BRB No. 92-0970

RAY G. EARL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOWELL/SCHLUMBERGER	)	DATE ISSUED:_____)
	)	
and	)	
	)	
CONSTITUTION STATE SERVICE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Quentin P. McCoglin, Administrative Law Judge, United States Department of Labor.

Robert W. Drouant, New Orleans, Louisiana, for claimant.

Patrick E. O'Keefe and A. Carter Mills IV (Montgomery, Barnett, Brown, Read, Hammond & Mintz), New Orleans, Louisiana, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-0492) of Administrative Law Judge Quentin P. McCoglin awarding continuing temporary total disability benefits 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant was employed as an operator on an offshore oil platform when he was injured on February 23, 1988, as the result of an explosion in which equipment struck him in the chest causing him to lose consciousness. As a result of this explosion, claimant suffered a significant cardiac injury, a fractured left finger and post-traumatic stress disorder. Employer voluntarily paid claimant temporary total disability benefits from March 8, 1988 to January 1, 1989, and claimant sought continuing temporary total disability benefits.

The administrative law judge awarded claimant permanent partial disability benefits for a 10 percent loss of use of his finger pursuant to 33 U.S.C. §908(c)(7), (19). The administrative law judge denied claimant compensation for his back pain, finding that claimant's back problems are related to his psychological condition rather than to his physiological condition. The administrative law judge, however, accorded determinative weight to the opinion of claimant's treating psychiatrist, Dr. Bick, that claimant cannot currently perform any work as it will cause acute anxiety and depression. The administrative law judge also found, based on Dr. Bick's opinion, that claimant had not reached maximum medical improvement. The administrative law judge therefore awarded claimant continuing temporary total disability benefits, and ordered employer to pay claimant's medical expenses related to the work injury.

On appeal, employer contends that the administrative law judge erred in finding that claimant continues to be temporarily totally disabled. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Employer contends that the administrative law judge erred in his evaluation of the medical evidence regarding claimant's ability to return to work, arguing that the treating physicians do not dispute that claimant is physically able to work. Employer specifically contends, moreover, that the administrative law judge mischaracterized the testimony of Dr. Roniger as precluding part-time gainful employment in favor of part-time volunteer work. In this regard, employer argues that the only way to construe the testimony of Dr. Roniger is to find that while claimant undergoes further treatment for his psychological injury, *i.e.*, post-traumatic stress disorder, he can and should engage in part-time employment as an integral part of his treatment. Employer also contends that claimant failed to cooperate with the vocational rehabilitation counselor and to seek the alternate jobs identified by the counselor.

We affirm the administrative law judge's finding that claimant is temporarily totally disabled. To establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). Where claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the administrative law judge finds, based on medical opinions, that claimant cannot perform any employment, employer has not established the existence of suitable alternate employment. *See Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *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). With respect to the extent of disability, the administrative law judge discussed the medical evidence of record and accorded determinative weight to the opinion of claimant's treating physician, Dr. Bick, that although claimant has made some progress, he has been totally disabled from the date of the accident until the time of the hearing and that if claimant were to return to work without further treatment, he would be unable to function.[1] The administrative law judge also commented that Dr. Maumus[2] found claimant to be totally disabled, that Dr. Mullener[3] did not find claimant capable of working and that Dr. Blotner, who testified that claimant was no longer suffering from a psychiatric disorder when he was discharged from Jo Ellen Smith Hospital, nonetheless deferred to the opinion of Dr. Bick. The administrative law judge noted that Dr. Blotner admitted that claimant may have been in a period of remission when this physician treated claimant during his hospitalization. The administrative law judge determined further that all psychiatrists agreed that the treatment claimant had thus far received was inadequate though they may disagree as to the specific inadequacies.

[1]When employer terminated claimant's compensation in January 1989, it additionally suspended all medical payments. At the time of the hearing claimant was receiving Social Security disability benefits. The medical benefits are limited, however, which precluded claimant from obtaining the care recommended by Dr. Bick. Dr. Bick testified that claimant has only received a combination of anti-anxiety and anti-depressant medication with psychotherapy on a regular basis. Dr. Bick stated that claimant needs a 2-3 months period of intensive treatment, possibly on an in-patient basis. This would be followed by working with a vocational rehabilitation counselor and participating in a work hardening program to ease claimant back into the work force.

[2]Dr. Maumus evaluated claimant on April 4, 1989 in order to determine his eligibility for Social Security disability benefits. Dr. Maumus diagnosed claimant as suffering from a major depression, possible residual aspects of a chronic post-traumatic stress disorder, and adjustment disorder with mixed emotional features connected to the work accident. Dr. Maumus further found that claimant is not able to obtain or even maintain any gainful employment and is in continual need of psychotherapy and medication.

[3]Dr. Mullener who issued a report of psychological evaluation on June 3, 1988 is a psychologist to whom Dr. Bick referred claimant for an assessment of his intellectual abilities and personality structure.

It is well-established that the administrative law judge is entitled to weigh the medical evidence and to draw his own inferences from it, and that he is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the evidence relied on by the administrative law judge, particularly the opinion of Dr. Bick, constitutes substantial evidence to support the administrative law judge's finding that claimant cannot perform any work, it must be affirmed. *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). To the extent that employer argues that a work program recommended by Dr. Roniger, whether volunteer or for wages, establishes that claimant is capable of working, the administrative law judge's crediting of Dr. Bick's opinion that claimant cannot currently perform any type of work precludes a finding that claimant is capable of performing suitable alternate employment. Moreover, the administrative law judge rationally inferred from the totality of Dr. Roniger's testimony that he thought *volunteer* work would aid in claimant's recovery. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Inasmuch as we have affirmed the administrative law judge's finding that claimant is currently incapable of any work, we note that the administrative law judge was not required to make a separate finding regarding suitable alternate employment. *See generally Lostaunau*, 13 BRBS at 229. Moreover, we need not address employer's due diligence argument, as claimant's duty to diligently seek work does not arise unless it is shown that claimant is capable of suitable alternate employment and that such opportunities exist. *See Roger's Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d at 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert denied*, 479 U.S. 826 (1986). Finally, we note that the record indicates that claimant met with the rehabilitation counselor. *See* Emp. Ex. 4. Consequently, we affirm the administrative law judge's award of continuing temporary total disability benefits as it is rational and supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge