BRB No. 93-1336

HARVEY E. WHITLOW	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: _____
	)	
	)	
GENERAL DYNAMICS CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

William H. Troupe (Hislop, Carney and Troupe), Boston, Massachusetts, for claimant.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (92-LHC-1733) of Administrative Law Judge Anthony J. Iacobo rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act as amended in 1984, 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).

Claimant, working as a ship fitter, sustained an injury on August 31, 1987 when a steel plate weighing 500-600 pounds fell, fracturing the first toe on his left foot. He was diagnosed with deep venous thrombosis secondary to the treatment for the fractured toe, and experiences resulting pain and swelling in his left leg, ankle and foot. Claimant, who has not worked since the accident, sought temporary total and permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that inasmuch as the medical opinions of record are unanimous that claimant is unable to return to his former work at the shipyard, claimant established a *prima facie* case of total disability. Crediting the testimony of

employer's vocational expert, Ms. Mountcastle, over that of claimant's expert, Mr. Blatchford, the administrative law judge further found that employer met its burden of establishing the availability of suitable alternate employment, and that claimant failed to meet his complementary burden of diligently seeking alternate work. Accordingly, he awarded claimant temporary total disability benefits from September 1, 1987 until September 11, 1989, the date of maximum medical improvement; permanent total disability benefits from September 12, 1989 until November 24, 1992, the date suitable alternate employment was shown to be available; and scheduled permanent partial disability under Section 8(c)(2), (19), 33 U.S.C. §908(c)(2), (19), thereafter for a 15 percent loss of use of the left leg, based upon Dr. Friedman's disability assessment. The administrative law judge also determined that employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief.

On appeal, claimant challenges the administrative law judge's finding that the jobs identified by employer's vocational expert were physically suitable as well as his finding that claimant failed to establish reasonable diligence in seeking alternate employment. Employer responds, urging affirmance. Claimant replies, reiterating the arguments made in his Petition for Review.

Where, as in the instant case, claimant has established a *prima facie* case of total disability, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing. *See CNA Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). If employer makes such a showing, claimant may nonetheless prevail in establishing entitlement to total disability benefits if he demonstrates that he diligently tried and was unable to secure alternate work. *Rogers 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).

Upon review of the administrative law judge's Decision and Order in light of the record evidence, we affirm his finding that the sedentary desk jobs identified by employer's vocational expert were physically suitable for claimant. While claimant argues that the alternate jobs identified do not constitute suitable alternate employment because they fail to account for his need to keep his leg elevated during most of the day, we disagree. Based upon Dr. Hayes's opinion that claimant would be "quite capable of performing light selected employment which was basically sedentary, but would allow him to get up and walk about at times," employer's vocational expert, Ms. Mountcastle, conducted a labor market survey and identified the availability of a number of sedentary, desk-type security guard and parking garage attendant positions which she considered consistent with claimant's transferable skills and physical capacity. In determining that employer established the availability of suitable alternate employment based on this testimony, the administrative law judge explicitly noted that Drs. Goodman, Friedman, and Hayes all agreed that claimant can perform sedentary work activity. Cx, 2; Rx. 5; Rx. 8. While all three doctors also indicated that claimant would need to elevate his leg periodically, and the administrative law judge did not explicitly consider this fact in assessing the suitability of the alternate work identified, his failure to do so on the facts presented is harmless; Dr. Friedman, whom the administrative law judge credited in determining the extent of claimant's disability, explicitly recognized that desk or office

work of a sedentary nature would accommodate claimant's restrictions, including the need to periodically elevate his leg. Rx. 5 at 5. Contrary to claimant's assertions, the fact that the need to elevate his leg was not communicated to prospective employers by the vocational expert is irrelevant since the Act does not require the vocational expert to contact prospective employers directly. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Inasmuch as the administrative law judge's finding that the alternate jobs identified were suitable for claimant is rational and supported by substantial evidence, it is affirmed. *See Hooe v. Todd Shipyards Corp.*, 21 BRBS 258, 260 (1988).

The administrative law judge's finding that claimant failed to exercise reasonable diligence in attempting to secure suitable alternate work is also affirmed. Inasmuch as claimant testified at the hearing that his employment efforts were primarily limited to applying for jobs pumping gas at gas stations, and jobs at fast food restaurants, which require prolonged periods of standing, Tr. at 57-58, and that he had not applied for any sedentary jobs, Tr. at 71, the administrative law judge reasonably found that claimant had not been diligent in seeking suitable work. *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Inasmuch as we affirm the administrative law judge's finding that claimant failed to meet his due diligence burden, his denial of permanent total disability benefits is also affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge