BRB No. 93-1633

HENRY COLEMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVENS SHIPPING COMPANY	)	DATE ISSUED:_____
	)	
Self-insured Employer	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Victor J. Chao, Administrative Law Judge, United States Department of Labor.

Henry Coleman, Jacksonville, Florida, *pro se*.

Mark K. Eckels and E. Robert Williams (Boyd & Jenerette, P.A.), Jacksonville, Florida, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (92-LHC-3370) of Administrative Law Judge Victor J. Chao 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). In reviewing this *pro se* appeal, we must affirm the findings of fact and the 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 injured his wrist while working as a latcher for employer on April 26, 1991. After receiving conservative treatment from Drs. Chappa and Switzer, Dr. Drewniany performed release surgery on September 12, 1991. On January 27, 1992, Dr. Drewniany found that maximum medical improvement had been achieved, rated claimant as having a 5 percent impairment of the right upper extremity, and released him to light duty work, indicating that claimant could lift up to 10 pounds frequently and up to 20 pounds occasionally. At the hearing, the parties stipulated that claimant had been voluntarily paid temporary total disability benefits through January 27, 1992, the date of maximum medical improvement, and permanent partial disability benefits under the schedule at the

appropriate rates. Tr. at 5.[1] Claimant sought additional temporary total disability benefits for the period between January 27, 1992 and April 13, 1992, when he returned to work.

In his Decision and Order, the administrative law judge determined that employer established that suitable alternate employment was available to claimant as of January 27, 1992, and therefore denied the additional compensation claimed. Claimant, appearing without benefit of counsel, appeals this determination. Employer responds, requesting affirmance.

After review of the Decision and Order in light of the evidence of record, we affirm the administrative law judge's denial of additional compensation. Inasmuch as claimant's work-related injury was to a scheduled member and it is undisputed that maximum medical improvement was reached as of January 27, 1992, the administrative law judge properly recognized that claimant was limited to an award of permanent partial disability under the schedule during the period in question unless he was totally disabled. *See Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212, 222 (1994)(Smith, J., dissenting on other grounds). As it is uncontested that claimant is unable to return to his usual longshoring position, claimant established a *prima facie* case of total disability and the burden shifted to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981).

[1]Claimant was represented by counsel before the administrative law judge.

Employer attempted to meet its suitable alternate employment burden in this case through the testimony of Thomas Foppiano, a vocational rehabilitation counselor. After reviewing the December 7, 1992, deposition of Dr. Drewniany, claimant's deposition, and the medical records of Drs. Switzer and Drewniany, and interviewing Ed Meadows, employer's safety director, Mr. Foppiano opined that the job of a driver at employer's facility was compatible with claimant's education, experience, and physical restrictions. A functional analysis of the physical requirements of this job was approved by Dr. Drewniany and Mr. Meadows testified at the hearing that driving jobs were available between January and April 1992. Tr. at 30-31. In addition, subsequent labor market surveys performed by Mr. Foppiano identified twenty-three other positions available in the relevant geographical area between January and June 1992 which were also approved by Dr. Drewniany. Tr. at 47; Emp. Ex. 2; Ex. B to February 12, 1993 Drewniany deposition. The jobs identified included dispatcher, hotel clerk, file clerk, and security positions. Emp. Exs. 1, 2. Crediting employer's vocational evidence, the administrative law judge determined that because suitable alternate employment was established as of January 27, 1992, claimant was not entitled to the additional temporary total disability benefits claimed. Inasmuch as the administrative law judge's finding is rational and supported by substantial evidence, we affirm his determination that employer established the availability of suitable alternate employment as of January 27, 1992 based on the aforementioned testimony.[2] *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).[3]

Once employer makes a showing of suitable alternate employment, the claimant may nonetheless prevail in establishing entitlement to total disability compensation if he demonstrates that he diligently tried and was unable to secure such employment. *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); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989) (Lawrence, J., dissenting). Although the administrative law judge did not address this issue in the present case, any error is harmless on the facts presented. Claimant, who provided the only relevant testimony, stated that although he pursued a couple of jobs based on mail referrals from the rehabilitation service by telephone, he made no attempt to pursue alternate employment on his own, except on January 27, 1992 when he

[2]Although claimant contends that Dr. Drewniany's opinion regarding claimant's ability to perform alternate work as of January 27, 1992 should not be credited because it is contrary to the "back to work" note he prepared for claimant on April 13, 1992, which proscribed use of claimant's right hand, the administrative law judge acted within his discretion in concluding that this note was written to placate claimant based upon his subjective complaints, and was not an accurate portrayal of his physical restrictions based on Dr. Drewniany's deposition testimony. February 12, 1993 deposition at 5-6. *See generally Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992).

[3]Claimant's assertion that he should have received temporary total disability benefits through late February 1992, when the labor market survey was performed fails because the administrative law judge rationally found that the alternate jobs identified were available in January 1992 based on Mr. Foppiano's hearing testimony, Tr. at 37. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on reconsideration).

went to the union hall, but was unable to secure "light work." Tr. at 13-14, 24-25. Claimant further testified that thereafter he did not go back to the union hall at any time prior to his return to work on April 13, 1992. Tr. at 16, 21-25. As claimant's testimony is insufficient to establish due diligence as a matter of law, the administrative law judge's denial of additional total disability compensation in this case is affirmed.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge