BRB No. 02-0283

WAYNE G. SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ADVANTAGE FINANCIAL GROUP	)	DATE ISSUED: Dec. 19, 2002
	)	
Employer-Respondent	)	DECISION and ORDER

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

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

Mark K. Eckels (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-2232) 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 if they 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 sustained a work-related injury to his right knee and shoulder on October 29, 1997. Dr. Lucie, an orthopedic surgeon and claimant=s treating physician, performed a right shoulder arthroscopy, decompression, joint debridement and rotator cuff repair in 1998, and another rotator cuff repair in 1999. Dr. Lucie ultimately opined that claimant attained maximum medical improvement with respect to his shoulder on June 10, 1999. Employer paid temporary total disability

compensation to claimant from October 30, 1997, through November 20,1999. 33 U.S.C. '908(b). After that date, employer paid claimant permanent partial disability compensation for a $367.44 loss in wage-earning capacity.[1] Claimant subsequently sought permanent total disability compensation under the Act. In his Decision and Order, the administrative law judge found that employer established the availability of suitable alternate employment as of November 9, 1999, and that claimant did not diligently seek employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from October 30, 1997, through November 9, 1999, and permanent partial disability compensation thereafter.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment; alternatively, claimant avers that the administrative law judge erred in determining that he was not diligent in seeking employment post-injury. Employer responds, urging affirmance of the administrative law judge=s decision.

Claimant challenges the administrative law judge=s finding that employer established the availability of suitable alternate employment as of November 1999. Specifically, claimant contends that, at a minimum, he is entitled to permanent total disability compensation benefits until August 2001, when Mr. Capps submitted an updated labor market survey. We disagree. Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Roger=s Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting).

In the instant case, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based

[1]The administrative law judge found that claimant sustained a two percent impairment to his lower right extremity under the schedule for the knee injury, and this finding is not challenged on appeal.

upon the report prepared by Mr. Hickey on November 9, 1999. In rendering this determination, the administrative law judge found that most of the employment positions enumerated in employer=s job search are well within claimant=s medical limitations set out by Dr. Lucie. The administrative law judge also considered claimant=s ability to perform post-injury work in light of his age and education, but found that these limitations would not prevent claimant from obtaining post-injury employment of a sedentary nature at the entry level. In this regard, the record reflects that Dr. Lucie approved three of the four positions identified as being suitable for claimant by Mr. Hickey in September and October 1999, for which the requirements were set out in detail: 911 Operator, Dispatcher for Snyder Air Conditioning, and Alarm Monitor for Kentronics Security System. Dr. Lucie did not approve the job of meter reader for a water company. CX 2 at 10.

We affirm the administrative law judge=s finding that employer established the availability of suitable alternate employment. It is well-established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). In the instant case, Mr. Hickey=s labor market surveys, and the approval of the identified positions by Dr. Lucie, establish that multiple positions are available within claimant=s physical restrictions. While claimant on appeal challenges the lack of specificity about the jobs listed in Mr. Capps=s August 2001 labor market surveys, *see* EX 4 to Capps=s Deposition, the administrative law judge found that employer established the availability of suitable alternate employment based on the aggregate of Mr. Hickey=s November 1999, December 1999, and January 2000 labor market surveys. Moreover, in finding suitable alternate employment established, the administrative law judge considered claimant=s alleged hygiene problem and found that it was not an insurmountable impediment to claimant=s ability to obtain a job and work. It follows that the administrative law judge=s finding that claimant is capable of performing the identified jobs is supported by substantial evidence and consistent with law. *See Wilson*, 22 BRBS 459; *Jones v. Genco*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge=s finding that employer has established the availability

[2]Employer offered the deposition of Albert Mark Capps, who testified that Mr. Hickey had been responsible for conducting the vocational assessment of claimant prior to him and prepared the labor market surveys in November 1999. Mr. Capps conducted a labor market survey in August 2001.

[3]Additionally, the record reflects that Dr. Lucie approved employment as an unarmed security guard with Giddens Security. *See* CX 2.

of suitable alternate employment, and his consequent award of partial disability benefits to claimant as of November 9, 1999. As we hold that employer has established the availability of suitable alternate employment on that date, we need not address claimant=s contentions with regard to Mr. Capps=s August 2001 labor market survey.

Lastly, claimant contends that the administrative law judge erred in failing to sufficiently consider whether he diligently sought employment post-injury. We reject this argument. A claimant may rebut employer=s showing of suitable alternate employment, and thus retain entitlement for total disability benefits, by demonstrating that he diligently tried but was unable to secure alternate employment post-injury. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Roger=s Terminal,* 781 F.2d 687, 18 BRBS 79(CRT); *Berezin v. Cascade General, Inc.,* 34 BRBS 163 (2000). In the instant case, claimant testified that he followed up on job leads which employer provided at the end of 1999, and that his wife took notes documenting his attempt to contact the employers set forth in employer=s labor market survey. *See* Tr. at 36-37, 52. In support of his testimony, claimant submitted into evidence handwritten notes reflecting that he contacted two employers on October 19, 1999, four employers on November 23, 1999, and another two employers on December 20, 1999. *See* CX 3. Claimant also testified that he contacted several potential employers in August 2001, but that he did not look for work between December 20, 1999, and August 2001. Tr. at 39-41. In finding that claimant was not diligent in seeking employment, the administrative law judge cited claimant=s admission that he looked for employment post-injury merely to please the attorneys involved. Tr. at 41. The administrative law judge in this case found that employer established the availability of suitable alternate employment in November 1999. The hearing was held on August 28, 2001. During this period, claimant documented inquiring into nine employment positions in October, November and December 1999, and five positions during August 2001. Claimant made no employment efforts, however, during the intervening nineteen months. Thus, the administrative law judge properly recognized that it is claimant=s burden to establish due diligence and rationally found, based upon his evaluation of claimant=s efforts, that claimant did not meet this burden. Accordingly, the administrative law judge=s finding that claimant did not establish that he was diligent in seeking alternate employment is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge