; such medication, however, appears to have been prescribed by Dr. Stiles, who thereafter approved the aforementioned positions. Cl. Ex. 7. Claimant's contention of error is thus without merit.

Claimant next 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 administrative law judge did not take into consideration claimant's participation in employer's vocational rehabilitation program, and that claimant unsuccessfully applied for each of the positions identified by employer.

In addressing claimant's testimony on this issue, the administrative law judge found that, although employer established the availability of suitable jobs within claimant's geographic area, claimant did not follow up on job leads and has not looked for work since July 2003. Decision and Order at 11. Specifically, the administrative law judge found that claimant's post-injury

> job search consisted solely of looking in the newspaper classified ads and dropping off applications with some of the employers listed in the labor market survey. He did not did not apply for a single job outside of the job leads sent to him by Employer. This minimalist approach to the job search does not demonstrate diligence.

Id. Based upon these findings, the administrative law judge concluded that claimant had not shown any genuine effort to obtain employment, and he accordingly denied claimant's claim for ongoing total disability compensation. *Id.* For the reasons that follow, we remand the case to the administrative law judge for further consideration of this issue.

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 employment. In *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, described claimant's burden in this regard as one of "'establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. . . . Job availability should depend on whether there is a reasonable opportunity for the claimant to compete in a manner normally pursued by a person *genuinely* seeking work with his determined capabilities,'" quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981) (emphasis in original). Moreover, while a claimant must diligently seek appropriate employment, *see Tann*, 841 F.2d 540, 21 BRBS 10(CRT), 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. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In the instant case, the administrative law judge concluded that claimant did not diligently seek employment post-injury based solely on his dual findings that claimant dropped off applications with *some* of the employers identified by employer, and that his

independent employment search involved looking in the newspaper classified job advertisements. Decision and Order at 11. In the instant case, however, employer identified five specific employment opportunities for claimant which the administrative law judge found established a range of suitable jobs available for claimant, and claimant testified that his employment search included submitting at least one application with each of these specific employers.[4] Claimant's testimony, if credited, supports a finding that he applied for all, and not some, of the jobs identified by employer and accepted by the administrative law judge.[5] If claimant unsuccessfully attempted to gain employment with the specific employers identified by employer, the administrative law judge must consider whether those positions were actually available. *See Hooe*, 21 BRBS 258. Moreover, claimant testified that he attempted to locate suitable employment within his restrictions by checking job listings in the newspaper, but that he was unable to find such positions. Tr. at 23. Accordingly, as an administrative law judge's inquiry into this issue requires a broader analysis regarding the nature and sufficiency of claimant's employment efforts, we vacate the administrative law judge's determination that claimant did not conduct a diligent job search, and we remand this case for the administrative law judge to reconsider the totality of the evidence of record regarding the sufficiency of claimant's efforts to secure post-injury employment within the compass of the employment opportunities established by the employer. *See Tann*, 841 F.2d 540, 21 BRBS 10(CRT); *Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT).

Lastly, claimant argues that, should his award of benefits under the Act be limited to a permanent partial disability award pursuant to the schedule, the administrative law judge erred in determining that he is entitled to benefits based on a two percent impairment rating to his right lower extremity. Specifically, claimant asserts that the administrative law judge erred in crediting the opinion of Dr. Luck over the opinion of Dr. Stiles, his treating physician, who opined that claimant sustained a 20 percent impairment to his right lower extremity.

It is well established that claimant bears the burden of establishing the extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd*

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[4] Employer identified cashier or counter person positions with Duck Thru Mini Mart, Dollar General, Family Foods, Red Apple, and Advance Auto Parts, and a security guard position with The Alpha Group. Cl. Ex. 7. Claimant testified that he applied for employment at two different Family Foods locations, that he twice submitted applications with Advanced Auto Parts, and that he submitted an application for employment with the remaining identified employers. Tr. at 19-20. At the formal hearing, employer withdrew the security guard position from consideration, and the administrative law judge thus did not consider it in addressing this issue.

[5] Ms. Harvey testified that her follow-up with the identified employers revealed that claimant had not filed an application with Dollar General. Tr. at 83-84.

Shipyards Corp., 22 BRBDS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.,* 17 BRBS 56 (1985). In the instant case, the administrative law judge, in awarding claimant compensation based upon a two percent impairment rating, credited the opinion of Dr. Luck. In rendering this determination, the administrative law judge initially acknowledged that Dr. Luck did not physically examine claimant but, rather, that he reviewed claimant's medical records. The administrative law judge found, however, that Dr. Luck is well-qualified to offer an opinion based upon a review of claimant's records since he is an orthopedic surgeon and author of the lower extremity chapter of the American Medical Association *Guides to the Evaluation of Permanent Impairment* and that Dr. Luck's opinion is well-reasoned and supported by the objective evidence gathered from claimant's physical therapy treatments. Decision and Order at 11-12. In this regard, based upon the flexion range documented in claimant's physical therapy records, Dr. Luck opined that an appropriate rating for claimant's right lower extremity would, at this point in time, be for a two percent impairment.[6] Emp. Ex. 8. In declining to rely upon the contrary opinion of Dr. Stiles, the administrative law judge initially acknowledged that Dr. Stiles, as claimant's treating physician, is well-situated to evaluate claimant's subjective complaints of pain and that his opinion regarding claimant's injury is generally credible. Decision and Order at 12. The administrative law judge concluded, however, that Dr. Stiles' opinion regarding the extent of claimant's impairment was not well-reasoned.

We hold that the administrative law judge committed no error in relying upon the opinion of Dr. Luck in determining claimant's right leg impairment. In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it, *see John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). The administrative law judge rationally weighed the evidence, and Dr. Luck's opinion constitutes substantial evidence to support the administrative law judge's ultimate finding. We therefor affirm the administrative law judge's determination that claimant suffers from a two percent permanent impairment to his right leg. *See O'Keeffe,* 380 U.S. 359.

Accordingly, 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 Decision and Order is affirmed.

SO ORDERED.

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[6] Dr. Luck conceded that claimant may be entitled to an additional rating based upon a significant restriction in his range of motion; however, he found that the records did not indicate claimant's range of motion.

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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