BRB No. 99-1064

JOSEPH MUHVIC	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLEVELAND STEVEDORE COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: 7/12/2000
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Muhvic, Wickliffe, Ohio, *pro se*.

Jeffrey A. Healy (Arter & Hadden LLP), Cleveland, Ohio, for employer/ carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (98-LHC-1037) of Administrative Law Judge Robert L. Hillyard 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 an appeal by claimant without counsel, we review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law; if so, they must be affirmed. *O'Keeffe v. Smith, Hinchman, & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

The parties stipulated that claimant sustained a work-related injury on February 27, 1992; that claimant was paid temporary total disability benefits beginning on February 27 at the rate of $324.90 per week, totaling $105,546.09; that employer paid medical benefits in the amount of $62,040.74; that claimant reached maximum medical improvement on May 17, 1996; and that claimant has not returned to his usual employment with employer since the date of the injury.

In his Decision and Order, the administrative law judge found that it is undisputed by the parties that claimant is unable to return to his pre-injury position as a result of the injury. The administrative law judge found that employer established the availability of suitable alternate employment on June 18, 1998, and that claimant failed to establish that he diligently sought suitable alternate employment. The administrative law judge, therefore, awarded claimant temporary total disability benefits from February 27, 1992 to May 17, 1996; permanent total disability benefits from May 17, 1996 to June 18, 1998; and continuing permanent partial disability benefits after that date. 33 U.S.C. §908(a), (b), (c)(21).

On appeal, claimant challenges the administrative law judge's denial of continuing permanent total disability benefits. Employer responds, urging affirmance.

Where, as in the instant case, claimant is unable to perform his usual pre-injury work, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must establish the availability of realistic job opportunities for which claimant, given his age, education, vocational history and physical restrictions, is able to compete and which he could realistically secure. *Id.* If employer establishes the availability of suitable alternate employment, claimant nonetheless can retain eligibility for total disability benefits if he establishes he diligently tried, but was unable to obtain, alternate employment of the general type identified by employer. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991)*; Roger's Terminal & Shipping Co. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 122 (1998).

The administrative law judge's determination that employer established suitable alternate employment is supported by substantial evidence. In the instant case, the administrative law judge rationally rejected claimant's contention that his disabling pain left him unable to perform any of the jobs on which employer relied to establish suitable alternate employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In so finding, the administrative law judge relied on the restrictions imposed by claimant's treating physician, Dr. Ockner, and employer's expert, Dr. Ungar, and the testimony of employer's vocational specialist, Ms. Burick, finding that five of the positions she identified constituted suitable alternate employment consistent with the physicians' restrictions.[1] Decision and Order at 15. Specifically, the administrative law

[1]Dr. Ockner opined that claimant could sit for three hours a day, walk for one hour per day, and stand for one hour per day. He stated claimant cannot walk any distances or carry more than a few pounds. Dr. Unger stated that claimant should be restricted to employment which required less than one hour of active walking per eight-hour day.

judge found that claimant is able to work 20 hours per week, *see generally Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 (1985), and that the following jobs from Ms. Burick's report allow for part-time work: (1) security guard for Burns International Security Systems; (2) telemarketer for Dial America; (3) telemarketer for Ameridial; (4) parking lot attendant with Metro Parking Systems; and (5) telephone attendant with Yellow Zone Cab Company.[2] Moreover, based on Ms. Burick's post-hearing submission, the administrative law judge rationally found that claimant could compete for the jobs at his age, 77. Thus, as the administrative law judge's conclusion that employer established the availability of suitable alternate employment is rational and supported by substantial evidence, it is affirmed.[3] *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Fox v. West State Inc.*, 31 BRBS 118 (1997).

In concluding that claimant failed to retain eligibility for total disability benefits through a diligent, though unsuccessful job search, the administrative law judge pointed to claimant's testimony that "he had not looked for a job since his accident." Tr. at 38. Subsequent to the hearing, claimant did contact the employers referenced in Ms. Burick's post-hearing vocational report. The administrative law judge acknowledged that claimant's concerns about the positions at Pinkerton's and Synder Staffing were valid, and for that reason the administrative law judge had previously found these positions unsuitable. Decision and Order at 15. The administrative law judge, however, gave little weight to claimant's other concerns, finding that claimant has the requisite communication skills to

[2]The administrative law judge found several other positions identified by Ms. Burick to be unsuitable for claimant given his restrictions, and rejected others due to a lack of information concerning the wages of the positions.

[3]The administrative law judge rejected the opinion of Daniel Simone that claimant is unable to engage in any gainful activity because he did not contact the potential employers to determine whether claimant could, in fact, perform the available jobs. Any error committed by the administrative law judge in this regard is harmless, inasmuch as the administrative law judge rationally credited the opinions of Dr. Ockner, Dr. Unger and Ms. Burick.

compete for the available telemarketing jobs, as underscored by Ms. Burick, who noted that claimant was both able to talk and communicate on the witness stand. The administrative law judge also stressed that claimant did not document whether he attempted to submit an application or inquire whether the employers would consider him for the vacant positions. Finally, the administrative law judge rationally determined that claimant's subjective fear or apprehension about whether he would be hired is insufficient to outweigh the evidence that he has the capacity to perform suitable, available jobs. Decision and Order at 16. Inasmuch as the administrative law judge's findings are rational and supported by substantial evidence, they are affirmed. *Mendoza*, 46 F.3d at 498, 29 BRBS at 79(CRT). We therefore affirm the administrative law judge's finding that claimant is entitled to permanent partial disability benefits from the date of the labor market survey. *See generally Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

Lastly, we affirm the administrative law judge's finding that claimant has a post-injury wage-earning capacity of $6.90 per hour, or $138 per 20-hour week, as it is rationally based on the average of the alternate jobs judged to be suitable. *See Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998); *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge