BRB No. 98-0745

WILLIAM KIRSCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Benjamin Rose (Clayton H. Thomas, Jr. & Associates), Philadelphia, Pennsylvania, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-LHC-1462) of Administrative Law Judge Robert D. Kaplan 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 longshoreman, suffered injuries to the heels of both feet when he fell on

May 19, 1989, and has subsequently undergone three surgeries for his condition. It is uncontested that claimant, who has not worked since the date of his accident, cannot return to his usual job and that he reached maximum medical improvement on April 1, 1995. Before the administrative law judge, employer controverted claimant's claim for permanent total disability compensation, asserting that claimant is only partially disabled based upon its establishment of suitable alternate employment.

In his Decision and Order, the administrative law judge found that employer established the availability of suitable alternate employment. Based upon claimant's post-hearing evidence, however, the administrative law judge concluded that claimant diligently but unsuccessfully attempted to secure available employment post-injury and, accordingly, awarded claimant permanent total disability compensation.

Employer now appeals, challenging the administrative law judge's award of permanent total disability compensation to claimant; specifically, employer contends that the administrative law judge acted improperly as claimant's advocate based upon his erroneous interpretation of the Board's decision in *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997). Alternatively, employer avers that the administrative law judge erred in determining that claimant diligently sought employment post-injury. Claimant responds, urging affirmance.

Where, as in the instant 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). If the employer makes such a showing, 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), *cert. denied*, 479 U.S. 826 (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); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Employer initially challenges the administrative law judge's decision to reopen the record prior to the issuance of his decision in order to allow claimant the opportunity to rebut employer's evidence regarding the availability of suitable alternate employment. In this regard, employer argues that the Board's decision in *Ion*, upon which the administrative law judge relied in reopening the record, is not dispositive of this claim because employer's evidence of suitable alternate employment was given to claimant prior to the hearing and no

action was initiated by claimant in the seven months that the record was held open post-hearing. For the reasons that follow, we reject employer's assertion of error.

The formal hearing in this case was held on December 17, 1996, and the record was closed on July 15, 1997. On September 8, 1997, the administrative law judge, citing the Board's decision in *Ion*,[1] issued an order requesting that claimant advise the administrative law judge of his desire, if any, to conduct a post-hearing investigation of the jobs identified by employer as being suitable and available. Claimant requested permission to make such an investigation and, on October 2, 1997, the administrative law judge issued an order directing claimant to submit relevant evidence on his job search within thirty days. Subsequently, claimant submitted an affidavit detailing his search for alternate employment based upon positions identified by his vocational consultant. Employer responded to claimant's submission by asserting that claimant did not diligently seek employment post-injury.

We hold that the administrative law judge committed no error in reopening the record in this case. It is well-established that an administrative law judge has great discretion concerning the admission of evidence. *See* 33 U.S.C. §923(a); 20 C.F.R. §702.339; *see also Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993). In this regard, Section 702.336(b) of the

[1]In *Ion*, which the Board issued on June 26, 1997, the administrative law judge found that employer established suitable alternate employment but, as there was no written report and employer did not inform claimant of the available positions prior to the hearing, the administrative law judge permitted claimant to conduct a post-hearing employment search; claimant thereafter filed an affidavit stating that he diligently contacted employers but was unsuccessful in obtaining employment. The Board affirmed the administrative law judge's decision to allow claimant the opportunity to rebut employer's showing of suitable alternate employment, but remanded the case to provide employer with the opportunity to cross-examine claimant or to respond to the post-hearing affidavit. *Ion*, 31 BRBS at 75.

regulations, 20 C.F.R. §702.336(b), states that "[a]t any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue." Similarly, Section 702.338 of the regulations, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. Based upon the foregoing, decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See McCurley v. Kiewest Co*, 22 BRBS 115 (1989).

In the instant case, claimant was given the opportunity to submit post-hearing evidence regarding his attempt to rebut employer's showing of suitable alternate employment. *See generally Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT). Employer was given the opportunity to respond to claimant's post-hearing evidence. *Ion,* 31 BRBS at 79. As the administrative law judge's actions occurred prior to the filing of his decision and he gave proper notice that he was raising a new issue, the administrative law judge complied with Sections 702.336 and 702.338 of the regulations. Employer has failed to establish that the administrative law judge abused his discretion when he informed the parties that he would consider the issue of whether claimant rebutted employer's evidence regarding the availability of suitable alternate employment. Accordingly, we hold that the administrative law judge did not err in requesting and admitting into evidence additional material relevant to the issue of claimant's entitlement to permanent total disability. *See generally Cornell University v. Velez,* 856 F.2d 402, 21 BRBS 155 (CRT)(1st Cir. 1988).

Employer next contends that the administrative law judge erred in determining that claimant diligently sought employment post-injury. We disagree. Contrary to employer's contention, there is substantial evidence in support of the administrative law judge's conclusion that claimant diligently, though unsuccessfully, attempted to secure employment post-injury. Specifically, in addressing this issue, the administrative law judge properly noted that claimant need not attempt to secure the precise jobs identified by employer, but need only "establish that he was reasonably diligent in attempting to secure a job 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo,* 937 F.2d at 74, 25 BRBS at 8 (CRT), *quoting Turner,* 661 F.2d at 1043, 14 BRBS at 165. The administrative law judge found that employer identified two positions as a cashier, as well as positions as a customer service clerk, a telephone dispatcher, and a telemarketing employee, which claimant was capable of performing. Next, the administrative law judge credited claimant's testimony that he unsuccessfully applied for work in the job categories of dispatcher, security guard, scheduler, telephone worker, and cashier at several employers.[2] *See* Decision and Order at 11-12; Order at 2. The administrative law judge thus concluded that claimant demonstrated that he was diligent, yet unsuccessful, in his quest to secure employment available within his capabilities. The administrative law judge specifically addressed employer's contentions regarding the suitability of the positions for which claimant applied and the promptness with which claimant applied.

[2]The administrative law judge found, however, that the positions of security guard and cashier at a retail pharmacy were not, in fact, suitable for claimant.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses; additionally, the administrative law judge may draw his own inferences and conclusions from the evidence. *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). In the instant case, the administrative law judge's specific finding that claimant diligently yet unsuccessfully sought employment post-injury with multiple employers is rational and supported by the record. *See generally DM & IR Ry Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998). Accordingly, we affirm the administrative law judge's determination that claimant diligently tried and was unable to secure employment post-injury, and his consequent award of continuing permanent total disability benefits to claimant. *See generally Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge