BRB No. 91-0748

ROBERT KOSS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	)
	)	
Party-in-Interest	)	DECISION and ORDER

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

James P. Berryman (Suisman, Shapiro, Wool, Brennan & Gray), New London, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-3239) of Administrative Law Judge John C. Holmes awarding permanent partial 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 as an outside machinist by employer at Electric Boat Shipyard for approximately thirty-three years until injuring his lower back on April 23, 1987. Tr. 19, 21. His duties included the installation and overhauling of machinery, including heavy-duty valves, motors,

shafts, turbines and propellers. Tr. at 19-20. These various duties required claimant to perform significant amounts of lifting, climbing and bending. Tr. at 21. Claimant testified that he had never held a sedentary position. Tr. at 21. As a result of his injury, claimant underwent two back surgeries and received cortisone shots when surgery was unsuccessful in alleviating his pain.

The administrative law judge accepted the parties' stipulation that claimant could no longer perform his former employment. Decision and Order at 5. The administrative law judge credited the opinions of Drs. Cooper and Goodman that claimant could perform sedentary or light duty work and the opinion of a vocational counselor, Ms. Tolley, that there are viable employment opportunities within claimant's physical restrictions and transferrable skills. The administrative law judge therefore concluded that employer established the availability of suitable alternate employment. The administrative law judge further found that claimant's testimony that he attempted to obtain the jobs contained in a labor market survey but that none were available did not establish that he diligently sought, but was unable to obtain, alternate employment. The administrative law judge therefore awarded claimant permanent partial disability benefits based on a post-injury wage-earning capacity of $5.00 per hour, which is the rate paid at the more sedentary positions. He found that the date of onset of permanent partial disability was October 24, 1988, the date Dr. Goodman's report indicated claimant has a 20 percent impairment. The administrative law judge found further that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f)(1988), based on claimant's pre-existing back condition as diagnosed by Dr. Cooper in October 1979.

On appeal, claimant contends that the administrative law judge erred in finding that employer established suitable alternate employment, that claimant did not seek alternate employment diligently, and in setting the onset date of permanent partial disability as October 24, 1988. Employer responds, urging affirmance of the permanent partial disability award as supported by substantial evidence. Employer seeks remand, however, to the administrative law judge in order that it may submit additional evidence concerning the appropriate onset date based on a change of law as set forth in *Palombo v. Director, OWCP*, 937 F. 2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991), in which the United States Court of Appeals for the Second Circuit held that partial disability status begins on the earliest date that employer shows suitable alternate employment to be available rather than on the date of maximum medical improvement.

Employer has conceded that claimant cannot return to his former job because of a work-related injury. Claimant therefore has established a *prima facie* case of total disability. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 59 (1985). The burden therefore shifts to employer to demonstrate the existence of realistically available job opportunities within the geographical area where claimant resides, which he is capable of performing given 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 F.2d 1031, 1042-43 (5th Cir. 1981); *Wilson v. Dravo Corp.*, 22 BRBS 463 (1989). If employer establishes the availability of such employment, claimant may rebut his employer's showing of suitable alternate employment and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried but was unable

to secure such employment. *Palombo*, 937 F.2d at 73, 25 BRBS at 5 (CRT).

Initially, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Specifically, claimant argues that his position is supported by the opinion of Ms. McCluskie, a vocational counselor, who concluded in her report that "the prognosis for claimant to successfully obtain employment in a sedentary position is extremely guarded." Next, claimant contends that the administrative law judge committed reversible error in crediting the opinion of employer's expert, Ms. Tolley, because she apparently conducted her labor market survey by phone, issued her report the day after interviewing claimant, and may not have informed prospective employers about claimant's physical and educational limitations. Finally, claimant argues in this regard that the administrative law judge failed to adequately explain how claimant's physical restrictions, including his taking of medication, are compatible with the position of a security guard.

We reject claimant's contentions. Contrary to claimant's contention, the administrative law judge did not err in crediting the opinion of Ms. Tolley that there are viable employment opportunities within claimant's physical restrictions and transferrable skills over the conflicting opinion of Ms. McCluskie. *See generally Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11 (CRT)(1st Cir. 1982). Moreover, Ms. Tolley, in performing her labor market survey, reviewed the medical records wherein claimant's medications were listed and determined that there are available job openings for production clerks, maintenance mechanics, security guards and delivery drivers, which are compatible with the medication claimant is taking. *See Jones v. Genco, Inc.*, 21 BRBS 12, 14 (1988). Additionally, Ms. Tolley was not required to contact employers directly, *see Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), and her August 11, 1989 job survey is based on claimant's physical restrictions, which she determined after reviewing claimant's medical records including Dr. Goodman's report restricting claimant to occasional lifting of 20 pounds. Based on this evidence, the administrative law judge rationally found that employer demonstrated available employment opportunities which are suitable considering claimant's age, work experience, and medical condition, and we affirm his finding as it is supported by substantial evidence. *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991).

Moreover, the administrative law judge reasonably concluded that claimant failed to establish that he diligently tried but was unable to secure the jobs identified by employer. The administrative law judge, within his discretion to make credibility determinations, found that claimant's reluctance to retrain, or to take either an inside or sedentary job, undoubtedly had adversely affected claimant's job interviews. *See generally Wilson*, 22 BRBS at 466. The administrative law judge therefore rationally concluded that claimant did not rebut employer's showing of suitable alternate employment. *See generally Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT). Consequently, we affirm the administrative law judge's finding that claimant is permanently, partially disabled.

We agree, however, that the case must be remanded to the administrative law judge for a

determination of the date upon which employer established the availability of suitable alternate employment, and thus the commencement date of claimant's permanent partial disability benefits. In *Palombo*, the court noted that its holding regarding the date an employee's disability switches to partial from total does not prevent an employer from attempting to establish the existence of suitable alternate employment as of the date an injured employee reaches maximum medical improvement or from retroactively establishing that suitable alternate employment existed on the date of maximum medical improvement. *See Palombo*, 937 F.2d at 77, 25 BRBS at 11-12 (CRT); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 111 S.Ct. 798 (1991). In view of this change in law since the time the administrative law judge issued his decision, we must vacate the administrative law judge's finding that claimant's partial disability award commences on the date of maximum medical improvement, and remand the case for findings regarding the date suitable alternate employment was shown to be available. Claimant will be entitled to permanent total disability benefits from the date of maximum medical improvement to the date suitable alternate employment is shown to have been available. *See Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

Accordingly, the Decision and Order-Granting Benefits is vacated with regard to the date of onset of permanent partial disability, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge