BRB No. 92-1949

BERNARDO MENDOZA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARINE PERSONNEL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Additional Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Ronald J. Kormanik (Mafrige & Kormanik, P.C.), Houston, Texas, for claimant.

Christopher R. Hart (Fulbright & Jaworski), Houston, Texas, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Awarding Additional Benefits (91-LHC-843) of Administrative Law Judge Kenneth A. Jennings 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

On November 14, 1987, claimant fell from a scaffold and injured his back, legs and abdomen while working for employer as a welder/fitter. Failing to respond to conservative

treatment, claimant underwent a laminectomy on April 5, 1988. Although claimant initially responded well to the surgery, it ultimately was not successful in relieving claimant's pain, and additional back surgery was performed on August 30, 1989. Claimant has not worked since the November 14, 1987, injury. Employer voluntarily paid claimant temporary total disability compensation from the date of his injury until the date of a formal hearing on September 12, 1991. *See* 33 U.S.C. §908(b). Employer also voluntarily paid claimant's medical expenses. *See* 33 U.S.C. §907. Claimant sought continuing total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that although it was undisputed that claimant was unable to perform his usual work as a welder/fitter, employer met its burden of establishing the availability of suitable alternate employment through the testimony of its vocational expert, Mr. Quintanilla, who identified two specific available light duty positions for a food production worker and production worker which were compatible with claimant's physical limitations. The administrative law judge further determined that as claimant had not exercised due diligence in attempting to secure alternate employment, he was limited to an award of permanent partial disability compensation commencing August 28, 1991, the date of Mr. Quintanilla's labor market survey, based on two-thirds of the difference between his stipulated average weekly wage of $192 and his $170 post-injury wage-earning capacity in the alternate minimum wage level work identified. *See* 33 U.S.C. §908(c)(21). Claimant appeals the administrative law judge's denial of permanent total disability compensation, arguing that as there was conflicting medical evidence in the record regarding claimant's ability to perform light duty work, the administrative law judge should have considered and resolved the evidentiary conflict based on claimant's testimony, thereby resolving all factual doubt in his favor. Employer responds, urging that the administrative law judge's denial of permanent total disability compensation be affirmed. Claimant replies that it is unrealistic to assume that any employer would be willing to hire him in light of the physical limitations imposed by Dr. Padgett and that Dr. Padgett's testimony in conjunction with his own establishes that he is incapable of working.

Once claimant establishes that he is unable to perform his usual work, he has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of suitable alternate employment. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991). In order to meet this burden, employer must show the existence of realistic job opportunities available to claimant within the geographical area where he resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-165 (5th Cir. 1981). *See P&M Crane*, 930 F.2d at 430, 24 BRBS at 120 (CRT); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145-146 (1991); *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991).

In concluding that employer met its suitable alternate employment burden in this case, the administrative law judge credited the testimony of Mr. Quintanilla, employer's vocational expert. After evaluating claimant, Mr. Quintanilla conducted a labor market survey and identified several

available minimum wage light duty positions consistent with the physical restrictions described in Dr. Padgett's April 23, 1990, report. Mr. Quintanilla also identified a number of medium duty jobs based on the projection of employer's physician, Dr. Moore, that claimant could perform such work upon the completion of a work hardening program. After considering both doctors' medical opinions, the administrative law judge found that Dr. Padgett's opinion was entitled to greater weight than Dr. Moore's opinion, reasoning that his status as claimant's treating physician placed him in a better position to assess claimant's capabilities than Dr. Moore, who examined claimant only once to ascertain his ability to return to work. The administrative law judge further determined that although Mr. Quintanilla identified medium duty jobs based on Dr. Moore's projection of claimant's potential capabilities upon completion of a work hardening program, such work was not suitable for claimant as Dr. Padgett expressly indicated that claimant was not a candidate for, and that he would not give permission for, participation in such a program.

While recognizing that claimant disputed the fact that he is able to work, the administrative law judge found that claimant had mischaracterized Dr. Padgett's testimony in his post-hearing brief as indicating that claimant was unable to work. The administrative law judge noted that while Dr. Padgett did testify on direct examination that claimant was unable to work, he later contradicted himself on cross-examination by assigning claimant restrictions. Because the restrictions described by Dr. Padgett on cross-examination corresponded to the light duty restrictions which Dr. Padgett had previously assigned claimant in a April 23, 1990, report written at the time claimant reached maximum medical improvement, the administrative law judge discounted Dr. Padgett's testimony on direct examination. Crediting Dr. Padgett's testimony on cross-examination, the administrative law judge thus concluded that claimant was capable of performing light duty work.

Specifically, the administrative law judge determined that although claimant could not engage in repetitive bending or stooping, he could lift 10 pounds repetitively, lift up to 20 pounds intermittently, sit for 30 minutes, and stand for 1 hour.[1] The administrative law judge then determined that of the seven actual available jobs which Mr. Quintanilla identified in his labor market survey, two were compatible with Dr. Padgett's physical restrictions, *i.e.*, the food production worker and production line worker positions. The administrative law judge further determined that because both of the relevant employers had reviewed claimant's profile and indicated a willingness to consider him, such work was realistically available to claimant. Finally, the administrative law judge determined that inasmuch as the record showed that claimant did not apply for any jobs after his work-related injury, claimant failed to establish that he was diligent in attempting to secure suitable alternate employment.[2] The administrative law judge accordingly found that claimant was not permanently totally disabled and awarded him permanent partial disability compensation based on the two-thirds of the difference between his pre-injury average weekly wage and his post-injury wage-earning capacity in the alternate employment identified.

[1]The administrative law judge also concluded that although claimant argued that his ability to work was limited by depression resulting from the work injury, there was no evidence to support this conclusion as no psychiatric or psychological reports were offered into evidence. This finding is not challenged on appeal.

[2]The administrative law judge's finding that claimant failed to exercise due diligence in seeking to obtain alternate employment is not challenged on appeal.

The administrative law judge thoroughly discussed and weighed the evidence in this case.[3] His finding that claimant is not permanently totally disabled is rational and supported by substantial evidence. As claimant has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting medical evidence and making credibility determinations, we affirm this determination. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the administrative law judge's Decision and Order awarding claimant permanent partial disability compensation is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[3]Although claimant asserts that the administrative law judge erred in failing to consider and resolve all factual doubt in his favor based on his testimony, we disagree. Contrary to claimant's assertions, the administrative law judge did consider claimant's testimony in evaluating the evidence. Moreover, the "true doubt" rule is inapplicable as the administrative law judge did not find the evidence to be in equipoise; the mere presence of conflicting evidence does not mandate a conclusion that there are doubts which must be resolved in claimant's favor. *See Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991), *aff'd mem sub nom. Wright v. Director, OWCP*, No. 92-70045 (9th Cir. Oct. 6, 1993).