BRB No. 04-0561

GENE P. GALLAGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FEDERAL MARINE TERMINALS	)	DATE ISSUED: Mar 2, 2005
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
FRANK GATES ACCLAIM	)	
	)	
Adjuster	)	DECISION and ORDER

Appeal of the Decision and Order-Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

H. Thomas Lenz (Spector & Lenz, P.C.), Chicago, Illinois, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (2003-LHC-2093) of Administrative Law Judge Daniel J. Roketenetz 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a crush injury to his left foot in a work-related accident on August 2, 2001. Employer voluntarily paid claimant temporary total disability benefits from August 3, 2001, through January 9, 2002, and permanent partial disability benefits under the schedule thereafter. Claimant subsequently filed a claim under the Act, seeking permanent total disability compensation.

The administrative law judge accepted the parties' stipulation that claimant reached maximum medical improvement on January 9, 2002. Moreover, the administrative law judge found that claimant is unable to return to his usual employment based on Dr. Gruszka's January 9, 2002, opinion stating that claimant is unable to return to longshore employment and restricting him to medium level work. Thus, the administrative law judge shifted the burden to employer to establish the availability of suitable alternate employment. The administrative law judge found that employer did not establish suitable alternate employment by virtue of its offer to claimant of a checker position in its facility because its collective bargaining agreement with the union rendered availability of the job speculative.[1] Nonetheless, the administrative law judge found that employer established the availability of suitable alternate employment through the January 18, 2002, labor market survey of Edward Rascati, employer's vocational rehabilitation specialist. The administrative law judge found that claimant did not diligently seek suitable employment, and consequently, the administrative law judge rejected claimant's claim for permanent total disability benefits. The administrative law judge found claimant entitled to a scheduled permanent partial disability award commencing January 10, 2002, for a 22 percent impairment to his left foot, which employer had already paid.

On appeal, claimant contends that the administrative law judge erred in commencing his partial disability award as of the date of employer's January 18, 2002, labor market survey. Specifically, claimant contends that since he was not advised of this survey until February 18, 2003, he is entitled to total disability benefits until this date. Employer responds, urging affirmance of the administrative law judge's decision.

[1] The labor agreement precluded employer from hiring claimant without a physical release with no restrictions.

Disability under the Act consists of an economic as well as a medical component. *See* 33 U.S.C. §902(10); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403, 405 (2d Cir. 1961). Claimant bears the initial burden of establishing his inability to return to his usual employment due to his work-related injury. Once claimant makes such a showing, employer may establish that claimant is at most partially disabled by demonstrating the availability of other jobs claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Partial disability does not commence until the date employer establishes the availability of suitable alternate employment. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). Employer may attempt to retroactively establish that suitable alternate employment existed on the date of maximum medical improvement.[2] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

It is undisputed that claimant cannot return to his former work. Decision and Order at 7. Therefore, he has established a *prima facie* case of total disability, and the burden shifted to employer to present evidence of suitable alternate employment. *Bunge Corp.*, 227 F.3d 934, 34 BRBS 79(CRT). Claimant essentially concedes that the administrative law judge's finding of suitable alternate employment is supported by substantial evidence, Cl. Br. on App. at 5-6, but contends that his entitlement to total disability benefits continued until February 18, 2003, when employer provided him with a copy of the January 18, 2002, labor market survey.

We reject claimant's contention that employer was obligated to inform claimant of the results of the January 18, 2002, labor market survey. Employer need not act as an employment agency for claimant, place claimant in a specific job, or establish that he was offered a specific job. *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-65; *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (1984). The

[2] Claimant can rebut employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *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). We affirm the administrative law judge's finding that claimant did not diligently seek work as the finding is unchallenged on appeal.

courts and the Board have held that employer is not required to convey to claimant information about job openings. *Tann*, 841 F.2d at 543, 21 BRBS at 15(CRT); *Palombo*, 937 F.2d at 74, 25 BRBS at 6(CRT); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). The Fourth Circuit, in holding that employer need not inform claimant of job availability and that the jobs employer identifies need not be available at the time of the hearing, emphasized that the statutory standard for disability turns on claimant's *capacity* for work, and not on actual employment. *Tann*, 841 F.2d at 543, 21 BRBS at 15(CRT), citing 33 U.S.C. §908(c)(21); *see also Trans-State Dredging*, 731 F.2d 199, 16 BRBS 74(CRT).

Claimant argues that "without that bare minimum amount of information, claimant is left to canvass the entirety of the labor market to prove a diligent effort to secure alternative employment." Cl. Br. at 5. The Second Circuit, in *Palombo*, 937 F.2d at 74-75, 25 BRBS at 6-8(CRT), recognizing the limited nature of employer's evidentiary burden to establish suitable alternate employment, stated that once employer's burden is met, claimant can refute it by showing he diligently sought work without success.[3] The court stated that such a showing "may be equally or even more probative of actual job availability" than employer's labor market survey. *Id.*, 937 F.2d at 73, 25 BRBS at 6(CRT). Thus, claimant "is not required to show that he tried to get the identical jobs the employer showed were available." Rather, claimant must establish only that he was reasonably diligent in seeking employment of the type employer showed to be suitable and available. *Id.*, 937 F.2d at 74, 25 BRBS at 8(CRT). In this case, however, the administrative law judge found that claimant's job search was not diligent, and, as noted, this finding is not appealed. *See* n. 2, *supra.* Therefore, as it is well established that employer is not required to inform claimant of suitable job openings, we reject claimant's contention that his total disability did not become partial until he received employer's January 18, 2002, labor market survey.

We cannot, however, affirm the administrative law judge's finding that claimant's entitlement to total disability ended on the date of maximum medical improvement, January 9, 2002.[4] Employer's labor market survey is dated January 18, 2002, and there is no evidence on the face of the survey or in the testimony of Mr. Rascati that the jobs

[3] In *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997), the Board affirmed an administrative law judge's allowing claimant to conduct a post-hearing job search where employer first identified suitable alternate employment at the formal hearing.

[4] This issue is sufficiently raised, contrary to employer's contention, as it is subsumed in claimant's contention that, on the facts of this case, partial disability does not commence on the date of maximum medical improvement. Cl. Br. at 6.

were available before that date. EX 16; Tr. at 189-190. Claimant therefore is entitled to total disability benefits until January 18, 2002, and we accordingly modify the administrative law judge's decision. *See generally Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002).

Accordingly, we modify the administrative law judge's Decision and Order to award claimant permanent total disability benefits from January 9, 2002 until January 18, 2002. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge