BRB No. 97-1633

HAYWARD K. HILL	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
AMERICAN COMMERCIAL BARGE LINE/LOUISIANA DOCK COMPANY, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Tony B. Jobe, Madisonville, Louisiana, for claimant.

Wayne G. Zeringue, Jr. and R. Scott Jenkins (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-2421) 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).

On December 5, 1988, claimant, while working as a welder for employer, injured his back when he fell into the hold of a ship. Claimant subsequently

underwent two surgical procedures on his back and has not returned to work since the injury. Employer voluntarily paid claimant temporary total disability benefits from December 6, 1988 to September 3, 1990, permanent partial disability benefits from September 4, 1990 to July 6, 1994, temporary total disability benefits from July 7, 1994 to May 21, 1996, and permanent partial disability benefits from May 22, 1996 to March 12, 1997.

In his Decision and Order, the administrative law judge, after initially noting the parties' agreement that claimant is incapable of returning to his former employment duties with employer as a welder, determined that employer failed to establish the availability of suitable alternate employment for the period April 1990 to July 1994, at which time claimant underwent a diskectomy. Next, the administrative law judge determined that while employer had established the availability of suitable alternate employment as of April 1996, claimant had established that he diligently, yet unsuccessfully, sought employment during that period of time. The administrative law judge thus awarded claimant temporary total disability from December 5, 1988 through April 10, 1996, and permanent total disability compensation commencing April 11, 1996, and continuing.

On appeal, employer challenges the administrative law judge's findings that it failed to establish the availability of suitable alternate employment from April 1990 to July 1994, and that claimant had rebutted employer's showing of suitable alternate employment after April 11, 1996. Claimant responds, urging affirmance.

Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir.1981); *Anderson v. Lockheed Shipbuilding & Const. Co.*, 28 BRBS 290 (1994). Employer contends that the administrative law judge erred in failing to credit the opinion of Dr. Warren over that of Dr. Jarrott and in failing to consequently find that it established the availability of suitable alternate employment from April 1990 until July 1994. We disagree. The administrative law judge found that considering claimant's age, background, and the fact that claimant had an undetected herniated disk at L4-5, claimant was not capable of performing any work from April 1990 until July 1994. In rendering this finding, the administrative law judge credited the opinion of Dr. Jarrott, who opined that claimant was totally disabled during this period of time, over that of Dr. Warren, because Dr. Jarrott was treating claimant during this period of time and Dr. Warren later admitted that the reason he missed claimant's second injury was because of a failure to perform an MRI or myelogram, as

suggested by Dr. Jarrott. Lastly, the administrative law judge noted that although Ms. Favaloro, employer's vocational expert, testified that jobs were available for claimant in 1990, this conclusion was based on the opinion and restrictions of Dr. Warren, who had failed to diagnose claimant's injury.

It is well-established that the administrative law judge as the trier-of-fact is entitled to weigh the evidence, and his decision must be affirmed if supported by substantial evidence. *O'Keeffe,* 380 U.S. at 359. As the administrative law judge rationally credited Dr. Jarrott, his finding that claimant could not perform work during the relevant period of time is supported by substantial evidence. As we affirm the administrative law judge's finding that claimant could not perform any employment during the period of April 1990 through July 1994, it follows that claimant is totally disabled during that time. *See generally Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1982), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Accordingly, we affirm the administrative law judge's conclusion that claimant is entitled to temporary total disability compensation from April 1990 to July 1994.

Lastly, employer challenges the administrative law judge's finding that claimant diligently sought employment subsequent to April 1996, the date claimant reached maximum medical improvement. If employer makes a showing of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986); *see also Turner*, 661 F.2d at 1031, 14 BRBS at 156; *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (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 Railway Co.,* 31 BRBS 75 (1997).

In his decision, the administrative law judge found that employer had established the availability of suitable alternate employment as of April 1996 via the testimony of Ms. Favaloro. Contrary to employer's contention, however, there is substantial evidence in support of the administrative law judge's subsequent conclusion that claimant diligently, though unsuccessfully, attempted to secure employment as of April 1996. Specifically, in addressing this issue, the administrative law judge credited claimant's testimony that he applied for all of the positions identified by Ms. Favaloro in her January 1997 report and received positive responses from none of them, and that claimant submitted over forty applications in the ten months prior to the formal hearing, received one employment interview but

received no job offers. Moreover, the administrative law judge specifically credited claimant's testimony regarding his desire to work. *See* Decision and Order at 11. The administrative law judge thus concluded that claimant demonstrated that he had been diligent in his quest to secure employment and that he had been unsuccessful in that quest.

In the instant case, the administrative law judge's specific findings that claimant unsuccessfully sought employment subsequent to April 1996 in employment categories identified by employer, and that he additionally attempted to secure a position available with other multiple employers, are rational and supported by the record. *See Calback v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir.1962). Accordingly, we affirm the administrative law judge's determination that claimant diligently sought and was unable to secure employment post-injury, and his consequent award of continuing permanent total disability benefits to claimant commencing April 11, 1996. *See generally Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge