BRB Nos. 92-1962
and 92-1962A

OTIS F. DUFFEY, Sr.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED:_____)
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lee E. Wilder (Rutter & Montagna), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (88-LHC-3533, 88-LHC-3534) of Administrative Law Judge Michael P. Lesniak 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).

On August 12, 1975, claimant sustained a cervical disc injury, and on September 27, 1982, he injured his lower back; both injuries occurred during work for employer as a material supply clerk. After each of the injuries, claimant was unable to work for a period of time, but returned to the shipyard thereafter performing light duty work as a material supply clerk. During the periods of disability immediately following the two injuries, employer voluntarily paid claimant temporary total disability benefits. It is undisputed that claimant filed a timely claim for benefits for the 1975 injury.

Claimant lost additional time from work beginning in July 1984 due to his back condition, but returned in February 1985 to his previous work as a material supply clerk. He did not receive compensation for time lost during this period. Claimant continued working in his supply clerk job regularly from February 1985 until September 15, 1987, when he was fired allegedly for insubordination in failing to follow a supervisor's order. At that time, claimant filed an informal claim for his 1982 injury and, shortly thereafter, a grievance in an effort to get his job back. In December 1987, claimant relocated to Hudson, North Carolina. In March 1988, after claimant prevailed on his grievance, employer offered claimant the opportunity to return to his former employment at the shipyard, which claimant declined. On March 7, 1988, claimant obtained a job with Siecor Corporation (Siecor) as a machine operator helper, and continued to perform this job on a full-time basis until he was laid off on May 24, 1988, due to a lack of work. EX 25. Claimant sought permanent total disability compensation commencing September 15, 1987, based upon his average weekly wage at the time of the 1982 injury.

In his Decision and Order, the administrative law judge found that claimant was unable to return to his former shipyard employment, and that employer had not met its burden of establishing the availability of suitable alternate employment based on claimant's post-injury work as a material supply clerk at its facility, work available in its Material Reclamation and Assembly (MRA) Shop, or claimant's post-injury job at Siecor. The administrative law judge also determined that claimant's claim for the September 1982 back injury was time-barred pursuant to Section 13(a) of the Act, 33 U.S.C. §913(a), because claimant was aware of the September 1982 injury and its relation to his employment contemporaneous with its occurrence and did not file his claim within one year of March 23, 1983, when employer made its last voluntary payment of compensation. Accordingly, he awarded claimant permanent total disability benefits commencing September 15, 1987, based upon claimant's average weekly wage at the time of the 1975 work injury, $263.97.[1] In a Supplemental Decision and Order dated March 27, 1990, the administrative law judge granted employer Section 8(f), 33 U.S.C. §908(f), relief.

On appeal, employer challenges the administrative law judge's award of total disability compensation. Claimant responds, urging affirmance. Claimant cross-appeals, challenging the

[1]Claimant did not seek compensation for the period from March - May 1988, during which he worked for Siecor Corporation. The administrative law judge awarded employer a credit for this period.

administrative law judge's finding that the claim for the 1982 injury was time-barred pursuant to Section 13(a), and consequently his award of compensation based upon claimant's 1975 average weekly wage.[2]

Citing *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980), and *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), employer first argues that the administrative law judge erred in awarding claimant total disability compensation inasmuch as claimant lost his light duty work as a supply clerk at its facility for reasons unrelated to his disability and refused employer's subsequent offer of reinstatement after his grievance was resolved because he was too proud to accept it and had relocated to North Carolina. We conclude, however, that the reasons why claimant lost this job or refused to return to the shipyard are irrelevant on the facts presented. The administrative law judge found that assuming, *arguendo*, a job at the shipyard could constitute suitable alternate employment despite claimant's subsequent relocation to North Carolina, *see See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994), the material supply clerk position which claimant held at employer's facility was not physically suitable for claimant. This finding was based on the restrictions set forth by claimant's physicians as well as claimant's testimony that he could not physically handle the material supply clerk work, Tr. at 44, 51, 52, needed constant medication, Tr. at 40, and required help from his co-workers on numerous occasions, Tr. at 124, 150. Because the administrative law judge's finding that the light duty job as a material supply clerk at employer's facility did not constitute suitable alternate employment is rational, supported by substantial evidence, and in accordance with applicable law, we affirm this determination. *See generally Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995).

The administrative law judge's determination that employer did not establish suitable alternate employment based on work available in the MRA shop is also affirmed. The administrative law judge rationally refused to speculate on such a job based on employer's failure to introduce any evidence into the record establishing the nature of specific activities

[2]Although the Director filed an appeal with the Board challenging the administrative law judge's finding that employer is entitled to Section 8(f), 33 U.S.C. §908(f) relief, BRB No. 92-1962B, by Order dated September 2, 1993, the Board dismissed this appeal as abandoned based on the Director's failure to file a Petition for Review and brief.

involved in that job or its availability.[3] As it is employer's burden to establish the availability of suitable alternate work, and employer introduced no evidence regarding work in the MRA shop, this finding is affirmed.

Employer also argues that the administrative law judge erred in finding employer did not meet its burden based on claimant's job in North Carolina as a machine operator helper with Siecor. Employer contends that this job constitutes suitable alternate employment, as claimant held it after he left the shipyard and lost it due to a lack of work, rather than for any reasons related to his disability. The administrative law judge concluded that employer did not establish that alternate work was available in North Carolina, finding that claimant worked at Siecor from only March 7, 1988, until May 24, 1988, and was separated due to lack of work. The administrative law judge further found that claimant cannot return to Siecor and that claimant has shown beyond all doubt that he is unemployable in the area of his residence, citing CX 6, a five-page list of employers to whom claimant applied for work between July 11, 1988 and December 16, 1988. Decision and Order at 13. The administrative law judge's findings in this regard are rational, supported by substantial evidence, and consistent with the applicable law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *See See*, 36 F.3d at 375, 28 BRBS at 96 (CRT); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

In *Lentz*, the court held that in order to establish the availability of suitable alternate employment, employer must present evidence that a range of jobs exists which are reasonably available, and which the disabled employee is realistically able to secure and perform. In the present case, there is no evidence that a range of suitable work exists in North Carolina, where claimant relocated, and the administrative law judge specifically determined that the single job on which employer relies was held by claimant for only a short period of time and became unavailable to him through no fault of his own. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1539 (1994). Moreover, the administrative law judge rationally relied on a five-page list of jobs claimant attempted to obtain subsequent to moving to North Carolina, CX 6, in finding that claimant established beyond all doubt that he is unemployable in the area of his residence. Where claimant demonstrates that he diligently tried, without success, to find another job, the administrative law judge may find him entitled to total disability benefits. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *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). Thus, the administrative law judge's finding that employer did not establish the availability of suitable alternate employment in the area where claimant relocated is affirmed. *See generally See*, 36 F.3d at 375, 28 BRBS at 96 (CRT); *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990). Accordingly, the administrative law judge's award of permanent total disability compensation is affirmed.

[3]We note that employer called one witness at the hearing -- claimant's supervisor, Rosalie Damron -- but no testimony was elicited from her with regard to the MRA shop. Her testimony focused only on claimant's job duties in his usual shipyard job as a supply clerk, and on the circumstances surrounding claimant's discharge from employment. Tr. at 119-153.

Claimant cross-appeals the administrative law judge's finding that the September 15, 1987, claim for the 1982 back injury was untimely filed pursuant to Section 13(a). Citing *Stancil v. Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970), claimant argues that inasmuch as he was not aware that he sustained an impairment of his earning capacity until after the shipyard released him and he began searching for work, the September 15, 1987, claim is timely.

Section 13(a) states that a claim is barred unless filed within one year after the injury or death and further provides that if compensation is voluntarily paid, "a claim may be filed within one year after the date of last payment. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." 33 U.S.C. §913(a). The Board has thus held that the portion of Section 13(a) allowing claimant to file a claim within one year of the last voluntary payment does not supersede the provision stating that the time limit does not run until claimant is "aware" of his injury. *See Morales v. General Dynamics Corp.*, 16 BRBS 293 (1984), *rev'd on other grounds sub nom. Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 17 BRBS 130 (CRT)(2d Cir. 1985); *see also Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

We are unable to affirm the administrative law judge's finding that the September 1987 claim was untimely. In the present case, the administrative law judge found that because claimant was aware or should have been aware of the relationship between the September 27, 1982, injury and his employment as of the time of its occurrence, and there had not been any allegation of misdiagnosis or missed prognosis by the claimant, the claim had to have been filed no later than one year after March 23, 1983, when employer made its last voluntary payment of compensation.[4] A claimant, however, may not be charged with awareness for purposes of Section 13(a) until he knows or has reason to know that he has sustained a injury which is likely to impair his wage-earning capacity; claimant must be aware of the true nature and extent of his condition and its relation to his employment. *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *Accord Duluth, Missabe & Iron Range Ry. Co. v. Director, OWCP*, 43 F.3d 1206 (8th Cir. 1994); *Abel v. Director, OWCP*, 932 F.3d 819, 24 BRBS 130 (CRT)(9th Cir. 1991); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127 (CRT) (9th Cir. 1990); *Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990). Moreover, contrary to the administrative law judge's determination, there need not be an initial misdiagnosis or erroneous prognosis in order to toll the Section 13(a) statute of limitations. *Parker*, 935 F.2d at 25, n. 5, 24 BRBS at 108 n. 5 (CRT); *Brown*, 893 F.2d at 294, 23 BRBS at 22 (CRT). Inasmuch as the administrative law judge's finding that the September 1987 claim is untimely does not comport with applicable law because he did not consider when claimant became aware of a permanent injury likely to impair his wage-earning capacity, we vacate this finding and remand for him to reconsider this issue in accordance with the appropriate legal standard.

[4]The administrative law judge further noted that the fact that claimant could not walk after this injury until he returned to work in 1983 should have alerted him that he was "injured." Decision and Order at 16.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge