BRB No. 93-1016

CLARENCE GRANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RYAN WALSH, INCORPORATED	)	DATE ISSUED: _____
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-270) of Administrative Law Judge Robert J. Shea 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 August 18, 1987, claimant sustained a work-related injury to his left knee. Employer voluntarily paid claimant temporary total disability benefits from August 31, 1987 through June 30, 1989, and permanent partial disability compensation for a 42.5 percent loss of use of the leg under Section 8(c)(2) and (19) of the Act, 33 U.S.C. §908(c)(2), (19), based upon an average weekly wage of $275.14. Claimant sought permanent total disability benefits at an increased average weekly wage. The administrative law judge found that employer demonstrated the availability of suitable alternate employment and awarded claimant compensation for a 42.5 percent loss of the leg based on an average weekly wage of $331.21.

Claimant appeals the denial of permanent total disability benefits, contending that the administrative law judge erred in determining that suitable alternate employment had been

established and that he did not exercise due diligence in seeking alternate work. In the alternative, claimant avers that the administrative law judge erred in limiting him to compensation for a 42.5 percent impairment of his left leg where his treating physician rated his impairment at 50 percent. Employer responds, urging that the administrative law judge's decision be affirmed.

Inasmuch as claimant's work related injury was to his left knee, 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). As it is uncontested 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 New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981). 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); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). 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 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).

After review of the Decision and Order in light of the record evidence and claimant's arguments on appeal, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment burden because it is rational, in accordance with applicable law, and supported by the vocational testimony of employer's experts, Sherry Carthane and her supervisor, Nancy Favaloro. *See O'Keeffe*, 380 U.S. at 359. The administrative law judge's decision to accord greater weight to the vocational rehabilitation reports of Ms. Favaloro and Ms. Carthane than to that of claimant's vocational expert, Mr. Waddington, is a credibility determination within his discretionary authority. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Inasmuch as the vocational testimony of Ms. Carthane and Ms. Favaloro in conjunction with Dr. Wilkes' approval of various available job opportunities, *see* EX. 18, 25; Tr. at 121-123, provides substantial evidence to support the administrative law judge's suitable alternate employment finding and claimant has failed to establish any reversible error, we affirm this

determination.[1] *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

The administrative law judge's finding that claimant failed to exercise reasonable diligence in securing alternate work is also affirmed. At the hearing, claimant testified that his only attempt to find work on his own occurred when he contacted the employers identified by Ms. Carthane from May 3, 1990, until May 7, 1990, that he did not thereafter place his name on any employment lists, go to the state employment office, or otherwise contact Ms. Carthane about the jobs she identified. Tr. at 48-49. The administrative law judge's conclusion regarding diligence is thus supported by substantial evidence. Inasmuch as employer established the availability of suitable alternate employment and claimant did not establish due diligence in attempting to secure alternate work, we affirm the administrative law judge's determination that claimant is only partially disabled, and thus limited to an award under the schedule. *Sketoe*, 28 BRBS at 224; *Dove v. Southwest Marine of San Francisco*, 18 BRBS 139 (1989).

Finally, claimant asserts that the administrative law judge erred in failing to award him compensation under the schedule based on the 50 percent impairment rating of Dr. Wilkes, his treating physician. Claimant contends that the administrative law judge erred in crediting equally the opinion of Dr. Wilkes, who had examined claimant on thirteen occasions over a twenty-one month period, CX. 9, with the opinion of employer's doctor, Dr. Deriso, who had examined claimant on one occasion for only three minutes. *See* EX. 12; Tr. at 30; Pet. for Rev. at 22. We reject the contention that the administrative law judge is required to accept the opinion of Dr. Wilkes merely because he is claimant's treating physician. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962) (the trier-of-fact is not required to accept the theory of any particular medical examiner). Nonetheless, in this case we cannot affirm the administrative law judge's award of a 42.5 percent impairment based on the average of the ratings of Dr. Wilkes (50 percent) and Dr. Deriso (35 percent), as the administrative law judge merely accepted the percentage on which employer's voluntary payments were made. *See* D. & O. at 3. The administrative law judge must independently evaluate the medical opinions to arrive at an impairment rating supported by the record. *See generally McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). We therefore vacate the administrative law judge's finding that claimant is entitled to compensation for a 42.5 percent loss of use of the knee and remand the case for further consideration of the issue of the extent of claimant's scheduled permanent partial disability.

[1]Although claimant also asserts that the administrative law judge erred in failing to resolve factual doubt in his favor, the United States Supreme Court has determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

Accordingly, the administrative law judge's finding regarding the extent of claimant's disability under the schedule is vacated and the case is remanded for further consideration 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