BRB No. 00-1115

EARNEST SANTIFUL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES, INCORPORATED	)	DATE ISSUED: July 27, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postal (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-2847) of Administrative Law Judge John C. Holmes 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 injured his right knee on July 1, 1998, during the course of his employment

as an equipment operator. Employer voluntarily paid compensation under the Act for temporary total disability, 33 U.S.C. §908(b), from July 2 to September 30, 1998, for temporary partial disability, 33 U.S.C. §908(e), from October 1, 1998, to March 18, 1999, and for a 10 percent permanent partial disability of the right knee, 33 U.S.C. §908(c)(2). Claimant, age 63 at the date of injury, retired from longshore employment on June 1, 1999. He sought additional compensation under the Act for temporary total disability from October 1, 1998, to March 30, 1999, and for continuing permanent total disability, 33 U.S.C. §908(a), thereafter.

In his decision, the administrative law judge initially found that, due to claimant's right knee injury, claimant is unable to return to longshore employment. The administrative law judge next found that employer established the availability of suitable alternate employment. The administrative law judge determined that claimant did not diligently seek alternate employment and that claimant is therefore limited to an award under the schedule for his work-related right knee impairment. The administrative law judge found that both Dr. Becker and Dr. Bennett opined that claimant has a 10 percent impairment of the right knee, and that claimant did not establish a basis for a higher award. Finally, the administrative law judge denied employer's request for Section 8(f) relief, 33 U.S.C. §908(f), as claimant was found entitled to fewer than 104 weeks of compensation for his permanent partial disability of the right knee. Employer's motion for reconsideration was summarily denied.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. Claimant also challenges the administrative law judge's finding that claimant did not rebut employer's showing of suitable alternate employment. Finally, claimant challenges the administrative law judge's denial of compensation based on a loss of wage-earning capacity. Employer responds, urging affirmance.[1]

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment. In his decision, the administrative law judge found that employer was prejudiced by claimant's lack of cooperation with Ms. Kielty, employer's vocational consultant. The administrative law judge found that claimant's failure to meet with Ms. Kielty prevented her from accurately assessing claimant's physical and mental skills and abilities. The administrative law judge found that Ms. Kielty nonetheless produced a competent labor market survey, which the

[1]By Order issued October 17, 2000, the Board granted employer's motion and dismissed its appeal. BRB No. 00-1115A.

administrative law judge credited as evidence of suitable alternate employment because of claimant's refusal to cooperate with Ms. Kielty's vocational assessment. Alternatively, the administrative law judge found Ms. Kielty's labor market survey credible, based on claimant's medical records, information that claimant is without a high school education, and Ms. Kielty's qualifications. Specifically, the administrative law judge found that claimant is capable of performing the parking lot attendant jobs at APCOA and Penn Parking, which are identified in employer's labor market survey.

We need not address claimant's contention that the administrative law judge erred by relying upon claimant's refusal to cooperate with employer's vocational consultant to find that employer established the availability of suitable alternate employment as the administrative law judge found, notwithstanding claimant's lack of cooperation, that the parking lot attendant positions identified in the labor market survey establish the availability of suitable alternate employment. Claimant asserts that the administrative law judge's crediting of employer's survey serves to demonstrate only that the administrative law judge was biased in favor of employer. It is well-established, however, that allegations of bias are not established by adverse rulings alone. *See generally Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Moreover, claimant does not challenge the administrative law judge's finding that he is capable of performing the parking attendant jobs, based on the opinions of Drs. Bennett and Becker.[2] Accordingly, we affirm the administrative law judge's finding that the parking attendant positions identified in employer's labor market survey establish the availability of suitable alternate employment as it is rational and supported by substantial evidence. *See generally* *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

Claimant next contends that the administrative law judge erred in finding that he did

[2]In arguing that claimant established an inability to return to his usual employment and that he is entitled to compensation for permanent total disability, claimant asserts the administrative law judge failed to address claimant's pre-existing left knee impairment. The administrative law judge credited the opinions of Drs. Becker and Bennett, that claimant is capable of performing the parking attendant jobs, and these physicians took into account claimant's pre-existing left knee impairment in rendering their opinions. EX 12, 15; CX 6.

not diligently seek suitable employment. Claimant generally asserts that the administrative law judge erred by relying on claimant's failure to seek jobs not identified in employer's labor market survey and claimant's not attempting to obtain jobs in the survey because of travel time considerations. If employer establishes the availability of suitable alternate employment, claimant can rebut that showing, and retain entitlement to total disability benefits, by demonstrating that, despite a diligent effort, he was unable to secure suitable employment. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT). In the instant case, the administrative law judge found that claimant failed to look for potential jobs outside of employer's labor market survey and that claimant summarily rejected jobs located 35 to 40 minutes from his residence. The administrative law judge specifically relied on claimant's testimony that he applied for jobs in employer's survey solely at the behest of his attorney, as it was required by "the system," *see* Tr. at 178-183, 198-199, in finding that claimant did not intend to return to the labor market.

Contrary to claimant's contention, the inquiry into claimant's diligence in seeking post-injury employment is not limited to the jobs identified by employer, but encompasses employment opportunities of the type shown by employer to be suitable and attainable. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998). Moreover, claimant has not alleged any specific error in the administrative law judge's finding that he could drive 30-40 minutes for a job. *See generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). Finally, the administrative law judge rationally interpreted claimant's testimony as indicating that claimant's post-injury job search was motivated solely by his desire to obtain compensation benefits, and that claimant was not sincerely seeking suitable employment. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961); *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Accordingly, we affirm the administrative law judge's finding that claimant failed to rebut employer's evidence of suitable alternate employment by diligently seeking work.

Claimant lastly asserts that the administrative law judge erred by ruling that *Potomac Electric Power Co. v. Director, OWCP* [*PEPCO*], 449 U.S. 268, 14 BRBS 363 (1980), applies in the instant case to limit claimant's recovery to a scheduled compensation award for his knee injury. We disagree. The Supreme Court held in *PEPCO* that a claimant who is permanent partially disabled due to an injury to a member listed under the schedule at Section 8(c)(1)-(20) of the Act, 33 U.S.C. §908(c)(1)-(20), is limited to the recovery provided therein, and may not receive an award under Section 8(c)(21), 33 U.S.C. §908(c)(21), for a loss of wage-earning capacity. *PEPCO*, 449 U.S. 268, 14 BRBS 363; *see also Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 234 (1985). Accordingly, as claimant's knee injury is an injury to a body part enumerated in the schedule and we have affirmed the administrative law judge's finding that employer established the

availability of suitable alternate employment, which claimant failed to rebut, we hold that the administrative law judge properly applied *PEPCO* to limit claimant's recovery to that

provided by the schedule. *See also Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998).

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge