BRB No. 97-0514

ROBBIE V. PRICE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robbie V. Price, Newport News, Virginia, *pro se*.

Melissa Robinson Link (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (96-LHC- 0180) of Administrative Law Judge Fletcher E. Campbell, Jr., 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). In an appeal by a claimant without representation by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On March 21, 1991, claimant sustained an injury to his ankle when he slipped during the course of his employment as a painter. Following surgery in 1991 and 1992, claimant sporadically attempted to return to work; claimant last reported to work on March 27, 1995. Employer paid claimant temporary total disability compensation for various periods of time from March 22, 1991, to June 30, 1995, as well as permanent partial disability compensation under the schedule for a 15 percent impairment to claimant's lower left leg. 33 U.S.C. §908(b), (c)(2). Claimant subsequently filed a claim for permanent total disability

benefits under the Act.

The only issue before the administrative law judge was claimant's entitlement to ongoing permanent total disability compensation. In his Decision and Order, the administrative law judge found that claimant was not totally disabled after March 27, 1995, the date on which employer established the availability of suitable alternate employment in its own facility; moreover, the administrative law judge determined that employer established the availability of suitable alternate employment in the open labor market. Accordingly, the administrative law judge found claimant entitled to no further compensation.

Claimant, without the assistance of counsel, now appeals, contending that the administrative law judge erred in not finding him entitled to continuing total disability compensation as of July 1, 1995.[1] Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984). Employer may meet this burden by offering claimant a light-duty position in its facility so long as the position is tailored to claimant's physical restrictions, and the job is necessary and profitable to employer's business. *See Peele v. Newport News Shipbuilding & Dry Dock Co.,* 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Employer may also meet its burden by showing the availability of a range of job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.,* 25 BRBS 294 (1992). If employer establishes the availability of

[1]Although claimant, in his *pro se* appeal, argues that he was denied proper medical treatment, *i.e.*, access to a physician of his choice and further physical therapy, the record reflects that medical services were not at issue in this case. *See* HT at 10. As the issue of medical benefits was never raised before the administrative law judge, it cannot be addressed by the Board on appeal. *See Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

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); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

In the instant case, the administrative law judge found that employer had established the availability of suitable alternate employment within its own facility based upon the testimony of Mr. Bennie Steele, a trade manager in employer's X-33/M-33 department. Mr. Steele testified that suitable alternate employment within the physical restrictions placed on claimant by Dr. Adelaar, claimant's treating physician, was available to claimant. Specifically, Mr. Steele identified a position which involved sanding hard hats, noting that this job would allow claimant to sit or stand at will in accordance with his restrictions; moreover, Mr. Steele testified that claimant could have been employed making insulation pads at a work station. It is well-established that, in arriving at his decision, the administrative law judge 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); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the case at bar, the administrative law judge's decision to credit the testimony of Mr. Steele regarding the availability of suitable alternate employment within employer's facility is neither inherently incredible nor patently unreasonable.[2] *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). Accordingly, we affirm the administrative law judge's determination that, as of March 28, 1995, employer established the availability of suitable alternate employment at its facility within claimant's restrictions, and his consequent denial of continuing total disability benefits to claimant.

Additionally, the administrative law judge found that employer established the availability of suitable alternate employment in the open labor market. In addressing this issue, the administrative law judge relied upon the testimony and labor market surveys of vocational consultants Ms. Roena Hamilton and Ms. Lesley Hutcheson; both Ms. Hamilton and Ms. Hutcheson identified specific employment oppportunites for claimant that were subsequently approved by claimant's treating physican, Dr. Adelaar. As the administartive law judge's finding on this issue is supported by substantial evidence and consistent with law, it is affirmed. *See Sketoe v. Dolphin Titan Int'l,* 28 BRBS 212 (1994)(Smith, J., dissenting on other grounds); *Jones v. Genco, Inc.,* 21 BRBS 12 (1988).

Next, the administrative law judge determined that claimant did not demonstrate due diligence in attempting to secure employment post-injury. The administartive law judge found that claimant exhibited a near-total lack of cooperation with employer's vocational efforts. 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

[2]Moreover, the administrative law judge committed no error in declining to credit claimant's testimony that he was unable to perform the identified positions due to pain.

diligence is affirmed. *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

Lastly, claimant contends that the administrative law judge demonstrated bias toward him but sets forth no specific instances other than the administrative law judge's findings which are contrary to his interests. Claimant's mere assertions are insufficient to demonstrate bias on the part of the administrative law judge. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1995), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).

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