BRB No. 91-1105

WILLIAM R. RANDALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDTOWN MOTORS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CNA INSURANCE CARRIERS	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Samuel B. Groner, Administrative Law Judge, United States Department of Labor.

Stuart L. Plotnick, Silver Spring, Maryland, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (90-DCW-28) of Administrative Law Judge Samuel B. Groner 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 Longshore Act), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973) (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, an automobile mechanic, twisted his back while working for employer on April 14, 1981. As a result of this accident, claimant exhibited severe radiculopathy at the L-5 level of his spine. Claimant was treated by Dr. Conant, an orthopedic surgeon, who assigned him a permanent physical impairment rating of 20 percent on November 4, 1986. Dr. Conant further concluded that although claimant could not perform his previous occupation as an automobile mechanic, he was capable of performing light duty work. Claimant underwent vocational rehabilitation and Lynn

Bacon, employer's vocational specialist, took him to Micro Systems, Incorporated (Micro Systems) for possible job placement.[1] Claimant spoke with the personnel director at Micro Systems who told him that the company would not consider him for a position without a high school diploma.[2] After obtaining his G.E.D. claimant returned to Micro Systems, where he again met with the personnel director and interviewed with another company representative for an entry level assembly position. The dispute in this case below arose from the circumstances of this interview. Employer contended that the assembly job at Micro Systems was sufficient to meet its suitable alternate employment burden and that claimant had voluntarily limited his income by effectively refusing this job offer by demanding too high a salary at the time he was interviewed. Claimant essentially responded that despite his good faith effort to obtain the Micro Systems job, he never was given a job offer and that his other efforts at obtaining alternate employment on his own have also proven unsuccessful. Employer voluntarily paid claimant temporary total disability compensation until February 7, 1990, when it learned that claimant had previously been injured in an accident in 1988, when a vehicle he was driving overturned.[3]

Crediting claimant's account of the circumstances surrounding the interview, the administrative law judge found that claimant did not voluntarily limit his income by sabotaging the interview. Although employer asserted that claimant had effectively eliminated himself from consideration by indicating that he had a salary expectation of twenty to thirty thousand dollars, the administrative law judge credited claimant's testimony that the reference to twenty or thirty thousand dollars was made in response to the interviewer's question about his previous salary and not as a requirement for the position with Micro Systems. The administrative law judge further concluded that claimant's responses to the interviewer were not a sly or sophisticated plan to foreclose a job offer and that it did not appear that any job offer was actually ever made. Finally, the administrative law judge noted that a serious question existed, in any event, regarding whether the job in question, which required sitting all of the time, was suitable for claimant given his physical limitations. He therefore determined that employer had not met its burden of establishing the availability of suitable alternate employment and awarded claimant permanent total disability compensation commencing November 4, 1986, based on Dr. Conant's permanency assessment on that date.

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[1]In his deposition, claimant refers to the person who took him to Micro as Annette Cow. *See* Cl. Depo. at 23.

[2]Again, the personnel director is referred to variously as Meg White and Meg Brown. *See* Cl. Depo. at 23; Tr. at 36.

[3]Employer does not argue on appeal that the 1988 accident was an intervening cause of claimant's disability.

On appeal, employer contends that although it does not take issue with the administrative law judge's finding that claimant did not voluntarily limit his income, his finding that claimant is totally disabled is not supported by substantial evidence. Employer asserts that because Dr. Conant assigned claimant a 20 percent permanent impairment and advised him to seek light-duty employment, claimant is at most partially disabled. Employer further maintains that because its vocational rehabilitation efforts combined with claimant's obtaining a G.E.D. diploma led to a viable job lead with Micro Systems, it met its suitable alternate employment burden and that in finding claimant permanently totally disabled, the administrative law judge only considered this evidence in light of the voluntary limitation of income allegation, and not in the context of the nature and extent of claimant's disability.

We reject employer's arguments. In this case, as it is undisputed that claimant could not perform his former job as an auto mechanic, claimant established a *prima facie* case of total disability. The burden accordingly shifted to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Lacey v. Raley's Emergency Road Service*, 23 BRBS 432, *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991). Contrary to employer's assertions, Dr. Conant's opinion that claimant has a 20 percent permanent physical impairment and can perform light work, does not limit claimant to an award of permanent partial disability compensation; disability is an economic as well as medical concept. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69, 74 (CRT) (D.C. Cir 1990); *McBride v. Eastman Kodak Co.*, 844 F.2d 797, 798, 21 BRBS 45, 47 (CRT)(D.C. Cir. 1988), *citing Crum v. General Adjustment Bureau*, 738 F.2d 474, 479, 16 BRBS 115, 122 (CRT)(D.C. Cir. 1984). *See also Stevens v. Director, OWCP*, 909 F.2d 1256, 1259, 23 BRBS 89, 93-94 (CRT)(9th Cir. 1990). Moreover, the administrative law judge acted reasonably in questioning the suitability of the assembly position which required sitting all day; claimant's treating physician, Dr. Conant, indicated that claimant was limited to intermittent sitting and claimant testified that he could not sit for very long.

Finally, we note that even if employer shows the availability of suitable alternate employment, claimant can nevertheless prevail in establishing his right to permanent total disability compensation if he demonstrates that he diligently sought but was unable to secure the alternate employment identified. *See Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986). In this case, the administrative law judge's finding that claimant did not voluntarily limit his income by sabotaging the interview is supported by substantial evidence, and employer does not challenge this finding on appeal. We therefore affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits on the facts presented. Employer's assertion that the administrative law judge erred in awarding claimant permanent total disability compensation because he only considered the evidence in the context of its allegation of income limitation is simply without merit given the administrative law judge's findings of fact. Because the administrative law judge's award of permanent total disability compensation in this case is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See O'Keeffe*, 380

U.S. at 363-364; *see generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1992).

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge