BRB No. 96-0946

ERNEST GREENE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
CERES CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Thomas R. Herndon (Donaldson, Herndon, Bell, & Metts, P.C.), Savannah, Georgia, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-1585) of Administrative Law Judge Vivian Schreter-Murray 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 gang foreman, was injured on April 3, 1987, when he was struck on his right knee by a turnbuckle. Claimant underwent a surgical procedure on August 12, 1987, and thereafter was released to return to his usual job without restrictions on February 22, 1988. Claimant underwent additional surgery on April 6, 1993, and has not returned to work since that time. Employer paid claimant temporary total disability compensation from May 4, 1987, through February 24, 1988, and from April 2, 1993, through February 21, 1994; additionally, employer has paid claimant $20,919.47 under Section 8(c)(2) of the Act for a twelve percent impairment to his lower leg. *See* 33 U.S.C. §908(b), (c)(2). Claimant

sought permanent total disability compensation under the Act.

In her Decision and Order, the administrative law judge found that claimant reached maximum medical improvement as of August 9, 1993, and that employer established the availability of suitable alternate employment as of February 21, 1994; based on these findings, the administrative law judge concluded that claimant was entitled to no further compensation than that previously paid by employer. Next, the administrative law judge denied claimant's request that employer provide him with an exercycle, as the record did not support a finding that this equipment was medically necessary for the treatment of his work injury.

On appeal, claimant challenges the administrative law judge's denial of his claim for additional compensation benefits. Employer responds, urging affirmance.

Claimant initially contends that the administrative law judge erred in failing to find that he is totally disabled as a result of the April 3, 1987, accident. Where, as in the instant case, a claimant is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available job opportunities within the geographical area where the claimant resides which he is capable of performing, considering his age, education, work experience and physical restrictions and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See Wilson v. Dravo Corp.*, 22 BRBS 463 (1989)(Lawrence, J., dissenting). If employer establishes the availability of suitable alternate employment, 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 Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); Roger's Terminal & Shipping Corp., 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the instant case, the administrative law judge concluded that employer established the availability of suitable alternate employment based upon the findings of employer's vocational consultants, Ms. Anderson-Balmer and Ms. McCain; specifically, these consultants identified the positions of dental instrument inspector, cashier, gate guard, and golf ranger as being suitable for claimant.[1] The record reflects that these identified job

[1]We note claimant's argument that the administrative law judge erred in rejecting Dr. Nettles' opinion that two additional positions located by the vocational consultants, *i.e.,* walking security guard and crab meat inspector, were beyond claimant's physical capabilities. However, as the administrative law judge based her conclusion as to the availability of suitable alternate employment upon other identified positions, any error the administrative law judge made on this issue is harmless.

opportunities were within claimant's physical restrictions and were specifically approved by Dr. Nettles, claimant's treating physician. 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 consistent with law. *See Wilson*, 22 BRBS at 465; *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.

Claimant next contends that the administrative law judge erred in failing to address his testimony that he did attempt to secure employment post-injury but was unable to do so. If a claimant diligently tries to secure alternative employment, he may still be entitled to total disability benefits. *Hooe*, 21 BRBS at 258. In the instant case, the administrative law judge reviewed claimant's testimony regarding his attempts to find work, but found that testimony to be unpersuasive based upon claimant's having quit a suitable job because of subjective complaints, his failure to report more than one job seeking attempt to the vocational consultants of record, his applying for physically unsuitable positions, and his failure to commence his search for employment until more than a year after he reached maximum medical improvement. *See* Decision and Order at 6, 9. Moreover, the administrative law judge found claimant's testimony regarding his search for employment to be vague, non-specific, and indefinite. *Id.* at 9. The administrative law judge's decision to discredit claimant's testimony is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge properly recognized that it is claimant's burden to establish due diligence; in this instance he found claimant did not meet this burden. Accordingly, the administrative law judge's finding that claimant did not demonstrate due diligence is affirmed.

Finally, claimant contends that the administrative law judge demonstrated obvious bias in her conduct of the hearing. We hold that claimant's various references to testimony given at the formal hearing fail to rise to the level necessary to indicate prejudicial bias by the administrative law judge. *See Raimer v. Willamette Iron & Steel Co.,* 21 BRBS 98 (1988). Adverse rulings alone are insufficient to show bias. *Orange v. Island Creek Coal Co.,* 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). Claimant thus has failed to demonstrate that the administrative law judge's actions regarding this claim were arbitrary, capricious, or an abuse of discretion. *See O'Keeffe*, 380 U.S. at 359.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeal Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge