BRB No. 99-0911

GLADYS REYES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY	)	DATE ISSUED:
	)	
and	)	
	)	
RSKCO (formerly ALEXIS)	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Catherine Dellinger Buckley (Hamilton, Westby, Marschall & Antonowich), Atlanta, Georgia, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-1028) of Administrative Law Judge John C. Holmes 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

Claimant, a childcare worker, suffered a back injury while pushing an evacuation crib during the course of her employment at Fort Carson in Colorado Springs, Colorado, on December 10, 1993. In January 1996, claimant accompanied her husband to Fort Stewart in Hinesville, Georgia. Employer voluntarily paid temporary total disability benefits to claimant from December 14, 1993, through May 12, 1994, and from November 14, 1994, through October 2, 1996, the date on which

claimant reached maximum medical improvement. 33 U.S.C. §908(b). Claimant filed a claim for continuing total disability benefits.

In his decision, the administrative law judge found that although it is undisputed that claimant is unable to perform her usual employment, employer established the availability of suitable alternate employment and claimant failed to demonstrate that she exercised due diligence in pursuing post-injury employment opportunities. The administrative law judge therefore awarded claimant temporary total disability compensation from December 14, 1993, through June 26, 1996, the date of employer's labor market survey, temporary partial disability compensation from July 27, 1996 through October 2, 1996, and permanent partial disability compensation thereafter, based on a loss of wage-earning capacity of $34.10.

On appeal, claimant challenges the administrative law judge's finding regarding the extent of claimant's disability. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in finding employer's evidence sufficient to establish the availability of suitable alternate employment.[1] Where, as here, claimant establishes that she is incapable of returning to her usual employment duties, the burden shifts to employer to prove that claimant is not totally disabled by presenting evidence of the availability of jobs within the geographic area in which claimant resides which she is, by virtue of her age, education, work experience, and physical restrictions, capable of performing and for which she can compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 6897, 18 BRBS 79 (CRT)(5th Cir. 1986).

In the instant case, the administrative law judge relied upon the testimony of

[1]Claimant's argument that employer may not establish the availability of suitable alternate employment until her condition reaches maximum medical improvement is without merit. If a claimant is shown to be disabled under the Act and maximum medical improvement has not yet been reached, the appropriate remedy is an award of temporary total or partial disability under Section 8(b) or (e), 33 U.S.C. §908(b), (e). *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999).

employer's vocational consultant, Ms. Arnold, in concluding that employer established the availability of suitable alternate employment. Ms. Arnold, after taking into consideration claimant's background and restrictions, identified four specific positions which she opined were suitable for claimant: tutor, crossing guard, pharmacy technician, and restaurant hostess. *See* HT at 80-84; EX - D8. Each of these positions was approved by Dr. Novak, claimant's treating physician. *See* CX 16. Moreover, contrary to claimant's contention, three of the four identified jobs are located within the city where claimant presently resides. *See generally See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994). Thus, based upon the record before us, the administrative law judge's finding that claimant is capable of performing the identified jobs is supported by substantial evidence and is consistent with law. *See Jones v. Genco, Inc.*, 21 BRBS 12 (1988). Accordingly, we affirm the administrative law judge's finding that employer has established the availability of suitable alternate employment. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

Claimant next asserts that the administrative law judge erred in failing to find that she diligently yet unsuccessfully sought employment post-injury. Where, as in the instant case, employer has established the availability of suitable alternate employment, claimant can nevertheless establish entitlement to total disability benefits if she demonstrates that she diligently tried and was unable to secure such employment. *See Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *see also Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). Claimant does not have to seek the exact jobs identified by employer in order to establish due diligence. *See Palombo*, 937 F.2d at 74, 25 BRBS at 8 (CRT).

In the instant case, claimant testified that she contacted 115 employers in an attempt to secure an employment position post-injury, that she was willing to immediately accept a position in child care if one was offered, and that she had not been offered any position as of the date of the hearing. *See* HT at 28-33; CX 20. Moreover, claimant testified that she unsuccessfully applied for the positions identified by employer's vocational consultant, but that she possesses neither the teaching certificate required for the tutor position or the computer skills required by the pharmacy technician position. *See* HT at 104-105. In addressing this issue, the administrative law judge stated that he gave "less credit to Claimant's efforts at job searches," *see* Decision and Order at 15, but he did not analyze whether claimant's uncontradicted actions established due diligence in attempting to secure

suitable alternate employment under the relevant case law.[2] The administrative law judge's failure to fully address this issue requires that we remand this case for the administrative law judge to consider all of the evidence and testimony regarding claimant's attempts to secure post-injury employment. *See Roger's Terminal,* 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Accordingly, the case is remanded for consideration of whether claimant diligently sought post-injury employment consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[2]In summarizing some of her testimony, the administrative law judge noted that claimant began her job search after Dr. Novak approved the positions located by employer as suitable, implying that this fact cast doubt on her search. Claimant's burden to show she sought employment, however, arises only after employer shows suitable alternate employment. There is also nothing inherently suspicious in keeping a log of her job search. The administrative law judge also noted claimant "admitted" she felt capable of performing the jobs she applied for, she sought full-time work, and applied for child care positions which she would have accepted if offered. None of the testimony described detract from her asserted diligence, and the administrative law judge offered no analysis to support his summary conclusion.