BRB No. 04-0256

JAMES W. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 11/23/2004
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein and Charlene Parker Brown (Montagna Breit Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision on Remand (1997-LHC-2495) of Administrative Law Judge Richard E. Huddleston 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).

This case is before the Board for the third time. Claimant suffers work-related bilateral carpal tunnel syndrome arising out of an injury suffered on May 11, 1993; the restrictions imposed following surgery for this condition prevent claimant's return to his usual job duties as a pipefitter. Although claimant performed light-duty work at employer's facility for a period of time, he was passed out of work on August 26, 1996;

claimant has not worked since that time. The parties stipulated that claimant's condition reached maximum medical improvement on May 12, 1997.

In his first Decision and Order, dated November 10, 1999, the administrative law judge found that employer failed to establish the availability of suitable alternate employment and awarded claimant continuing permanent total disability benefits. 33 U.S.C. §908(a). Employer appealed the administrative law judge's award of benefits.

In *Brown v. Newport News Shipbuilding & Dry Dock Corp.*, BRB No. 00-0318 (Dec. 5, 2000)(unpub.), the Board remanded the case for the administrative law judge to reconsider the suitability of four cashier and two security guard positions which he had rejected for reasons unsupported by the evidence of record. On remand, the administrative law judge again found that employer did not establish the availability of suitable alternate employment and awarded claimant permanent total disability benefits.

Employer appealed to the Board contending, *inter alia*, that the administrative law judge erred in finding that the security guard positions, approved by claimant's treating physician, were not suitable. The Board held that these positions constituted suitable alternate employment as a matter of law, agreeing with employer that the administrative law judge's rejection of these positions based on the vocational expert's erroneous identification of the applicable *Dictionary of Occupational Titles* number was neither rational nor supported by substantial evidence. The case was remanded for the administrative law judge to determine the date suitable alternate employment became available and whether claimant exercised diligence in seeking alternate employment. *Brown v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0905 (Aug. 22, 2002)(unpub.).[1]

In his second Decision on Remand, the administrative law judge concluded that suitable alternate employment was available to claimant as of July 14, 1997, and that claimant failed to exercise diligence in his attempts to secure such employment. The administrative law judge found that, therefore, claimant was partially disabled and his recovery was limited to that provided under the schedule.[2] 33 U.S.C. §908(c)(1).

[1] In this Decision and Order, the Board also affirmed the finding that the cashier position at Denbigh Toyota is not suitable based on the administrative law judge's finding regarding the probability of claimant's being required to count change requiring finger dexterity and hand manipulation which he cannot perform. Slip op. at 4.

[2] In his second Decision on Remand, the administrative law judge found claimant entitled to compensation for total disability from May 12, 1997, to July 14, 1997, and for permanent partial disability for a period of 143.52 weeks thereafter based on a 46 percent permanent impairment to his right arm.

Claimant appeals, contending that the administrative law judge erred in finding that suitable alternate employment was available as of July 14, 1997. Claimant also maintains that the administrative law judge erred in finding that he did not exhibit diligence in seeking employment.[3] Employer responds, urging affirmance of the administrative law judge's second decision on remand.

Claimant initially contends that the administrative law judge erred in relying on July 14, 1997, as the date upon which employer established the availability of suitable alternate employment and claimant's disability became partial. Claimant contends that September 15, 1998, the date upon which Dr. Kline, claimant's treating physician approved the positions listed in the labor market survey, is the earliest date that suitable alternate employment was demonstrated by employer to be available.

Disability under the Act consists of an economic as well as a medical component. *See generally Owens v. Traynor*, 274 F.Supp. 770 (D.Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir.), *cert. denied*, 393 U.S. 968 (1968). Partial disability does not commence until 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)(dec. on recon.). Employer may attempt to retroactively establish that suitable alternate employment existed on the date of maximum medical improvement. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

We reject claimant's contention that suitable alternate employment cannot be established prior to the date a physician approves the proposed positions. In the instant case, the Board held in its prior decision that the security job positions constituted suitable alternate employment as a matter of law based upon the vocational and medical evidence of record which demonstrates that the security jobs are within claimant's physical and vocational capabilities. *Brown*, BRB No. 01-0905, slip op. at 4. Permanent work restrictions were assigned by Dr. Kline on May 12, 1997. EX 11(b). As the medical restrictions placed upon claimant remained unchanged after this date, the positions

[3] Claimant further contends that the administrative law judge's prior finding that the security guard positions do not constitute suitable alternate employment was correct and should be reinstated. This issue was fully addressed in the Board's prior decision and claimant raises no argument that necessitates our revisiting that issue. Accordingly, the Board's second decision, holding that employer established suitable alternate employment based on the security guard positions, constitutes the law of the case. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Claimant's contention therefore is rejected.

approved by Dr. Kline on September 15, 1998, were physically suitable on July 14, 1997; the only issue was whether employer established their availability as of that date.

The administrative law judge found that employer established the availability of suitable alternate employment as of July 14, 1997, based upon the testimony of employer's vocational consultant, Mr. Karmolinski, that suitable positions were regularly available, as well as on employer's Form LS-208, dated July 14, 1997, noting the cessation of temporary total disability payments as the result of a labor market survey. EX 12. Although the survey employer referenced in its LS-208 form was not admitted into the record, Mr. Karmolinski testified that the security guard positions located in his survey, conducted on August 3, 1998, were frequently available from July 1997 to the date of the August 11, 1998 hearing. HT at 71, 75. Mr. Karmolinski also testified that he spoke with individuals in charge of hiring at Diversified Industrial Concepts and the Virginia Department of Transportation who informed him that security guard positions were continually available. HT at 49-52. Accordingly, we affirm the administrative law judge's finding that suitable alternate employment was established as of July 14, 1997, as it is rational and supported by substantial evidence. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Claimant next appeals the administrative law judge's finding that he failed to exercise diligence in seeking suitable alternate employment. Once employer meets its burden of demonstrating that suitable jobs are available, claimant may retain entitlement to total disability benefits if he demonstrates that he was unable to secure employment although he diligently tried. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). If, in fact, employers will not hire applicants with claimant's history, it will be apparent when a claimant demonstrates that his diligent job search was unsuccessful. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997). In determining whether a claimant exercised diligence in seeking suitable alternate employment, the administrative law judge must analyze claimant's alleged efforts to find employment, making specific findings regarding the nature and sufficiency of claimant's job search. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT).

We reject claimant's initial argument that employer's failure to provide him with a list of the jobs it identified in its labor market survey precludes a finding that he was not diligent in seeking employment. *Id.*, 937 F.2d at 74, 25 BRBS at 7(CRT). Claimant is not required to show he tried to secure the exact jobs employer showed were available. Claimant need only establish that he was reasonably diligent in attempting to secure jobs

similar to those employer established were suitable and available.[4] *Id.*, 937 F.2d at 74-75, 25 BRBS at 8(CRT).

In the instant case, the administrative law judge provided a detailed analysis of claimant's attempts to find suitable alternate employment during an eleven-week period in 1998 preceding the August 11, 1998, hearing.[5] He noted that claimant did not seek work at all in 1997 despite receiving his permanent work restrictions in May, and that claimant began his search in 1998 only after Dr. Lee advised him to do so. The administrative law judge also found that claimant failed to register with the Virginia Employment Commission and refused to meet with employer's vocational consultant to discuss job opportunities. Decision on Remand at 9-10. Moreover, the administrative law judge found claimant's submission merely of a list of employment inquiries failed to establish that claimant sought employment in positions appropriate to his restrictions. Accordingly, the administrative law judge found that claimant's assertion of diligence was not credible given the limited and vague nature of his job search.

Claimant contends that his job search list is sufficient to establish that he diligently sought employment. We reject claimant's contention that the administrative law judge erred in finding otherwise. The list of fourteen employers from whom claimant alleges he sought a position contains the name and addresses of the companies with date and first name of someone to whom claimant claims he spoke regarding work. However, the administrative law judge rationally found that the list fails to document the type of work claimant sought or which these employers offered, whether the positions were within claimant's physical restrictions or whether the individuals with whom claimant spoke were in a position to make hiring decisions. As noted by the administrative law judge, claimant indicated to at least one potential employer that his long period of unemployment was due to a hand injury but failed to explain that he is left-handed and could use his hand so long as the tasks were within his restrictions. HT at 31; Decision on Remand at 9. Moreover, although claimant left applications with ten of these employers the administrative law judge found that he did not follow up on any of the applications.

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[4] The Board has affirmed an administrative law judge's decision to permit a claimant to demonstrate diligence by conducting a post-hearing job search, based on the employer's failure to inform claimant of suitable jobs prior to the hearing. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997).

[5] Claimant submitted a list of fourteen employment inquiries made between April 27 and July 3, 1998, for work at a variety of employers, including Wal-Mart, Gateway, Midas, Lowe's and McDonald's. CX 1. Claimant also inquired at one additional employer on the Friday preceding the hearing. HT at 24-25.

It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge found that claimant did not exercise diligence in seeking employment based on his failure to seek work until he was advised by Dr. Lee to seek light-duty work in 1998, despite his being physically able to do so earlier, his failure to meet with the vocational consultant, his failure to explore all opportunities in seeking employment, and his failure to demonstrate the suitability of the work for which he did apply. *See Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). As the administrative law judge's findings and conclusions are rational and supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant failed to exercise diligence in seeking alternate work. *Berezin v. Cascade General, Inc.*, 34 BRBS 162 (2000).

Accordingly, the administrative law judge's Decision on Remand awarding partial disability benefits 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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REGINIA C. McGRANERY
Administrative Appeals Judge