



BRB No. 15-0271

ROBERT G. HOBBS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SERVICE EMPLOYEES)	DATE ISSUED: <u>Dec. 9, 2015</u>
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

James L. Azzarello, Jr. (Thomas & Associates), Chicago, Illinois, for employer/carrier.

Before: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2014-LDA-00531) of Administrative Law Judge Pamela J. Lakes 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant fell and injured his left hip on October 14, 2011, during the course of his employment for employer as a driver in Iraq. Claimant underwent six hip surgeries, as he contracted MRSA after his initial hip replacement surgery. The parties stipulated that claimant’s hip condition reached maximum medical improvement on December 16, 2013, and that claimant thus is permanently disabled. Decision and Order at 3. Claimant found work in North Carolina, where he resides, as a dump truck driver in April 2014; he was terminated in August 2014 when the employer learned he had work restrictions against working overtime. Tr. at 24-26; CX 8. Claimant sought compensation for permanent total disability except for his period of employment as a truck driver.

The only issue before the administrative law judge was the extent of claimant’s permanent disability. In her decision, the administrative law judge credited the work restrictions imposed by claimant’s treating physician, Dr. Wellman.¹ Decision and Order at 10; *see* EX 6 at 3. The administrative law judge found that claimant’s restrictions preclude his return to his usual work. Employer submitted a labor market survey that identified 12 alternate positions, which Dr. Wellman approved as physically suitable for claimant. EXs 7, 8. The administrative law judge found that employer established the availability of suitable alternate employment based on two positions as a dispatcher and equipment operator, which were located near claimant’s residence in North Carolina. The administrative law judge found that, “it is clear there are some jobs that [claimant] could realistically compete for.” Decision and Order at 12-15. However, the administrative law judge rejected two supply technician positions in Kuwait as evidence of suitable alternate employment because they are too physically demanding and are not located in claimant’s geographic area. *Id.* at 13. The administrative law judge found that claimant applied to positions identified by employer in its labor market survey and, in some cases, sought other available positions with the identified employers. *Id.* at 15. Moreover, the administrative law judge found that claimant’s obtaining the dump truck driving job is evidence of his motivation to work. *Id.* Accordingly, the administrative law judge found that claimant exercised due diligence in his unsuccessful job search. The administrative law judge thus found that claimant rebutted employer’s showing of suitable alternate employment, and she awarded claimant compensation for ongoing permanent total disability, except for the post-injury period during which he was employed, when she awarded permanent partial disability benefits. *Id.*; *see* 33 U.S.C. §908(a), (c)(21).

¹ These restrictions are: no working in a war zone, no lifting over 100 pounds, no prolonged sitting over 45 minutes, and no prolonged walking over 30 minutes. EX 6 at 3.

On appeal, employer challenges the administrative law judge's finding that the supply technician positions it identified as available in Kuwait do not also constitute suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in rejecting the two positions in Kuwait, noting that Dr. Wellman approved them as physically suitable for claimant and that, pursuant to *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003), overseas positions may be evidence of suitable alternate employment in this case because claimant had been continuously employed in Iraq for approximately five years prior to the work injury.

Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to perform his usual employment duties due to his work injury, the burden shifts to employer to establish the availability of suitable alternate employment. See *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); see also *Del Monte Fresh Produce v. Director, OWCP [Gates]*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009). Employer must establish the availability of realistic job opportunities which claimant is capable of performing considering his age, education, work experience and physical restrictions. *Turner*, 661 F.2d at 1042, 14 BRBS at 165. Claimant can rebut employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), cert. denied, 479 U.S. 826 (1986); see *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

We reject employer's contention that the administrative law judge erred in discounting the two available supply technician jobs in Kuwait. The administrative law judge fully discussed employer's contention and rationally found the Board's decision in *Patterson*, 36 BRBS 149, is not controlling in this case.² Decision and Order at 14. The

² In *Patterson*, also a Defense Base Act case, the claimant was injured in Moscow. Before his employment in Moscow, the claimant had worked for employer in Mozambique, Nigeria, South Africa, Chile, Kazakhstan, Ukraine, and Finland. After his injury, the claimant again obtained work in Nigeria with a different employer. The Board held, based on the unique facts of the case, that the relevant labor market for purposes of establishing the availability of suitable alternate employment included both the Missouri area in which the claimant maintained a residence and the overseas locations where suitable jobs similar to those claimant had performed were available. *Patterson*, 36 BRBS at 153-154. The Board affirmed the rejection of jobs in Washington, D.C., because they would have required that the claimant relocate his permanent residence and

administrative law judge properly noted that *Patterson* does not stand for the proposition that employers in Defense Base Act cases can always attempt to show the availability of suitable alternate employment in overseas locales. Rather, the Board noted that the “relocation” cases have some relevance to the issue of suitable alternate employer in such cases.³ *Patterson*, 36 BRBS at 153. The administrative law judge found that unlike Claimant Patterson, claimant, who worked in North Carolina before his work in Iraq, returned to his home after his injury, obtained work there, and manifested no intent to again obtain work overseas. *Id.* The administrative law judge rationally found this case distinguishable from *Patterson*, and therefore she did not err in discounting the two jobs in Kuwait on the basis of their geographic locale. Thus, we reject employer’s contention of error in this regard.⁴ *See Obadiaru v. ITT Corp.*, 45 BRBS 17, 22 n.7 (2011).

We note, moreover, that, with respect to the identified jobs in North Carolina, employer has not challenged on appeal the administrative law judge’s finding that claimant conducted a diligent, but unsuccessful, search for post-injury employment within the ambit of jobs shown to be suitable and available. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Therefore, we affirm the award of permanent total disability benefits. *See Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).

did not include travel and expense money or other benefits characteristic of overseas employment. *Id.*

³ In instances where the claimant relocates to a new community following an injury, the courts have held that the administrative law judge should determine the relevant labor market after considering such factors as claimant’s residence at the time he filed a claim for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in that community as opposed to those in his former residence, and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. *See Wood v. U.S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Holder v. Texas Eastern Products Pipeline, Inc.*, 35 BRBS 23 (2001).

⁴ Therefore, we need not address employer’s contention that the administrative law judge erred in also finding the positions in Kuwait were beyond claimant’s physical capabilities.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge