BRB No. 96-1305

MILTON ZEBOTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
	)	
DM & IR RAILWAY COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL ADMINISTRATION, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Courtney, III (James Courtney, III Law Office, P.A.), Duluth, Minnesota, for claimant.

Larry J. Peterson, St. Paul, Minnesota, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (95-LHC-1080) of Administrative Law Judge Daniel L. Leland 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 April 30, 1992, claimant injured his left knee while working for employer as an ore dock worker. Employer voluntarily paid claimant temporary total disability benefits through November 21, 1994, the stipulated date of maximum medical improvement, Emp. Ex. 1, and scheduled permanent partial disability benefits for a 10 percent impairment of the left lower extremity thereafter. 33 U.S.C. §908(c)(2), (19). Claimant sought permanent total disability benefits from the date of maximum medical improvement or alternatively permanent partial disability benefits for a 22 percent impairment of the lower left extremity based on the opinion of Dr. Person.

The administrative law judge awarded claimant temporary total disability benefits from June 25, 1992, through November 21, 1994, and permanent total disability benefits thereafter. On appeal, employer challenges the award of permanent total disability benefits, and argues that claimant is limited to benefits for, at most, a 13 percent impairment under Section 8(c)(2), 10 percent of which it has already paid. Claimant responds, urging affirmance.

Citing *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), employer first argues that inasmuch as claimant sustained an injury to his leg, which is a member covered under the schedule, his exclusive remedy is permanent partial disability benefits under Section 8(c)(2). Contrary to employer's assertion, however, the schedule, which compensates permanent partial disability, does not apply where claimant is entitled to total disability benefits under Section 8(a) or (b), 33 U.S.C. §908(a), (b). *PEPCO,* 449 U.S. at 277 n.17, 14 BRBS at 366-367 n.17. *See also Jacksonville Shipyards v. Dugger*, 587 F.2d 197, 9 BRBS 460 (5th Cir. 1979). This argument is therefore rejected.

Employer next contends that the administrative law judge erred in concluding that the modified nighttime janitorial position it offered claimant did not constitute suitable alternate employment. Employer asserts that in finding that this job exceeded claimant's limitations, the administrative law judge acted arbitrarily in crediting Dr. Carlson's opinion over that of Dr. Dowdle based on his status as claimant's treating orthopedist without providing any additional explanation. Moreover, employer alleges that because claimant did not make a diligent attempt to continue to perform this position, in that he refused to request modifications or accommodations, it was relieved of the obligation of identifying other suitable alternate employment outside of its facility. In the alternative, employer argues that Mr. Utities provided testimony sufficient to establish the availability of sedentary work to claimant on the open market. Employer asserts that the administrative law judge erred in rejecting this evidence based on Mr. Utities's failure to state whether each employer was willing to allow claimant to have his leg elevated for part of the day, as the only reference to the need for claimant to elevate his leg was contained in the functional capacity evaluation and Mr. Utities testified that many employers are able to accommodate this type of restriction.

As it is undisputed that claimant could not perform his usual work, he established a *prima facie* case of total disability. Accordingly, the burden shifted to employer to demonstrate the availability of realistic job opportunities which claimant could perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 14 BRBS 155 (5th Cir. 1981); *Royce v. Elrich Construction Co.,* 17 BRBS 157 (1985).

We initially affirm the administrative law judge's finding that the janitorial job at its facility which employer offered to claimant did not meet employer's burden of establishing the availability of suitable alternate employment. Contrary to employer's contention, the administrative law judge acted within his discretion in crediting Dr. Carlson's opinion that the modified janitorial job was light duty work which was beyond claimant's restrictions over Dr. Dowdle's contrary opinion. In making this credibility determination, the administrative law judge reasoned that as Dr. Carlson had been claimant's treating physician since his injury in 1992 and had performed two arthroscopic surgeries on claimant's left knee, he was in a superior position to evaluate claimant's condition than Dr. Dowdle, who saw claimant on only one occasion . Decision and Order at 12. *See Mijangos v. Avondale Shipyards, Inc*., 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). Moreover, the administrative law judge also noted that Dr. Carlson's opinion was supported by the functional capacities evaluation performed in May 1995 which indicated that claimant should sit 7-8 hours per shift or stand or walk 2-3 hours, whereas the job description of the janitorial position provided by employer stated that employee would be required to be on his feet the entire shift. In addition, the administrative law judge credited claimant's testimony that employer's videotape showing the alleged physical requirements of the janitorial job did not accurately portray all of the required duties, Tr. at 29, and found that Dr. Carlson's conclusion that claimant is limited to sedentary work was corroborated by Mr. Casper's vocational report. While employer maintains that it was prepared to further modify this position to the extent necessary to render it suitable for claimant, the administrative law judge considered and rationally rejected this assertion. Based on the testimony of Mr. Van Brunt, the dock manager responsible for modifying the position, who testified that the job required some squatting or bending which required flexion of the knee of more than a few degrees, which even Dr. Dowdle conceded claimant could not do, the administrative law judge rationally concluded that the janitorial job could not be modified sufficiently to be compatible with claimant's restrictions. Tr. at 73, 83.

The administrative law judge also reasoned that although Dr. Dowdle was a board-certified orthopedic surgeon and thus highly qualified, his opinion that claimant could perform the janitorial job was entitled to less weight for several reasons, including his testimony on deposition that claimant should not squat, kneel, crouch, or crawl. The administrative law judge noted that the testimony of claimant and Mr. Van Brunt established that claimant would be required to do at least some of these movements during a shift. The administrative law judge also accorded less weight to the opinion of Mr. Utities, who relied on the restrictions imposed by Dr. Dowdle in stating claimant could perform the job, finding that he admitted at his deposition that if the restrictions imposed on claimant by Dr. Carlson

were credited claimant would be precluded from performing the janitorial job. Tr. at 111. *See Dygert v. Manufacturer's Pakaging Co.*, 10 BRBS 1036,1046 (1979).

Finally, the administrative law judge noted that when claimant actually tried to carry out the janitorial job for two days, he had to go to the hospital emergency room because of pain and swelling in his left knee. Decision and Order at 14 n.3. Inasmuch as the administrative law judge's finding that the light duty janitorial job at employer's facility did not constitute suitable alternate employment is rational and supported by substantial evidence, we affirm this finding.[1] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

[1]There is no indication in the administrative law judge's decision to support employer's contention that the fact that employer offered claimant the janitorial position shortly before the hearing played any part in the administrative law judge's finding that this position was unsuitable. In addition, employer's allegation that claimant was not diligent in attempting to retain this job is rejected, based on the finding it was not suitable.

We also affirm the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment on the open market. In so concluding, the administrative law judge found the opinion of Mr. Casper, claimant's vocational expert, more convincing than that of employer's expert, Mr. Utities, noting that it was well-reasoned, based on a number of objective tests, and consistent with the restrictions placed on claimant by his treating physician, Dr. Carlson, which in turn, were corroborated by the functional capacities evaluation. After administering a Schlossen Intelligence Test, a Wide Range Achievement test, performing a transferable skills analysis, and reviewing claimant's medical records,[2] Mr. Casper testified that claimant belongs in a highly modified sedentary category of work and indicated that in view of additional "drastic" recommendations that claimant sit on a cushioned surface and be allowed to elevate his leg, he was reasonably certain that claimant could not find and hold employment in the Duluth area. Tr. at 53-55; Cl. Ex.7. Mr. Casper's testimony in conjunction with the medical evidence that substantial accommodations are required because of claimant's knee condition provides substantial evidence to support the administrative law judge's finding that employer did not establish the availability of suitable alternate employment on the open market. *See Dupre v. Cape Romain Contractors*, 23 BRBS 86, 94 (1989); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988).[3] Inasmuch as the administrative law judge is free to accept or reject all or any part of any testimony according to his judgment and employer has failed to raise any reversible error, we affirm this finding and consequently the administrative law judge's award of permanent total disability compensation. *See generally Thompson v. Northwest Enviro Services*, 26 BRBS 53 (1992). In light of our affirmance of the administrative law judge's finding that claimant failed to establish the availability of suitable alternate employment, we need not address employer's arguments relating to claimant's diligence in securing alternate work and the extent of claimant's permanent physical impairment .

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[2]Employer's contention that Mr. Casper's opinion is unreasoned and lacking any foundation is therefore rejected.

[3]Employer's contention that claimant has done nothing to improve his level of functioning is without merit, as Dr. Carlson stated that, while he did not object to Dr. Dowdle's recommendation of further quad strengthening exercises, claimant has attempted quad strengthening for an extended period of time and that he was personally pessimistic that claimant could improve it much further. Cl. Ex. 2.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge