BRB No. 98-0354

CLARENCE MYLES, JR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
DIVERSIFIED INDUSTRIAL CONTRACTORS	)	
	)	
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Donald F. de Boisblanc, New Orleans, Louisiana, for claimant.

J. Michael Stiltner, Baton Rouge, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-471) of Administrative Law Judge Clement J. Kennington 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 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).

Claimant, a shipfitter, sustained a work-related injury to his neck, back and right hip on January 28, 1994, while working on a scaffolding which collapsed,

causing claimant to fall approximately fourteen feet onto a pile of angle irons. Employer voluntarily paid temporary total disability benefits to claimant from January 28, 1994 to April 4, 1996. Claimant underwent back surgery on November 30, 1994, and has reached maximum medical improvement with respect to his back. At the time of the hearing, claimant was contemplating cervical surgery which the parties agreed would leave him temporarily totally disabled for a period.

In his Decision and Order, the administrative law judge found that it was undisputed by the parties that claimant was unable to return to his pre-injury position as a result of the accident. The administrative law judge found that employer established the availability of suitable alternate employment, and that claimant failed to establish due diligence in obtaining alternate employment. The administrative law judge also found that claimant's injury resulted in no present economic loss to his post-injury wage-earning capacity.[1] The administrative law judge finally found that the record established that if claimant underwent cervical surgery, he would become temporarily totally disabled for a period, causing his wage-earning capacity to fall below his pre-injury wages. The administrative law judge therefore awarded claimant a *de minimis* award of one percent of his pre-injury average weekly wage.[2]

On appeal, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment and that claimant did not diligently pursue job leads, and therefore erred in denying claimant continuing disability benefits. Claimant also contends that the administrative law judge erred in failing to impose a Section 14(e) penalty against employer. Employer responds, urging affirmance.

Where, as in the instant case, it is undisputed that claimant is unable to

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[1]Claimant's pre-injury average weekly wage as stipulated by the parties is $184.58. Claimant does not challenge the administrative law judge's finding that an evaluation of the fifteen suitable alternate positions identified by employer and approved by claimant's treating doctor produce weekly earnings of $224.27.

[2]The *de minimis* award is unchallenged on appeal.

perform his usual pre-injury work, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores, Inc.v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The employee must establish reasonable diligence in attempting to secure employment, within the range of opportunities shown by employer to be reasonably attainable and available. *Roger*'s *Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert. denied,* 479 U.S. 826 (1986). Claimant's subjective complaints of pain do not preclude an administrative law judge from finding that employer has established suitable alternate employment. *See generally Adam v. Nicholson Terminal & Dry Dock Corp.*, 14 BRBS 735 (1981); *Peterson v. Washington Metropolitan Area Transit Authority,* 13 BRBS 891 (1981).

The administrative law judge's determination that employer established suitable alternate employment is supported by substantial evidence. In the instant case, the administrative law judge rationally rejected claimant's contention that his disabling pain left him unable to perform any of the jobs on which employer relied to establish suitable alternate employment. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963). In so finding, the administrative law judge relied on the approval by Dr. Murphy, claimant's treating physician, of the positions identified by employer as being within claimant's restrictions. The administrative law judge also found, within his discretion, that claimant's testimony that his pain medications made performance of most, if not all, of the identified positions unsuitable, lacked credibility. The administrative law judge noted that at no time did claimant ever mention any difficulties caused by his medication to either his treating doctor or employer's vocational counselor.[3] EX 3 at 1. Additionally, the administrative law judge rejected claimant's claim that the jobs were unsuitable, finding nothing in the job descriptions that would indicate that any of the positions are outside the capabilities of someone of claimant's intelligence, as supported by the skills analysis and testing performed by employer's expert. The administrative law judge then assumed, *arguendo,* that even if claimant's contention regarding his capabilities has merit, this would eliminate only the telemarketing positions, leaving several other jobs sufficient to satisfy employer's burden.[4] *See*

[3]Employer's vocational counselor, Ms. Lillis, who worked with claimant for ten months, testified that claimant never made mention to her of the alleged dramatic side effects his prescription medication has on his ability to function. She stated that if she had been informed of this factor which she would have included it in her notes and considered it significant in the rehabilitation effort.

[4]In addition to the telemarketer positions, Dr. Murphy approved, as suitable for claimant, positions as a toll taker and gate guard.

Emp. Ex. 3; *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). On the basis of the record before us, the administrative law judge's conclusion that employer established the availability of suitable alternate employment is affirmed as it is rational, supported by substantial evidence and in accordance with law. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995); *see generally Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Moreover, the administrative law judge concluded that claimant, despite being presented with numerous job opportunities, including a contact name and phone number, failed to present any evidence that he followed up on any of these positions and thus failed to satisfy his burden of diligently seeking work, even admitting to employer's vocational expert on June 12, 1996, that he had done nothing up to that point to secure employment. Inasmuch as the administrative law judge's finding is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's finding and consequent denial of total disability benefits. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Claimant correctly contends, however, that the administrative law judge erred in finding suitable alternate employment established as of February 23, 1996, in contravention of the parties' stipulation that claimant's temporary total disability continued until April 4, 1996. *See* Emp. Ex. 1; Decision and Order at 2. Inasmuch as the parties' agreed to litigate only the issue of whether claimant's disability continued after April 4, 1996, we vacate the administrative law judge's finding that employer established suitable alternate employment on February 23, 1996, and modify his decision to reflect that claimant is entitled to temporary total disability benefits until April 4, 1996, consistent with the agreement of the parties. *See generally Misho v. Dillingham Marine & Manufacturing*, 17 BRBS 188 (1985); *Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981). We therefore vacate employer's credit, against its liability for the *de minimis* award, for benefits paid to claimant from February 23 to April 4, 1996. 33 U.S.C. §914(j).

Finally, claimant's contention that the administrative law judge erred in failing to assess a Section 14(e) penalty against employer is without merit. The file contains a Notice of Controversion LS-207 Form dated March 30, 1996, and a Notice of Final Payment LS-208 Form dated April 9, 1996, which are timely with regard to the suspension of compensation on April 4, 1996. Emp. Ex. 2 at 5, 7. Employer therefore is not liable for a Section 14(e) penalty. 33 U.S.C. §914(d), (e).

Accordingly, we modify the administrative law judge's finding to reflect that employer established suitable alternate employment as of April 4, 1996, and we vacate employer's credit for benefits paid between February 23, 1996 and April 4, 1996. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge