

BRB No. 97-1248

RICHARD SYLVE)
)
 Claimant-Respondent) DATE ISSUED: _____
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 v.)
)
 COOPER/T. SMITH STEVEDORING)
 COMPANY, INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Granting in Part Employer's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Pete Lewis and Michelle K. Buford (Lewis & Caplan), New Orleans, Louisiana, for claimant.

John L. Duvieilh (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Granting in Part Employer's Motion for Reconsideration (96-LHC-308) of Administrative Law Judge James W. Kerr, 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 February 12, 1994, claimant sustained injuries to his left knee, leg and back while working for employer. Claimant was subsequently diagnosed with a

posterior disk rupture; moreover, claimant has undergone surgery to reconstruct the joint surface of his knee, and it is anticipated that he will require a total knee replacement in the future. Claimant has not returned to gainful employment since the date of his work-injury, and his present physical restrictions include being able to alternate between sitting and standing on a 20 minute basis, no floor lifting, no continuous lifting over 11 pounds, and limited squatting and crouching. Employer voluntarily paid claimant temporary total and temporary partial disability benefits through October 16, 1996. See 33 U.S.C. §908(b), (e).

In his Decision and Order, the administrative law judge initially determined that claimant's average weekly wage for compensation purposes was \$703.35, and that claimant reached maximum medical improvement on June 28, 1995. Next, the administrative law judge found that claimant could not return to his usual work, and that employer had established the availability of suitable alternate employment. The administrative law judge thereafter concluded, however, that claimant diligently but unsuccessfully attempted to secure available employment post-injury and, accordingly, awarded claimant permanent total disability benefits. On reconsideration, the administrative law judge modified claimant's average weekly wage to \$689.83, but denied employer's request to overturn his finding regarding claimant's willingness to work.

On appeal, employer challenges the administrative law judge's award of permanent total disability compensation to claimant; specifically, employer contends that the administrative law judge erred in determining that claimant diligently sought employment post-injury. Claimant responds, urging affirmance of the administrative law judge's decision.

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); 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).

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 initially found that employer had identified positions as a security guard, pressing machine operator, inspector, usher, and messenger 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 driver, security guard, movie usher, and presser at several dry cleaners; moreover, the administrative law judge acknowledged claimant's testimony that he tried but failed to attain any position available at various grocery, department, and food service stores, that he desires to return to work, and that he is willing to try any type of work offered to him. See Decision and Order at 12; Order at 2. Taking into consideration the Fifth Circuit's decision in *Turner*, 661 F.2d at 1031, 14 BRBS at 156, the administrative law judge thus concluded that claimant demonstrated that he had been diligent in his quest to secure available employment and that he had been unsuccessful in that quest.

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 findings that claimant unsuccessfully sought employment post-injury in employment categories identified by employer, that he additionally attempted to secure a position available with other multiple employers, and that he continues to seek employment, are rational and supported by the record. 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 and Order Granting in Part Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge