BRB No. 99-0875

LARRY MANEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXXON CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John A. Ferrone (Sparagna, Sparagna, Ferrone & Ferrone), Reseda, California, for claimant.

Ira J. Rosenzweig (Smith Martin), New Orleans, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-LHC-2521) of Administrative Law Judge Lee J. Romero, 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and 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).

This case is before the Board for the second time. Claimant, a maintenance specialist, allegedly injured his back in a work-related accident on February 17, 1997,while working on a platform off the coast of California. Claimant performed his usual job until March 15, 1995, when he reported the injury to employer. Claimant did not return to his usual

employment, and was terminated by employer in October 1995.

In his initial Decision and Order, the administrative law judge found that claimant established a *prima facie* case for a work-related injury, entitling him to the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer failed to rebut the presumption. Therefore, the administrative law judge found that claimant's injury is work-related. The administrative law judge next found that claimant could not perform his usual employment, and thus was temporarily totally disabled. The administrative law judge did not address whether employer established suitable alternate employment, citing his finding that claimant had not reached maximum medical improvement as obviating the need for further inquiry. Accordingly, the administrative law judge awarded claimant continuing temporary total disability benefits from March 17, 1995, as well as medical benefits.

Employer appealed to the Board, challenging the administrative law judge's finding that claimant established his *prima facie* case for invocation of the Section 20(a) presumption, and that claimant is temporarily totally disabled. The Board affirmed the administrative law judge's findings that claimant sustained a work-related injury, that claimant had not yet reached maximum medical improvement, and that claimant could not perform his usual employment. The Board held, however, that the administrative law judge erred in not addressing whether employer established the availability of suitable alternate employment. Consequently, the Board vacated the administrative law judge's finding that claimant is temporarily totally disabled and remanded the case to the administrative law judge to address the extent of claimant's disability. *Manen v. Exxon Corp.*, BRB No. 97-1415 (July 10, 1998)(unpublished).

On remand, the parties stipulated that after the May 14, 1996 hearing, claimant underwent back surgery on March 20, 1998. The parties further stipulated that claimant was temporarily totally disabled following his March 20, 1998 surgery for a period of time. The administrative law judge found that employer established the availability of suitable alternate employment effective April 15, 1996, and thus that claimant was temporarily partially disabled from that date through March 19, 1998. 33 U.S.C. §908(e).

On appeal, claimant challenges the administrative law judge's finding that employer established suitable alternate employment. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment on April 15, 1996, the date of employer's labor market survey. Specifically, claimant alleges that the administrative law judge erred in finding the identified positions suitable because employer's vocational expert failed to establish the amount of time each job required in various physical activities, *i.e.*, walking, sitting, standing, *etc.*

Once, as here, claimant establishes his inability to return to his usual work, he has

established a *prima facie* case of total disability, and the burden shifts to employer to establish the availability of suitable alternate employment which the claimant is capable of performing. *See Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must show the availability of specific job opportunities within the geographical area where claimant resides, which he could perform based upon his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. *See Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988).

We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment. In finding that employer established suitable alternate employment as of the date the labor market survey was completed, the administrative law judge law judge credited the approval, without qualification, by Dr. Kendrick, claimant's treating physician, of five of the six light to sedentary positions submitted to Dr. Kendrick by Ms. Favaloro, employer's rehabilitation specialist.[1] EX 13, 14. Moreover, the administrative law judge explicitly rejected claimant's contention that the five positions were unsuitable for lack of specificity. The administrative law judge noted that Dr. Kendrick did not delineate with any specificity the time increments related to how long claimant could sit, stand or walk. The administrative law judge rationally inferred, however, that Dr. Kendrick's approval of the five identified jobs signifies their conformance to his restrictions. *See generally Wilson v. Dravo Corp*., 23 BRBS 463 (1989). The administrative law judge also found, within his discretion, that Ms. Favaloro credibly testified that the jobs identified are within claimant's physical restrictions, permitting alternation of postural positions, and that claimant possesses the skills, abilities, and educational levels required for the positions. *See generally Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). The administrative law judge, therefore, concluded that employer established suitable alternate employment effective April 15, 1996, when the labor market survey was completed. Inasmuch as this finding is rational and supported by substantial evidence, we affirm it, and the consequent award of temporary partial disability benefits for the period of time claimant was able to work prior to his surgery.

[1]The identified positions were in Harrison, Arkansas, where claimant resides. The administrative law judge rejected the jobs in Thousand Oaks, California, near the place of injury, as too vague in their terms and also because they were not presented to Dr. Kendrick for approval.

Accordingly, we affirm the administrative law judge's Decision and Order on Remand.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge