BRB No. 90-1261

EUGENE E. SHANER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEALAND SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Denying Petition for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Mark C. Wagner, Tacoma, Washington, for claimant.

Russell A. Metz (Witherspoon, Kelley, Davenport & Toole, P.S.), Seattle, Washington, for employer/carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Petition for Reconsideration (88-LHC-3020) of Administrative Law Judge Alexander Karst 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*. 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).

On October 2, 1985, claimant injured his right knee, shoulder and fifth finger during the course of his employment as a loader/checker for employer. Employer voluntarily paid claimant temporary total disability compensation and medical benefits under the Act. *See* 33 U.S.C. §§907, 908(b). On January 12, 1987, claimant's treating physician approved his return to work with restrictions; specifically, claimant was advised to avoid lifting more than 10 pounds above chest

level. EX 2 at 18. Employer subsequently contracted with Carolyn Prosser, a vocational consultant, to identify occupations suitable for claimant and to conduct a labor market survey. After an interview and testing of claimant and a review of his medical file, Ms. Prosser identified a number of specific job openings in March 1987, which she believed claimant was capable of performing. EX 7 at 35-42. On June 30, 1987, claimant's treating physician reviewed Ms. Prosser's labor market survey and approved, as within claimant's work restrictions, twenty-two of the twenty-three specific job openings. EX 7 at 78-79. Subsequently, on July 6, 1987, employer controverted claimant's entitlement to additional benefits under the Act. EX 1 at 4.

In his Decision and Order, the administrative law judge implicitly determined that claimant is incapable of performing his usual employment duties with employer, that claimant reached maximum medical improvement, and that employer has established the availability of suitable alternate employment. Accordingly, the administrative law judge denied claimant's claim for permanent total disability compensation. Claimant's subsequent motion for reconsideration was summarily denied by the administrative law judge.

On appeal, claimant contends that the administrative law judge erred in failing to find that he is totally disabled as a result of his work-related conditions. Employer responds, urging affirmance.

Initially, claimant contends that the administrative law judge erred in failing to resolve all doubtful questions of fact in his favor. We disagree. Subsequent to the filing of claimant's appeal, the United States Supreme Court has held that the "true doubt rule" does not apply to cases under the Longshore Act because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which requires that the party seeking the award bear the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994). Thus, we hold that the administrative law judge committed no error in failing to resolve all doubtful questions of fact in claimant's favor.

Claimant next contends that the administrative law judge erred in failing to find that he is totally disabled as a result of his work-related conditions. It is well-settled that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). When claimant is unable to return to his usual employment, as in the instant case, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). 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. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish actual, not theoretical, job opportunities; however, the employer need not actually obtain a job for claimant. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. *See Anderson v. Lockheed Shipbuilding and Construction Co.*, BRBS , BRB No. 91-1967 (Oct. 27, 1994).

In the instant case, employer presented the testimony of Ms. Prosser, a vocational counselor, who set forth twenty-three specific employment opportunities which she found appropriate for claimant based upon claimant's age, education, background, work experience and physical restrictions. The administrative law judge credited Ms. Prosser's testimony over the testimony of Mr. Owens, claimant's vocational witness, who opined that claimant was unemployable, in concluding that employer established the availability of jobs within claimant's physical restrictions which claimant could secure if he diligently tried to obtain employment.[1] *See* Decision and Order at 4. It is well-established that in arriving at his decision, the administrative law judge 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). Based upon the record before us, we cannot say that the administrative law judge's credibility determinations are inherently incredible or patently unreasonable. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment, as that determination is supported by substantial evidence and is consistent with law. *See generally Bumble Bee Seafoods*, 629 F.2d at 1327, 12 BRBS at 660; *Southern*, 17 BRBS at 64.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Petition for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]We note that Dr. Silver, claimant's treating physician, approved twenty-two of the twenty-three positions identified by Ms. Prosser as being within claimant's physical restrictions. *See* EX 7 at 79.