BRB No. 99-1224

GEORGE LIVINGSTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	DATE ISSUED: 08/23/2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2813) of Administrative Law Judge Stuart A. Levin 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 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 law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This is the second time this case is before the Board.

Claimant, a first class pipefitter, injured his right ankle on August 2, 1989, underwent arthroscopic surgery on February 18, 1991, and reached maximum medical improvement on May 24, 1991, with a permanent partial disability rating of 14 percent for which he has been fully compensated. CX 1; EX 3. In 1991, claimant returned to his usual work for a few months, but was unable to continue due to his work injury. Because employer had no light duty work available, he was laid off; claimant thereafter sought permanent total disability compensation under the Act.

In his first decision, the administrative law judge determined that while claimant

cannot return to his usual work, employer established the availability of suitable alternate employment; the administrative law judge therefore denied the claim for permanent total disability benefits. Claimant appealed, challenging the administrative law judge's denial of his claim. The Board affirmed the administrative law judge's finding that employer established the availability of suitable alternate employment, but remanded the case for the administrative law judge to make specific findings regarding the nature and sufficiency of claimant's efforts to seek employment post-injury.[1] *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

On remand, the administrative law judge found, based on claimant's testimony and other evidence of record, that claimant failed to demonstrate that he had been diligent in his attempts to secure available employment post-injury. Accordingly, the administrative law judge denied claimant's claim for additional disability benefits.

On appeal, claimant challenges the administrative law judge's denial of his claim for ongoing benefits. Specifically, claimant argues that the administrative law judge erred in finding that employer established the availability of suitable alternate employment and that he had failed to exercise due diligence in pursuing such employment. Employer has not responded to this appeal.[2]

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[1]The Board also modified the administrative law judge's decision to reflect claimant's entitlement to permanent partial disability benefits from September 16, 1991, through November 20, 1995, the date upon which employer established the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C.Cir. 1990); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(dec. on recon.).

[2]Employer notified the parties of its bankruptcy on September 30, 1996; subsequently, employer's former counsel's motion to withdraw due to employer's bankruptcy and the law firm's lack of authority to act on employer's behalf was granted. 20 C.F.R. §802.219.

Where, as in the instant case, it is uncontroverted that 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 clamant 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 & Shipbuilding 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).

Claimant initially contends that the administrative law judge erred in determining that employer established the availability of suitable alternate employment. The Board thoroughly considered and addressed claimant's contentions in this regard in its previous decision, and claimant has raised no basis for the Board's departing from the law of the case doctrine. *See Arizona v. California,* 460 U.S. 605 (1983); *Ricks v. Temporary Employment Services,* 33 BRBS 81 1999); *Ortiz v. Todd Shipyards Corp.,* 25 BRBS 228 (1991). Claimant's contention therefore is rejected, and the decision that employer established the availability of suitable alternate employment is affirmed.

Claimant summarily asserts that the administrative law judge erred in concluding that he did not diligently seek employment post-injury. Specifically, claimant avers that

> Assuming that the employer has satisfied their burden the claimant has an opportunity to offer evidence that he looked for work and was unsuccessful. Firstly, it would be demonstrated initially that the employer has satisfied their burden. The claimant contends that the employer has not satisfied their initial burden and, therefore, the claimant's diligence in determining employment is immaterial. [The administrative law judge] found that the claimant did not exercise diligence in his job search and, therefore, the evidence of his job search was not considered. Specifically, [the administrative law judge] found that the claimant used a cane or other brace in seeking employment opportunities to therefore discourage prospective employers from hiring him.

Brief at 4-5. Initially, we note that where, as in this case, claimant is represented by counsel, the mere assignment of error is insufficient to invoke Board review. *Carnegie v. C & P Telephone Co.,* 19 BRBS 57 (1986). Claimant's statement on this issue fails to cite any

relevant law or identify any error in the administrative law judge's consideration of the evidence and, therefore, fails to raise any substantial issue for review. *See Oceanic Butler, Inc. v. Nordahl* , 842 F.2d 773, 21 BRBS 33 (CRT)(5th Cir. 1988). Contrary to claimant's general allegation, moreover, the administrative law judge on remand did fully address claimant's contention that he diligently yet unsuccessfully sought employment post-injury. In this regard, the administrative law judge first stated that claimant's physicians found the proffered positions to be within clamant's physical restrictions. Next, the administrative law judge noted that no documentation regarding the dates on which claimant allegedly sought employment had been submitted into evidence, nor was the testimony of any of those individuals who claimant stated accompanied him on these searches procured. Moreover, the administrative law judge found that claimant's consistent use of a cane and/or brace when visiting prospective employers, although videotapes demonstrated that claimant did not use such devices when at home, was "an exaggeration by which claimant conveys the impression that he suffers greater physical limitations than he actually experiences." *See* Decision and Order at 4.

Thus, the administrative law judge properly recognized that it is claimant's burden to establish that he diligently sought employment. Based upon his evaluation of claimant's efforts, the administrative law judge concluded that claimant did not meet this burden. The administrative law judge's finding that claimant did not diligently seek employment is rational and supported by the record. As claimant has thus not shown that he was unable to find work within the ambit of the suitable alternate employment identified by employer, the finding that he is not totally disabled is affirmed. *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.,* 22 BRBS 104 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge