BRB No. 96-0321

ROBIN PAULUS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE NAVY/MWR	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Jeffrey Winter (Law Offices of Preston Easley), National City, California, for claimant.

Eugene L. Chrzanowski (Littler, Mendelson, Fastiff, Tichy & Mathiason), Long Beach, California, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (95-LHC-774) of Administrative Law Judge Daniel L. Stewart 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §1871 *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).

Claimant injured her low back on November 12, 1992, when she slipped and fell while working as a sailboat maintenance mechanic for the Navy/MWR. Although claimant continued to work until December 7, 1992, she has not worked since that date. Employer voluntarily paid claimant temporary total disability benefits for various periods. Cl. Ex. 6. Claimant sought permanent total disability benefits under the Act.

The administrative law judge awarded claimant temporary total disability benefits from December 8, 1992, through September 21, 1993, and permanent total disability benefits from September 22, 1993, through November 9, 1994. He denied claimant additional compensation thereafter, however, based on his determination that as of that date employer established the availability of suitable alternate employment which, at the time of claimant's injury, paid wages equal to or greater than claimant's stipulated average weekly wage of $252.80. Claimant appeals the denial of permanent total disability benefits, contending that the administrative law judge erred in determining that employer established suitable alternate employment. Employer responds, urging that the administrative law judge's decision be affirmed. Claimant replies, reiterating several arguments.

Where, as here, it is undisputed that claimant is unable to return to her pre-injury employment, she has established a *prima facie* case of total disability and the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that employer must point to specific available jobs that the claimant can perform in order to meet its suitable alternate employment burden. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988).

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 denial of permanent total disability compensation inasmuch as his finding that employer met its burden of establishing the availability of suitable alternate employment burden is rational, supported by substantial evidence, and in accordance with applicable law. *See O'Keeffe*, 380 U.S. at 359. Contrary to claimant's assertions, in determining that suitable alternate employment was established, the administrative law judge acted within his discretion in crediting the vocational testimony of Ms. Lopez, as well as the medical opinion of Dr. Dodge that claimant could work an eight-hour day and commute one hour each way, stopping to stretch on some days, over claimant's contrary testimony; based on his observations of claimant at the hearing, her testimony, and the surveillance evidence introduced by employer, the administrative law judge questioned whether claimant was embellishing her case. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Claimant's assertion that the vocational testimony of Ms. Lopez cannot properly support a finding of suitable alternate employment because it was merely a relisting of jobs found in the newspaper classified ads is rejected, as our review of the record does not support this allegation. Rather, after initially identifying job openings from the newspaper, Ms. Lopez thereafter contacted many of the prospective employers by telephone to determine the precise, nature, terms and availability of the positions listed. In addition, after conducting a labor market survey, Ms. Lopez identified

36 specific available job opportunities in the San Diego area which she believed were suitable and realistically available to claimant given her age, education, work experience, and physical capabilities.

We also reject claimant's argument that pursuant to *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 381, 28 BRBS 96, 102 (CRT)(4th Cir. 1994), the relevant labor market for establishing the availability of suitable alternate employment was in Guatay, California, rather than in San Diego, because claimant had permanently relocated there. The administrative law judge rationally found the facts in the present case distinguishable from those in *See*, where the claimant had moved from the location of injury for economic reasons after the injury occurred. As claimant in the present case relocated in Guatay prior to her work injury purely for personal reasons, *i.e.*, to raise animals, we affirm the administrative law judge's determination that the San Diego area, where the injury occurred, was the relevant labor market rather than rural Guatay, located sixty miles away. *See generally McCullough v. Marathon Letourneau Co.*, 22 BRBS 357 (1989).

The vocational testimony of Ms. Lopez identifying specific available sedentary job opportunities,[1] in conjunction with Dr. Dodge's approval of these jobs, *see* Emp. Ex. 23, Tr. at 44, and his opinion that claimant could work eight hours and commute two to two and one-half hours daily, Tr. at 36, 43-44,[2] provide substantial evidence to support the administrative law judge's finding that suitable alternate employment was established. As claimant has failed to demonstrate any reversible error in his findings, we affirm this

[1]The administrative law judge's suitable alternate employment finding was based on the following positions which Ms. Lopez identified: Eastman, Union Tribune, Metro One, Continental, Stanley Steamer, Advanced Business, Ogden. *See* Decision and Order at 19, n.5.

[2]Although claimant attempts on appeal to challenge several of the positions identified as not vocationally suitable, as the administrative law judge noted in his Decision and Order at 5, at the hearing claimant conceded that the jobs identified in employer's vocational report were within the parameters of her skills but argued that she was unable to travel the distance necessary to perform these jobs. Tr. at 109.

determination. Accordingly, the administrative law judge's denial of permanent total disability compensation is also affirmed. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge