BRB No. 96-1410

HAROLD B. GIBSON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING INCORPORATED	)	DATE ISSUED:_____
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Ray Mitchell (Ray Mitchell, P.A.), Ocean Springs, Mississippi, for claimant.

Ronald T. Russell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-0659) of Administrative Law Judge C. Richard Avery awarding disability benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed by Ingalls Shipbuilding as a joiner/insulator on May 5, 1993, when he suffered an injury to his lower back while lifting cabinets. EXs-1, 2, 8:29. Claimant sought disability compensation for a herniated disc in his lower back. EX-2. The administrative law judge found that claimant could not return to his former position as a joiner/insulator based on restrictions imposed by Dr. McCloskey. EX-11; *see* Decision and Order at 6. He then found that employer met its burden of demonstrating the existence of suitable alternate employment by offering claimant a position at its facility within these medical restrictions, and that claimant failed to exercise sufficient diligence in attempting to

go back to work. Decision and Order at 7. The administrative law judge awarded temporary total disability compensation for the period from May 26, 1993 through May 25, 1994, the date of claimant's maximum medical improvement, and permanent total disability from May 25 to October 3, 1994, but denied disability compensation thereafter. Claimant appeals, asserting that he is entitled to permanent total disability compensation. Employer responds to claimant's appeal, urging affirmance.

Because it is uncontested that claimant is unable to return to his former position as a joiner/insulator, claimant has made a *prima facie* case of total disability, and the burden shifted to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981); *see also Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 126, 29 BRBS 22, 26 (CRT) (5th Cir. 1994). 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, is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). A job in employer's facility may constitute suitable alternate employment, provided that it is actually available, *see Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688, 30 BRBS 93, 94-95 (CRT)(5th Cir. 1996); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 24 (1988), necessary and tailored to comply with an employee's restrictions. *Darby*, 99 F.3d at 688, 30 BRBS at 94-95 (CRT); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). Once the employer establishes suitable alternate employment, claimant bears the complementary burden of demonstrating diligence in obtaining alternate employment. *See generally Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 82-83 (CRT) (5th Cir. 1986); *Dove v. Southwest Marine of San Francisco*, 18 BRBS 139, 141 (1986).

Upon consideration of the Decision and Order of the administrative law judge, the arguments raised on appeal and the administrative record as a whole, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment within its facility and that claimant did not exercise diligence in seeking to perform this work, because these findings are rational, supported by substantial evidence and accord with applicable law. The administrative law judge reasonably found that employer satisfied its burden of proving suitable alternate employment with the offer to claimant of a modified joiner/insulator position which was within the medical restrictions outlined by Dr. McCloskey based on the testimony of Melinda Wiley, employer's "Work Restriction Coordinator," and Joe Walker, a rehabilitation counselor.[1] *See* EXs-14, 15, 16,

[1]Dr. McCloskey reported that claimant "has an identifiable disc problem in his low back and should not do heavy work," and stated that "In general ... [claimant] could work 8 hours a day, forty hours a week ... lift up to 30 pounds occasionally ... [and that] [b]ending, lifting, twisting, and climbing should be restricted." Dr. McCloskey further opined that claimant "can sit, stand, walk around, use his hands, and operate a motor vehicle." EX-11. Dr. McCloskey testified that while claimant could not perform heavy or strenuous work, and

17; Tr. at 53-79; *see Darby*, 99 F.3d at 688, 30 BRBS at 94-95 (CRT); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430, 24 BRBS 116, 120-121 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). With respect to claimant's lack of due diligence, the administrative law judge rationally credited the testimony of Ms. Wiley, who described the interview with claimant at her office on October 3, 1994, at which time this position was offered, over claimant's contrary recollection of this meeting. Ms. Wiley recalled that claimant was uncooperative and that his "manner was such ... that it was obvious that he did not intend to return, or attempt to return, or to complete processing to return to work." Tr. at 63. According to Ms. Wiley, claimant never offered to go to the worksite and try the new job, and he never contacted her after the October 3, 1994 interview.[2] Tr. at 66. In a vocational rehabilitation report sent to the Department of Labor, Mr. Walker reported that claimant perceived the modified position as an insulator/joiner as beyond his restrictions. EX-17 at 3. He also recorded that claimant did not pursue work activity beyond the meeting with Ms. Wiley,

---

would need to move around continuously, he reiterated that claimant can work an eight-hour day. EX-10 at 14-15, 26. Mr. Walker stated that while the "joiner" position was probably outside claimant's restrictions, EX-17 at 4, tasks of an "insulator" job would lie within the limitations outlined by Dr. McCloskey. *Id.* Mr. Walker emphasized that "activity could have been assigned in the Insulation Department that would have been compatible [with claimant's restrictions] ... ." *Id.* at 6. Mr. Walker met with employees of the Insulation Department to determine where claimant could be placed consistent with his restrictions. Mr. Walker was given the location of a job designated for claimant had he returned, and also was informed that there were other insulation jobs consistent with claimant's restrictions. *Id*. at 12.

[2]Ms. Wiley testified that claimant was given seven days to decide about returning to Ingalls, and that he was terminated on November 7, 1994, for failure to report. Tr. at 67-8. Claimant eventually obtained a security guard position in June 1995, which paid $4.25 per hour.

report for a follow up with Dr. McCloskey, or "report to his department for placement consideration." EX-17 at 3, 4, 6.

The administrative law judge's decision to credit the testimony of Ms. Wiley, as well as the other documentation of employer's attempt to provide a position within claimant's work restrictions, over claimant's view that employer did not make a *bona fide* offer of a suitable position within his work restrictions, is within the administrative law judge's discretion as the trier-of-fact, and claimant has raised no reversible error in the administrative law judge's weighing of this evidence. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As his findings that employer has discharged its burden of establishing suitable alternate employment and that claimant lacked diligence by not attempting to work at this position are supported by the credited evidence, we affirm the administrative law judge's decision. *See Darby*, 99 F.3d at 688-689, 30 BRBS at 94-95 (CRT).

Accordingly, we affirm the Decision and Order of the administrative law judge.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge