BRB No. 96-1155

RICHARD H. CARROLL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

C. Michael Walker (McGarry, Prince, McGarry, P.C.), New London, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Benefits (93-LHC-3130) of Administrative Law Judge David W. DiNardi 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).

On February 24, 1993, while working as an industrial radiographer for employer, claimant reinjured his right ankle[1] as he was pushing himself out of the hatch of a submarine. In April 1993, claimant began a Department of Labor (DOL)-sponsored vocational rehabilitation program in non-destructive testing designed to improve his transferable skills and employability. Employer voluntarily paid temporary total disability benefits from February 24, 1993 until September 13, 1994, and permanent partial disability

[1]Claimant had apparently injured his right ankle several times since 1977.

compensation for a 20 percent impairment of the right leg, thereafter. 33 U.S.C. §908(c)(2), (19). Claimant sought permanent total disability commencing September 13, 1994.

In his decision, the administrative law judge denied the claim for permanent total disability compensation. He found that employer established the availability of suitable alternate employment through the testimony of its vocational counselor, Mr. Takki, who performed labor market surveys on May 11, 1993, and September 27, 1994, and the testimony of Robert Violetta, the Office of Workers' Compensation Programs' vocational rehabilitation counselor who oversaw claimant's DOL-sponsored vocational retraining program. He thus awarded claimant scheduled permanent partial disability compensation commencing September 13, 1994, the date Dr. Salkin, claimant's treating orthopedic physician, found he reached maximum medical improvement. Accordingly, he awarded claimant temporary total disability benefits from February 24, 1993, through September 12, 1994, and permanent partial disability benefits under Section 8(c)(2) and (19), for a 20 percent impairment of the right leg thereafter, based on an average weekly wage of $715.90.

On appeal, claimant challenges the administrative law judge's denial of permanent total disability compensation. Claimant avers that he is entitled to total disability benefits through at least November 1995 under *Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1995), because he was enrolled in a DOL-sponsored vocational rehabilitation program from April 1993 until November 1995. Claimant further asserts that he is entitled to continuing total disability compensation after November 1995 because the May 1993 and September 1994, labor market surveys upon which the administrative law judge relied to find suitable alternate employment are insufficient to establish the availability of suitable alternate employment in November 1995. Finally, claimant argues that, in any event, the administrative law judge erred in finding that the jobs identified in those surveys were physically suitable for him. Employer responds, urging affirmance. Claimant replies, reiterating his original arguments.

Inasmuch as claimant's work-related injury was to his right ankle, pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 278, 14 BRBS 363 (1980), he is limited to an award under the schedule unless he establishes that his injury resulted in permanent total disability. *See, e.g., Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212, 222 (1994)(Smith, J., dissenting on other grounds). Inasmuch as the administrative law judge found that claimant is unable to return to his usual longshoring position, the burden shifted to employer to establish the availability of suitable alternate employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *American Stevedores, Inc. v. Salzano,* 538 F.2d 933, 2 BRBS 178 (2d Cir. 1976). In order to meet this burden, employer must show the availability of job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, could compete for and reasonably secure. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer makes such a showing, the 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 Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 83 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986).

We initially reject claimant's contention that he is entitled to total disability benefits through November 1995 pursuant to *Abbott* .[2] In *Abbott*, the Board and the United States Court of Appeals for the Fifth Circuit affirmed the administrative law judge's award of total disability compensation to an injured worker while he was enrolled in a four-year full-time medical technology program sponsored by the Department of Labor where his participation in the program precluded him from working despite employer's having established the availability of suitable alternate employment which claimant was physically able to perform. The Board and the court reasoned that the administrative law judge could reasonably find that this employment was not realistically available to claimant because his participation in the program precluded him from working and that the award of total disability compensation during the period claimant was undergoing vocational rehabilitation served the Act's goals of promoting rehabilitation and the interests of both parties. In the present case as claimant's formal vocational rehabilitation program ended in early September 1994, prior to the time period for which permanent total disability compensation is being claimed, *Abbott* is not applicable. Claimant's argument that he is entitled to permanent total disability compensation through November 1995 seeks to extend the period included in a

[2] According to Mr. Violetta, the rehabilitation program began on January 3, 1994. Emp. Ex. 20 at 25. It is unclear precisely when it ended. According to the original plan, it was to end on October 30, 1994, which apparently included two months for job searches. Mr. Violetta deposed that claimant was originally scheduled to finish training on June 30, 1994 and they began to initiate job searches toward the latter part of the summer [1994], but by the time they got through the retest progression, "it was about September of '94 when [they] were really prepared to begin in earnest." *Id.* at 32, 76.

vocational rehabilitation program to include time related to subsequent searches; the holding in *Abbott*, however, applies only to the period of actual enrollment in a vocational rehabilitation program which precludes claimant's obtaining a job during that time.

As claimant completed his vocational rehabilitation program in early September 1994,[3] his entitlement to the permanent total disability compensation claimed is contingent upon whether the administrative law judge properly found that employer met its burden of establishing the availability of suitable alternate employment. The administrative law judge found that employer established the availability of suitable alternate employment based on job opportunities as a security guard, cashier, counter person, or a pizza deliverer identified by Mr. Takki in his May 1993 and September 1994 labor market surveys . The administrative law judge stated that he accepted the "results of those surveys which consisted of the counselor making telephone calls to prospective employers and then visiting some of the establishments to observe the working conditions to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work." Decision and Order at 14. In addition, he indicated that he accepted and credited the testimony of Mr. Violetta which he found to be forthright and persuasive.

We conclude that the case must be remanded for the administrative law judge to reconsider the issue of suitable alternate employment. Initially, the administrative law judge did not explicitly identify claimant's medical restrictions and then compare those restrictions with the requirements of the alternate jobs identified to determine whether they were suitable given claimant's physical capabilities. *See Villasenor v. Marine Maintenance Industries, Inc.* 17 BRBS 99, *aff'd on recon*., 17 BRBS 160 (1985). Moreover, the record reflects that at the time Mr. Takki conducted the May 1993 survey, he was apparently under a misconception regarding the extent of claimant's physical capabilities. Mr. Takki deposed that the May 1993 labor market survey was conducted based on Dr. Salkin's April 14, 1993, medical report in which he stated: "We can try returning him to some light duty depending on what's available for him." Cl. Ex. 4 at 14(c). Mr. Takki explained that in conducting the May 1993 survey he interpreted Dr. Salkin's reference to "light duty" as meaning that claimant had no limitations as far as walking or standing, just on lifting. Emp. Ex. 16 at 6-7, 15. As claimant avers, however, in a June 17, 1993 report, Dr. Salkin provided an additional explanation of claimant's limitations, stating that, "[Claimant's] restrictions continue as no climbing and extended periods of standing." Cl. Ex. 4 at 14b. Moreover, in a work restrictions form attached to this report, Dr. Salkin further stated that claimant was limited to walking and standing two hours per day and lifting up to 10 pounds; was unable to perform any climbing, kneeling, twisting, bending or squatting; was only able to use his right foot occasionally to operate foot controls; was not capable of operating a car or vehicle; and was not capable of performing work with his hands requiring fine

[3]Claimant also relies on *Baker v. U.S. Dept. of the* Army, 30 BRBS 37 (ALJ) (1996), to support his position. We note that administrative law judge decisions are not binding upon the Board. In any event, this decision follows *Abbott*, and does not lead to a different result here.

manipulation. Cl. Ex. 4.

When questioned at his deposition regarding the standing and walking requirements of the various jobs identified in May 1933, Mr. Takki testified that the delivery job at Domino's Pizza would require claimant to walk approximately 30 percent and to stand approximately 50 percent of an 8-hour day, that the counter positions available at two Subway shops and D'Angelos would involve constant standing, and that it was unlikely that the security job positions would be able to accommodate claimant's hand restrictions. Emp. Ex. 16 at 37. As the administrative law judge did not consider whether Mr. Takki's interpretation of Dr. Salkin's restrictions was consistent with the limitations the doctor imposed, or whether the jobs identified in the May 1993 survey were compatible with claimant's restrictions, we vacate the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment based on this labor market survey. On remand, the administrative law judge should reconsider this issue in light of all the relevant evidence.[4]

[4]As claimant avers, in making his finding of suitable alternate employment, the administrative law judge did not discuss the July 2, 1993, report of Hank Lerner, a vocational rehabilitation consultant with Rehabilitation Resources, in which he opined that all of the jobs identified in the May 11, 1993 labor market survey are beyond claimant's capabilities. Cl. Ex. 13 at 2. In determining whether employer established the availability of suitable alternate employment on remand the administrative law judge must consider this testimony consistent with the requirements of the Administrative Procedure Act, 5 U.S.C.§557(c)(3)(A).

With regard to the September 1994 survey, although the administrative law judge found that of the jobs listed by Mr. Takki, claimant was capable of performing work as a security guard and cashier, he did not detail the physical restrictions relied upon or discuss the consideration given to claimant's age, education, work experience, and physical limitations. In conducting this survey, Mr. Takki relied on Dr. Dugdale's August 27, 1994, report indicating that claimant was capable of sedentary light duty work with restrictions on standing more than ten minutes per hour, repetitive high impact loading of the ankle, climbing, jumping or running. Emp. Ex. 16 at 11; Emp. Ex.17 at 14. Mr. Takki testified, however, that he did not account for the limitations on walking, bending, climbing, kneeling, and twisting imposed by Dr. Salkin in conducting the September 1994 labor market survey. While there is evidence of jobs which may be suitable under either doctor's restrictions,[5] the administrative law judge did not provide any explanation as to the basis for his finding that employer established suitable alternate employment based on the September 1994 labor market survey. We therefore vacate the administrative law judge's determination and remand for further findings. On remand, the administrative law judge should identify which of the positions he views as constituting suitable alternate employment and explain how those particular jobs are compatible with claimant's age, education, and physical restrictions.[6] *See generally Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992).

In finding suitable alternate employment established, the administrative law judge also found the testimony of Mr. Violetta persuasive. After providing a lengthy discussion of Mr. Violetta's dealings with claimant and his participation in claimant's DOL- sponsored vocational retraining, the administrative law judge stated: "In view of the foregoing, I do accept the results of the Labor Market Surveys because I find and conclude that those jobs constitute as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities." Decision and Order at 18 (emphasis in original). Because it is unclear from the administrative law judge's Decision and Order what the administrative law judge is referring to and how Mr. Violetta's testimony supports his finding of suitable alternate

[5]Specifically, the record contains a Job Analysis Form dated September 26, 1994, for a security guard position at Boardsen Associates, which is attached to the September 27, 1994, labor market survey. This job allows for 100 percent sitting approximately 20 hours per week. In addition, there are several cashier positions in service stations listed in the 1994 survey which allow the employee to sit.

[6]We decline to address claimant's arguments regarding the suitability of other types of jobs identified in the labor market surveys because the administrative law judge only found that the security guard, cashier, counter person, and pizza delivery jobs constituted suitable alternate employment. Moreover, contrary to claimant's assertions on appeal, there is evidence jobs were actually available at Bordsen security at the time of the September 1994 survey. Emp. Ex. 16 at 30. Although claimant also argues on appeal that there were no specific salaries listed for some of the identified jobs, we note that Mr. Takki deposed that while not all employers in the 1994 labor market survey provided salaries, they ranged from $8,840 to $15,600 per year.

employment, on remand the administrative law judge should also provide an explanation of this determination.[7]

If employer establishes the availability of suitable alternate employment, claimant can prevail in establishing that he is entitled to total disability compensation if he shows that he diligently tried, but could not obtain alternate employment. *Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT). The administrative law judge in the present case found that claimant's vocational retraining with Mr. Violetta had not yet borne fruit because he was not one-hundred percent cooperative and had conducted an unfocused job search in which he apparently informed employers prematurely of his disability and work restrictions. Such evidence is relevant to claimant's diligence if the administrative law judge finds employer established the availability of suitable alternate employment opportunities. Accordingly, consistent with his findings on remand regarding the availability of suitable alternate employment, the administrative law judge should reconsider whether claimant was diligent in attempting to secure alternate work within the sphere of suitable alternate work shown to be available by employer. *Id.*

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[7] Mr. Violetta refers to general job categories for which he feels claimant is qualified and to a couple of specific jobs, including a level two ultrasound lead which he received from Mr. Hellier at Aerospace in December 1994, but Mr. Violetta was apparently unaware of the specific requirements or salary. Mr. Violetta also refers to a contact with MSQ, but not a specific position. Emp. Ex. 20 at 38-39, 50-51.

NANCY S. DOLDER
Administrative Appeals Judge