BRB No. 96-1607

L.C. HOOD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONTINENTAL STEVEDORING	)	DATE ISSUED:
	)	
and	)	
	)	
FLORIDA INSURANCE GUARANTY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein, Miami, Florida, for claimant.

Jerry M. Hayden (Vernis & Bowling of Miami, P.A.), North Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (91-LHC-1854) of Administrative Law Judge Robert G. Mahony 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).

This case is before the Board for the second time. To recapitulate the facts, claimant worked as a porter for employer for twenty-two years. His duties included driving a forklift to load and unload luggage from ships and helping passengers load luggage into their cars. Claimant injured his back on March 14, 1986, when he was helping a passenger load his luggage. As a result of this injury, claimant underwent a lumbar laminectomy, a

discectomy, and a foramenotomy on July 23, 1986. Claimant, who has not worked since the date of this accident, sought permanent total disability compensation under the Act. Employer conceded that claimant was permanently disabled as a result of his work injury, but argued that his disability was partial rather than total.

In his initial Decision and Order, the administrative law judge found that although it was undisputed that claimant is unable to perform his regular or usual employment, employer established the availability of suitable alternate employment based on a locker room attendant position which Pedro Roman, one of employer's vocational consultants, had identified in his January 27, 1992, report. The administrative law judge further noted that although there was no wage information for this position in the record, other vocational evidence presented indicated that claimant's wage-earning capacity was in the four to eight dollar range. He therefore inferred that claimant's post-injury wage-earning capacity as a locker room attendant was the minimum wage of $4.35 an hour, or $174 a week. Accordingly, he awarded claimant permanent partial disability compensation commencing October 10, 1989, the date his treating physician, Dr. Kalbac, indicated that maximum medical improvement had been reached, based on two-thirds of the difference between his stipulated average weekly wage of $858.75 and his post-injury wage-earning capacity as a locker room attendant. *See* 33 U.S.C. §908(c)(21).

On appeal, the Board vacated the administrative law judge's finding that suitable alternate employment was established based on the locker room position, as employer failed to introduce any evidence that locker room attendant position opportunities existed in the relevant geographic area either at the time of the January 27, 1992, report, or at any other time in which claimant was able to work. Also vacated were the administrative law judge's findings regarding the terms of employment and wages paid by such a position. Holding that the administrative law judge failed to provide any rationale for his finding that other job opportunities were not suitable for claimant, and that the administrative law judge failed to weigh the evidence, the Board remanded the case for the administrative law judge to reconsider the suitability and availability of other alternate employment opportunities identified by employer consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). Lastly, the Board held that the administrative law judge erred in applying his finding of suitable alternate employment retroactively to the date of maximum medical improvement, *see Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), and instructed that if, on remand, the administrative law judge finds that employer met its burden of establishing the availability of suitable alternate employment, the commencement date for the award of permanent partial disability compensation should be the date that employer first establishes the availability of such employment. *See Hood v. Continental Stevedoring*, BRB Nos. 93-119/A (May 20, 1994)(unpublished).

On remand, the administrative law judge first found that numerous available employment opportunities proffered by employer were not suitable for claimant. However, the administrative law judge determined that employer established the availability of

suitable alternate employment based on the positions of manhole guard, packager, and assembler which employer's vocational consultant, Ms. Maria Martin, identified in her October 4, 1990, report. The administrative law judge then found that claimant failed to establish that he exercised reasonable diligence in attempting to secure employment, and thus, was not entitled to permanent total disability compensation. After noting that the hourly wage for the positions of manhole guard, packager, and assembler ranged from $4.00 to $4.50, the administrative law judge determined that claimant's post-injury wage-earning capacity was $4.35 per hour, or $174 a week. Accordingly, the administrative law judge awarded claimant permanent partial disability compensation commencing on October 4, 1990, the date of Ms. Martin's vocational report, based on two-thirds of the difference between his stipulated average weekly wage of $858.75 and his computed post-injury wage-earning capacity. *See* 33 U.S.C. §908(c)(21).

On appeal, claimant contends that the administrative law judge erred in finding that employer established that suitable alternate employment was available to claimant based on the positions of manhole guard, packager, and assembler. In addition, claimant challenges the administrative law judge's finding that claimant failed to exercise reasonable diligence in trying to secure employment. Lastly, claimant asserts that the administrative law judge's issuance of his Decision and Order on Remand over one year after the date of the second hearing was untimely and a violation of Sections 702.348 and 702.349 of the regulations, 20 C.F.R. §§702.348, 702.349. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties, the burden shifts to employer to establish the existence of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering 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, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *Wilson v. Dravo Corp.*, 22 BRBS 459 (1989)(Lawrence, J., dissenting). If employer establishes the availability of suitable alternate employment, 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 Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In his Decision and Order on Remand, the administrative law judge accepted the parties' stipulation that claimant's physical restrictions are those set forth by claimant's treating physician, Dr. Kalbac, who concluded that claimant can sit for eight hours continuously, stand, sit or walk intermittently for two hours, kneel, sit and bend for one hour

intermittently, and lift up to thirty pounds, but that claimant cannot drive, climb or grasp.[1] *See* Decision and Order on Remand at 2; *see also* Cl. Ex. 2. The administrative law judge then determined that employer met its burden of establishing the availability of suitable alternate employment based on three jobs identified by Ms. Martin, employer's vocational expert. After evaluating claimant, Ms. Martin conducted a labor market survey in October 1990, which identified unskilled jobs of manhole security guard, packager for a medical supply company, and assembler for a company which assembled Christmas lights onto extension cords. The manhole guard position allowed claimant to sit and stand at his convenience, and each of the listings stated that no lifting was involved. *See* Emp. Ex. 2. Thereafter, employer queried Dr. Kalbac, an orthopedic surgeon and claimant's treating physician, as to whether these positions were physically suitable for claimant. In a letter dated December 21, 1990,[2] Dr. Kalbac stated that claimant's physical limitations did not preclude him from performing these specific jobs.[3] Emp. Ex. 3. In finding that employer established suitable alternate employment based on these positions, the administrative law judge credited Ms. Martin's opinion that these unskilled positions are attainable given claimant's educational and vocational background. The administrative law judge rejected the opinions of Dr. Williams and Ms. Lazarus, claimant's vocational counselors, that claimant is unemployable, as the basis of their opinions was that claimant was not physically capable of performing the jobs and that the competition for the positions identified was especially keen in the South Florida area. *See* Cl. Ex. 2 at 35, 49, 56, 62; Cl. Ex. 3 at 23-24, 30. Additionally, the administrative law judge found Dr. Kalbac's opinion approving these positions as within claimant's physical restrictions more persuasive than the contrary opinions of Dr. Williams and Ms. Lazarus, as Dr. Kalbac is claimant's treating physician. *See* Decision and Order at 6-7. Thus, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment with the evidence of job openings for a manhole guard, packager, and assembler. *Id.*

[1]Moreover, claimant's reading and writing skills are limited. *See* April 21, 1992 Transcript at 22-23; April 19, 1995 Transcript at 15. Claimant's IQ level is 57. *See* Cl. Ex. 1 at 19.

[2]The administrative law judge erroneously stated that this letter was dated September 21, 1990.

[3]At his deposition, Dr. Kalbac testified that these light-duty positions were within claimant's physical limitations. Emp. Ex. 1 at 12, 15, 17.

Contrary to claimant's assertion, the job openings of manhole guard, packager, and assembler were specified in Ms. Martin's October 4, 1990 report; the name of the companies were provided, as well as the rate of pay. The administrative law judge reasonably rejected their assessments in favor of the opinion of Dr. Kalbac, claimant's treating physician, to find suitable alternate employment established. It is well-established that the administrative law judge as the trier of fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1981), *cert. denied*, 440 U.S. 911 (1979). Thus, since the identified job opportunities were within claimant's physical restrictions and were specifically approved by Dr. Kalbac, claimant's treating physician, we affirm the administrative law judge's finding that claimant is capable of performing the identified jobs as supported by substantial evidence and consistent with law.[4] *See Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994) (Smith, J., dissenting on other grounds)*; Wilson*, 22 BRBS at 465; *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Claimant next contends that the administrative law judge erred in finding that he did not exercise reasonable diligence in attempting to secure employment. If a claimant diligently tries to secure alternative employment, he may still be entitled to total disability benefits. *Hooe*, 21 BRBS at 258. In finding that claimant failed to demonstrate due diligence, the administrative law judge relied on claimant's testimony that he took an almost two year hiatus from his job search from the time of the first hearing on April 21, 1992 until early 1994 due to the occurrence of Hurricane Andrew. The administrative law judge found that claimant's having to get his house back together did not adequately explain why he could not simultaneously continue to seek employment by checking the classified advertisements and visiting the Florida Placement Service, as he testified he had done prior to the hurricane and subsequently in 1994. *See* April 19, 1995 Transcript at 29-31. The administrative law judge properly recognized that it is claimant's burden to establish due diligence; in this instance, he found that claimant did not meet this burden. Accordingly, the administrative law judge's finding that claimant did not demonstrate due diligence is affirmed. *See, e.g., Wilson*, 22 BRBS at 466; *Dangerfield v. Todd Pacific Shipyards Corp.*,

[4]Contrary to claimant's assertion, the administrative law judge, on remand, commenced claimant's permanent partial disability compensation on the date employer first established suitable alternate employment, October 4, 1990, the date of Ms. Martin's market survey. He did not commence the award on October 10, 1989, the date of claimant's maximum medical improvement. Decision and Order on Remand at 8. Claimant's contention in this regard is therefore rejected.

22 BRBS 104 (1989).

Lastly, we reject claimant's contention that the administrative law judge's decision should be vacated and a trial *de novo* ordered because of the fifteen month lapse between the date of the second hearing and the issuance of the Decision and Order on Remand, as claimant has not shown that the delay resulted in prejudice to him. *See Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983).

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge