BRB No. 08-0351

R.P.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BOSTON SHIP REPAIR	)	DATE ISSUED: 10/30/2008
	)	
and	)	
	)	
A.I.M. MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, United States Department of Labor.

Steven M. Buckley (Lawson & Weitzen, LLP), Boston, Massachusetts, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-01212) of Administrative Law Judge Colleen A. Geraghty 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).

Claimant injured his back in a work-related accident on December 7, 2002. Employer voluntarily paid claimant temporary total disability benefits. Claimant has not returned to his usual employment as a laborer with employer, maintaining that his back

injury is totally disabling. Employer contended that claimant is able to perform suitable alternate employment as established by its medical and vocational experts.

In her Decision and Order, the administrative law judge found that claimant's condition reached maximum medical improvement as of October 6, 2006. The administrative law judge found that claimant established his inability to return to his usual work due to his injury, but that employer established the availability of suitable alternate employment based on the work restrictions imposed by claimant's treating physician, Dr. Abate. The administrative law judge found that claimant did not diligently seek alternate employment. Accordingly, the administrative law judge awarded claimant total disability benefits from December 27, 2002 until November 20, 2006, the date of employer's labor market survey, and permanent partial disability benefits thereafter for a loss of wage-earning capacity. 33 U.S.C. §908(c)(21), (h).

On appeal, claimant challenges the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not diligently seek employment. Employer has not responded to this appeal.

Once, as here, claimant establishes his inability to perform his usual work, he has established a *prima facie* case of total disability. The burden then shifts to employer to establish that suitable alternate employment is available in claimant's community given his age, vocational experience, education and physical restrictions. The employer meets its burden by proving that "'there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job.'" *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434, 24 BRBS 202, 207(CRT) (1st Cir. 1991), *quoting New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). If employer establishes the availability of suitable alternate employment, claimant can retain entitlement to total disability benefits by showing he diligently sought, but was unable to secure, an alternate position of the type shown to be suitable and available. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

Claimant contends that suitable alternate employment is not established, as a rehabilitation specialist with the Office of Workers' Compensation Programs closed claimant's vocational file because claimant has no transferable skills and insufficient physical stamina to work at even unskilled, entry-level sedentary positions. CX K. The specialist based this determination on the vocational report of Carole Falcone, a licensed rehabilitation counselor retained by claimant. Ms. Falcone concluded that claimant "is not capable of performing the essential functions for applicable jobs that exist in the open

labor market." CX 1 at 16.[1] The administrative law judge did not credit Ms. Falcone's opinion because she reviewed only general job titles, rather than specific requirements of actual jobs. Moreover, the administrative law judge found that Ms. Falcone incorrectly stated that claimant has manual dexterity limitations. Decision and Order at 22. The administrative law judge instead looked to the actual jobs employer identified and compared them to claimant's physical restrictions. *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). We reject claimant's contention that the administrative law judge erred in this regard. The administrative law judge is not required to rely on the assessment of the OWCP regarding claimant's employability, but conducts a *de novo* review of all the relevant evidence. *See, e.g., Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In addition, the administrative law judge gave rational reasons for declining to credit the opinion of Ms. Falcone, and the Board is not empowered to reweigh the evidence. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

We also reject claimant's contention that the administrative law judge erred in crediting employer's labor market survey because employer did not provide to Nancy Segreve, its vocational consultant, the October 2006 report of claimant's treating physician. The administrative law judge credited the restrictions placed by Dr. Abate in his October 2006 report, and she reviewed the jobs identified by Ms. Segreve to determine if they are suitable in light of these restrictions. The administrative law judge rejected identified positions that required either more than a sedentary level of exertion or specific physical exertion in excess of the restrictions placed by Dr. Abate. *See* Decision and Order at 22-23. Thus, Ms. Segreve's ignorance of Dr. Abate's report does not preclude her report from consideration as evidence probative of the extent of claimant's disability.[2] *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990).

Claimant further contends the administrative law judge erred in finding suitable alternate employment established because: (1) the assembler position is 50 miles from his home and thus, outside the relevant geographic area; (2) he cannot obtain any of the three jewelry repair positions due to his criminal record; and (3) the two dispatcher jobs are not long-term positions. We need not address the substance of claimant's first two

[1] In formulating her opinion, Ms. Falcone met with claimant, reviewed all his medical information, and applied vocational standards from several reference works. CX 1 at 1.

[2] The administrative law judge fully addressed and rationally rejected claimant's contention that he is entitled to permanent total disability benefits because employer asked for a continuance in order to provide Dr. Abate's report to Ms. Segreve and then failed to do so. Decision and Order at 24 n.8.

arguments, as the third is without merit; thus, any error made by the administrative law judge is harmless. *See generally Wood v. U.S. Dep't of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). The administrative law judge found that dispatcher positions with Brighton Towing and Repossession and with Commonwealth Limousine Worldwide are suitable for claimant, a finding claimant does not contest on appeal. Decision and Order at 23. Claimant avers, however, that these positions are only short-term employment, as evidenced by Ms. Segreve's testimony that Brighton Towing "hire[s] on a pretty frequent basis." Tr. II at 91; *see also* EX 2 ("This employer indicated that they are always looking for dispatchers"). This statement alone does not establish that claimant could not retain a dispatcher position on a long-term basis. Ms. Segreve's testimony and report establish only the frequent availability of suitable work as a dispatcher. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). Therefore, we affirm the administrative law judge's finding that employer established the suitability and availability of alternate employment, as it is supported by substantial evidence. *Mendoza v. Marine Personnel Co., Inc*., 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

Claimant also contends the administrative law judge erred in finding that he did not seek alternate employment in a diligent manner. Claimant testified he contacted each employer identified in Ms. Segreve's labor market survey, as well as some additional jewelry stores. Tr. II at 102-116. Claimant informed the employers of his medical restrictions and testified the employers told him his skills were outdated, or they had no openings, or they could not accommodate his restrictions. *Id.* The administrative law judge found claimant's attempt to seek work was not conducted in a diligent manner. The administrative law judge noted that claimant's job search was conducted over only a "few days," which she characterized as a "very brief" search. She found that while it is appropriate for claimant to inform a prospective employer of his restrictions, claimant focused more heavily on his physical limitations than on his "skills, attributes and commitment." Decision and Order at 25.

Claimant contends he is required by Massachusetts law to inform an employer of his condition at the time of hire or risk the loss of state workers' compensation benefits should he reinjure himself. *See* Mass. Gen. Laws ch. 152 §27A. The administrative law judge acknowledged the propriety of claimant's informing prospective employers of his physical restrictions, but found, based on claimant's testimony, that claimant did not present himself in a favorable light or clearly articulate both his attributes and his limitations. The administrative law judge also found that claimant's job search was too brief to be considered "diligent."

We affirm the administrative law judge's finding that claimant did not diligently seek alternate work. The administrative law judge is entitled to assess claimant's credibility and to draw rational inferences from the evidence. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge made specific findings about the nature and sufficiency of claimant's job search, *see Palombo,* 937 F.2d 70, 25 BRBS 1(CRT), and her findings are rational and supported by substantial evidence. *Berezin*, 34 BRBS at 167. Therefore, as employer established the availability of suitable alternate employment and as claimant did not diligently seek alternate work, we affirm the administrative law judge's award of partial disability benefits as of the date of employer's labor market survey. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991) (decision on reconsideration).

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge