



BRB Nos. 17-0545
and 17-0545A

THEODORE H. WALKER)	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	DATE ISSUED: <u>Mar. 30, 2018</u>
)	
HUNTINGTON INGALLS INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order (2016-LHC-01565, 2016-LHC-01566) of Administrative Law Judge Paul C. Johnson, Jr., 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 rational,

supported by substantial evidence, and 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 work-related injuries to both shoulders on January 20, 2007 and to both knees on December 1, 2009. He has had surgery on his shoulders and on his right knee. Employer paid claimant temporary total disability benefits for various periods between August 10, 2010 and July 7, 2014. EX 8. Employer placed claimant in its Job Club program from April 5, 2013 to September 30, 2013. Tr. at 53. This program provided educational testing and helped with job searches. *Id.* at 54. Claimant estimated that he applied for about 200 jobs during that time period but was not hired for any of those positions. *Id.*

Claimant returned to work for employer on September 22, 2013. Tr. at 55. Claimant was off work from September 2, 2015 to January 10, 2016 due to his injuries, and then returned to work on light duty. *Id.* As of March 14, 2016, employer no longer had suitable work for claimant. *Id.* He has not worked since that time. *Id.*

Claimant filed two claims for benefits, one for his shoulder injury and the other for his knee injury. *See* EXs 8, 9. The parties stipulated that claimant’s injuries arose out of and in the course of his employment. Decision and Order at 2. They also stipulated that claimant reached maximum medical improvement for his shoulder injuries on November 20, 2014 and for his knee injuries on January 11, 2016. *See id.* Claimant sought continuing permanent total disability benefits from May 3, 2016.

The administrative law judge noted that the parties agreed that claimant cannot return to his usual work and therefore established a prima facie case of total disability. Decision and Order at 18. He concluded that employer met its burden of establishing suitable alternate employment based on a labor market survey that included 15 positions within claimant’s physical abilities, which were approved by claimant’s physician, Dr. Wardell, as being appropriate provided the physical demands were within claimant’s standing and walking limitation of three hours. *Id.* at 19. The administrative law judge further found that claimant established reasonable diligence in trying to secure employment but was unsuccessful. *Id.* at 20. Accordingly, the administrative law judge found that claimant is permanently totally disabled. *Id.*

Employer appeals the administrative law judge’s finding that claimant diligently sought alternate employment. Claimant filed a response brief in support of the administrative law judge’s finding. Claimant also filed a cross-appeal, contending the administrative law judge erred in concluding that employer established the availability of suitable alternate employment. Employer urges rejection of claimant’s cross-appeal. Claimant filed a reply brief.

Where, as here, a claimant has established an inability to return to his usual employment due to his work injury, the burden shifts to the employer to establish that the claimant is not totally disabled by presenting evidence of a range of jobs that are available in the relevant geographic market for which the claimant is physically and educationally qualified. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If employer succeeds in establishing suitable alternate employment, claimant may nonetheless show that he is totally disabled if he demonstrates that he diligently tried but was unable to obtain other employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Where a claimant offers evidence that he diligently tried to find a suitable job, the administrative law judge must make specific findings regarding the nature and sufficiency of claimant's efforts. *Palombo v. Director, OWCP*, 937 F.2d 70, 75, 25 BRBS 1, 9(CRT) (2d Cir. 1991).

The administrative law judge found that employer established suitable alternate employment on the open market. In finding that claimant diligently sought alternate work, the administrative law judge rejected employer's contention that claimant was merely engaged in the minimum job search required to retain entitlement to unemployment compensation.¹ The administrative law judge stated that "Claimant's motivation for applying for two jobs per week is immaterial to his burden of establishing reasonable diligence." Decision and Order at 20. The administrative law judge found that claimant applied for 14 of the 15 jobs identified in employer's labor market survey, as well as a total of 74 other positions between June 3, 2016 and January 20, 2017 to conclude that claimant diligently tried but failed to obtain suitable work. *Id.* The administrative law judge stated that the "vast majority" of claimant's search involved customer service and parking attendant/cashier jobs, which were physically suitable for him. *Id.*; see CX 4. The administrative law judge also found that claimant's willingness to work was demonstrated through claimant's quick return to work after each of his injuries, until the job at employer's facility was no longer available. Decision and Order at 20. As claimant's diligent job search was unsuccessful, the administrative law judge found claimant entitled to permanent total disability benefits.

Employer contends that the administrative law judge erred in finding that claimant showed reasonable diligence in trying to secure work because claimant applied to only two jobs per week in order to qualify for unemployment compensation. Employer also contends that the administrative law judge erred in finding that claimant's returning to work after his injuries establishes his willingness to work. We disagree.

¹ Claimant acknowledged that he applied for two jobs a week in order to receive unemployment benefits. Tr. at 65.

The administrative law judge correctly noted that whether claimant sought the jobs in order to receive unemployment compensation is not relevant. All that is required is for claimant to “establish that he was reasonably diligent in attempting to secure a job ‘within the compass of employment opportunities shown by the employer to be reasonably attainable and available.’” *Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981)). Claimant submitted records of his job search indicating that he applied for 14 of the 15 jobs identified in employer’s labor market survey and more than 70 other positions. *See* CX 4. Claimant testified that he looked for jobs on the website Indeed.com and also through the Virginia Employment Commission. Tr. at 56-58. The administrative law judge rationally found that the jobs claimant applied for were suitable given his physical restrictions and educational levels. Decision and Order at 19-20; *cf. Wilson v. Virginia Int’l Terminals*, 40 BRBS 46 (2006) (affirming the administrative law judge’s finding that claimant did not engage in a diligent effort because the administrative law judge concluded that claimant applied for jobs for which he was not qualified, exaggerated his weaknesses, and limited his employability by refusing to work weekends or mornings). The administrative law judge also rationally concluded that claimant’s repeatedly returning to work for employer demonstrated his willingness to work; claimant worked for employer until it no longer had suitable work for him. Employer is essentially challenging the administrative law judge’s weighing of the evidence and credibility determinations. It is, however, well established that such determinations are left to the discretion of the administrative law judge and cannot be overturned by the Board on the basis that other conclusions could have been drawn from the evidence. *See Ceres Marine Terminals, Inc. v. Director, OWCP [Jackson]*, 848 F.3d 115, 50 BRBS 91(CRT) (4th Cir. 2016). Because the administrative law judge’s finding that claimant showed reasonable diligence in his job search is rational and supported by substantial evidence, we affirm the administrative law judge’s conclusion. *DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004)

Because we affirm the administrative law judge’s finding that claimant was diligent in his job search but was ultimately unsuccessful in obtaining a job, the issue of whether employer established suitable alternate employment is moot and we need not address claimant’s cross-appeal. Claimant has established that he is totally disabled because he is unable to return to his usual work and was unable to obtain alternate employment. *Fortier*, 38 BRBS 75. Thus, we affirm the administrative law judge’s finding that claimant is permanently totally disabled.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge