BRB No. 97-1025

ESTHER E. WESTRY	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: _____
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Permanent Total and Temporary Total Disability of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna, L.L.P)., Norfolk, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Permanent Total and Temporary Total Disability (95-LHC-1056 and 95-LHC-1057) 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).

Claimant, who worked for employer in numerous capacities, injured her right hand and wrist, and her left hand and wrist in separate work-related accidents, the former occurring in 1981 and the latter in 1990. Claimant has had six surgeries on her right hand and one on her left hand for carpal tunnel syndrome and/or trigger finger release. Employer made voluntary payments of temporary total disability compensation and temporary partial disability compensation. In addition, employer voluntarily paid claimant scheduled permanent partial disability compensation for a 5 percent impairment of the right hand. *See* 33 U.S.C. §908(c)(1), (19). Claimant sought permanent total disability benefits under the Act, commencing June 8, 1994, the date she was laid off by employer. In the alternative, claimant sought temporary total disability compensation for the two-week period following her September 4, 1996, trigger release surgery.

The administrative law judge denied the claim for permanent total disability compensation, finding that, although it was undisputed that claimant could not perform her usual work, employer established the availability of suitable alternate employment and claimant did not demonstrate a diligent effort to secure alternate work. The administrative law judge also denied the alternate claim for temporary total disability compensation following claimant's September 4, 1994, surgery, finding that the supporting medical documentation was not adequately reasoned.

Claimant appeals the denial of permanent total disability benefits, contending that the administrative law judge erred in determining that employer established the availability of suitable alternate employment and that she did not exercise due diligence in seeking alternate work. In the alternative, claimant avers that the administrative law judge erred in denying the claimed temporary total disability compensation for the period from September 4, 1996 to September 18, 1996, following her September 4, 1996, surgery. Employer has not responded to claimant's appeal.

In the present case, as it is undisputed that claimant is unable to perform her usual job, claimant established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment by presenting evidence of alternate jobs that are available in the relevant geographic market for which claimant is physically and educationally qualified. *See Universal Maritime Corp. v. Moore,* 126 F.3d 256, 264, 31 BRBS 119, 124 (CRT) (4th Cir. 1997); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). A showing by employer of a single job opening is insufficient to satisfy employer's burden of proving the availability of suitable alternate employment; employer must present evidence that a range of jobs exists which claimant is realistically able to secure and perform. *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992). If the employer makes such a showing, the claimant nevertheless can prevail in her quest to establish total disability if she demonstrates that she diligently tried and was unable to secure such employment. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

After review of the Decision and Order in light of the record evidence and claimant's arguments on appeal, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment because it is rational, in accordance with applicable law, and supported by the testimony and November 11, 1996, labor market survey of Gary Klein of Resources Opportunities Inc., as well as the February 15, 1995 and January 10, 1996, labor market surveys performed by Employment Dynamics Incorporated.[1] *See O'Keeffe*, 380 U.S. at 359. Claimant argues on appeal that

[1]In the labor market survey conducted by Employment Dynamics, Inc. dated February 15, 1995, the following jobs were identified as suitable for claimant: jewelry sales associate at Gordon's Jewelers, appointment secretary at Affordable Lifestyles, receptionist at J.C. Penney Beauty Salon, and front desk clerk at Comfort Inn. Employer's

the administrative law judge erred in finding that employer met its burden of establishing suitable alternate employment because employer's vocational experts failed to account for the fact that claimant was restricted to lifting no more than 5 pounds and was precluded from performing work involving computer keyboards, cash registers, or any other work involving gripping, repetitive reaching, and pulling. We reject this argument. In the present case, after noting that he had some question regarding claimant's ability to work as a cashier, the administrative law judge determined that inasmuch as Dr. Gilbert had approved these positions, he was inclined to find that claimant's physical restrictions did not prevent her from working as a cashier. As this determination is rational and within the administrative law judge's authority, we will not disturb it on appeal. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). While claimant argues that she also lacks the math skills necessary to work as a cashier, the administrative law judge rationally found to the contrary, crediting Mr. Klein's testimony that claimant's intellectual abilities mirrored those listed in the Department of Labor's *Dictionary of Occupational Titles* for a cashier. Tr. at 29; Decision and Order at 8.

In the same vein, claimant argues that inasmuch as she is marginally literate, the security jobs proffered by employer which require a written test and state certification within 90 days of hiring are not vocationally suitable. In considering this argument, the administrative law judge rationally determined that even if security work was not suitable for claimant, this finding was not determinative as employer had established numerous other positions available to claimant which were within her capabilities and physical restrictions. While claimant also argues that the other jobs employer proffered are not vocationally suitable because of her difficulties in reading and writing, the administrative law judge acted within his discretion in finding to the contrary based on his crediting of employer's vocational testimony.

Finally, claimant argues that the jobs identified by Mr. Klein cannot properly support a finding of suitable alternate employment because in conducting his labor market survey Mr. Klein mistakenly assumed that claimant was capable of lifting up to 10 pounds, when, in fact, Dr. Gilbert recommended that she lift no more than 5 pounds. The administrative law judge, however, also considered and rationally rejected this argument below, noting that many of the jobs listed in the labor market survey did not require any lifting whatsoever.

The testimony of Mr. Klein, the vocational surveys conducted at Employment

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Exhibit 7. On January 10, 1996, Employment Dynamics submitted an updated study, identifying the following jobs as suitable: crewperson at McDonald's Restaurant, security guard positions at James York Security and Key Security, and customer service representative at Coliseum Mall. Employer's Exhibit 11. In his November 12, 1996, labor market survey, Mr. Klein identified numerous jobs which he considered suitable for claimant, including: interviewer at ASI, dispatcher at Baker Installations, and cashier at Goodwill Industries, Crown and Express Car Wash. Employer's Exhibit 12.

Dynamics, Inc. and Dr. Gilbert's approval of various available job opportunities thus provide substantial evidence to support the administrative law judge's suitable alternate employment finding. *See O'Keeffe*, 380 U.S. at 359. As claimant has failed to establish any reversible error made by the administrative law judge in evaluating the record evidence and making credibility determinations, this determination is affirmed. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

The administrative law judge's finding that claimant failed to exercise reasonable diligence in securing alternate work is also affirmed. In finding that claimant did not establish due diligence the administrative law judge noted that the only evidence of claimant's job search was a hand-written list of over 200 low paying jobs for which she allegedly applied and was turned down. The administrative law judge considered this evidence but rejected it, stating that he found it incredible that all of these employers would not be hiring and that there was no indication from testimony or otherwise that claimant actually submitted written applications to any of these employers. He further noted that claimant went on only one occasion to the Virginia Employment Commission. Because the administrative law judge's conclusion regarding due diligence is rational based on the evidence before him, it is affirmed. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988). Inasmuch as employer established the availability of suitable alternate employment and claimant did not establish due diligence in attempting to secure alternate work, the administrative law judge's denial of the claimed permanent total disability compensation is affirmed.[2]

We agree with claimant, however, that the administrative law judge erred in denying her alternate claim for temporary total disability benefits for the two-week period following her September 4, 1996, surgery. The administrative law judge based his determination on the rationale that Dr. Gilbert's handwritten note on a facsimile from claimant's counsel reflecting that claimant was disabled for 2 weeks following her surgery did not rise to the level of a well-reasoned medical opinion.[3] In so concluding, the administrative law judge ignored the fact that Dr. Gilbert also submitted other medical notes relevant to this issue, most notably a September 4, 1996, operative note, in which he stated that his plan of treatment was to discharge claimant with dressing on her right hand, and have her return to his office in two weeks for suture removal. Claimant's Exhibit 5. Inasmuch as this operative report corrects the deficiency which the administrative law judge perceived in Dr. Gilbert's

[2]As claimant is not totally disabled, any permanent partial disability must be compensated under the schedule. *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 278, 14 BRBS 363 (1980). Employer paid claimant for a 5 percent loss of use of her right hand, and the administrative law judge noted she submitted no evidence on permanent impairment of her left hand. Decision and Order at 7, n.2.

[3]The administrative law judge was referring to the fact that approximately one week before the trial in this case, claimant's attorney faxed a note to Dr. Gilbert, asking him for a note as to the period of total disability he recommended after the September 4, 1996 surgery. Dr. Gilbert did not write a note, but rather simply wrote on claimant's attorney's facsimile "2 wks," and initialed it. Claimant's Exhibit 8.

return fax, we reverse his denial of benefits for the two-week period immediately following claimant's September 4, 1996, surgery. Accordingly, we modify his Decision and Order to reflect that claimant is entitled to temporary total disability benefits from September 4, 1996 until September 18, 1996 as a matter of law.

Accordingly, the administrative law judge's denial of the claim for temporary total disability benefits from September 4, 1996 to September 18, 1996 is reversed, and his Decision and Order is modified to reflect claimant's entitlement to benefits during this period. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge