

BRB No. 00-0299

DONALD L. SINCLAIR)
)
 Claimant-Respondent)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: Oct. 31, 2000
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel A. Sarno, Jr.,
Administrative Appeals Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason), Newport News, Virginia, for
self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-LHC-0220) of
Administrative Law Daniel A. Sarno, 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 findings of fact and conclusions of law of the administrative law judge if they
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 pipefitter, suffered two injuries during the course of his employment: one to his
right wrist on September 10, 1992, and a second to his left wrist on February 9, 1995. Claimant has
subsequently undergone several surgeries and physical therapy programs for his multiple conditions.
Before the administrative law judge, the parties agreed that claimant cannot return to his usual
employment duties with employer.

In his decision, the administrative law judge found that although employer had established
the availability of suitable alternate employment, claimant had demonstrated that he had attempted
diligently, though unsuccessfully, to secure employment post-injury. Accordingly, the
administrative law judge awarded claimant permanent total disability compensation from the date he
reached maximum medical improvement, March 7, 1997, and continuing.

On appeal, employer challenges the administrative law judge's award of permanent total disability benefits to claimant; specifically, employer asserts that the administrative law judge erred when, in determining that claimant diligently yet unsuccessfully sought employment post-injury, he failed to exclude the effects of claimant's non work-related medical conditions. Claimant responds, urging affirmance.

Where, as in the instant case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See Norfolk Shipbuilding & Dry Dock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170 (CRT)(4th Cir. 1999). If the employer makes such a showing, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *see also 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); *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); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Contrary to employer's contention, there is substantial evidence to support the administrative law judge's conclusion that claimant attempted diligently, yet unsuccessfully, to secure employment post-injury. Specifically, in addressing this issue, the administrative law judge initially found that employer identified positions as a cashier, unarmed security guard, and desk clerk which claimant was capable of performing. Next, the administrative law judge found that claimant met with two vocational counselors post-injury, and that one of those counselors described his attitude as "eager" and his effort in obtaining employment "aggressive." *See* Decision and Order at 13. Moreover, the administrative law judge concluded that claimant cooperated fully with the counselor and met with prospective employers identified by the counselor. *Id.* Lastly, after noting that claimant failed to secure an offer of employment, and that the vocational counselors of record opined that re-employment by claimant would be difficult due to a number of factors, including his work-related wrist conditions and his academic abilities, the administrative law judge acknowledged the totality of claimant's present health problems, including the need to wear a brace on his left arm, and concluded that claimant demonstrated that he had been diligent, but unsuccessful, in his post-injury search for a job.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses; additionally, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calback v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's specific findings that claimant cooperated fully with vocational counselors and thereafter unsuccessfully sought employment post-injury is rational and supported by the record. *See generally DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998). Accordingly, we affirm the administrative law judge's

determination that claimant diligently tried and was unable to secure employment post-injury, and his consequent award of continuing permanent total disability benefits to claimant. *See generally Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT).

Accordingly, the administrative law judge's decision and order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge