BRB No. 97-1394

KEVIN KILGARIFF	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Dorsey Redland, San Francisco, California, for claimant.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-LHC-1744) of Administrative Law Judge Thomas Schneider 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).[1] We must affirm the findings of fact and conclusions of law of the

[1]Pursuant to claimant's request, the Board dismissed claimant's appeal in BRB No. 97-1394A by Order dated May 5, 1998. In addition, by Order dated April 9, 1998, the Board dismissed employer's supplemental appeal as abandoned. 20 C.F.R. §802.402(a).

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 was injured on December 22, 1991, in a work-related accident when a container was dropped twice on the chassis of the tractor he was driving, the second time apparently with greater force than the first time. H. Tr. at 144. Claimant filled out an accident report and went home. The next day, claimant reported to Dr. Stroop, an orthopedist, who diagnosed acute lumbosacral sprain, with a possible discogenic component and radiculopathy. Cl. Ex. 8. Dr. Silverman took over treatment of claimant's back after Dr. Stroop's retirement. She diagnosed lumbar disc disease with radiculopathy at the left L5 or S1 level, and she stated that claimant's 1992 MRI showed disc protrusion and stenosis. H. Tr. at 78. Prior to his retirement, Dr. Stroop referred claimant to a psychiatrist to treat his attendant depression. Dr. Trahms, claimant's treating psychiatrist, opined that she did not think claimant was capable of working due to his major depression with psychotic features, and that he could not handle surgery from a psychiatric standpoint. H. Tr. at 198, 237. Claimant has not returned to work since the accident, and sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that there were possibly some jobs claimant might be able to perform from a purely orthopedic standpoint, but when claimant's psychological condition is considered, he is not a candidate for a job in the open market. Decision and Order at 7. Moreover, the administrative law judge credited the testimony of Ms. Schissel, a vocational consultant testifying on claimant's behalf, that she found no employer willing to hire claimant. Therefore, the administrative law judge concluded that claimant is entitled to permanent total disability benefits under the Act.

On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to establish suitable alternate employment. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

Employer contends that the administrative law judge erred in finding that claimant is permanently totally disabled as it alleges the evidence supports a finding of suitable alternate employment. As it is uncontested that claimant is unable to perform his usual work, the burden shifted to employer to demonstrate the availability of actual job opportunities within the geographic area where claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). If the administrative law judge finds, based on medical opinions, that claimant cannot perform any employment, employer has not established suitable alternate employment. *Lostaunau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director,*

OWCP v. Campbell Industries, Inc., 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Moreover, if the vocational expert states that no jobs exist which the employee could reasonably obtain, he is permanently totally disabled. *Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), *rev'd on other grounds*, 785 F.2d 329, 18 BRBS 73 (CRT) (D.C. Cir. 1986).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we hold that the administrative law judge's Decision and Order is supported by substantial evidence, and therefore it is affirmed. Specifically, although the administrative law judge discussed the opinions of Drs. Curry and Munday that vocational rehabilitation was desirable in determining whether claimant is psychologically capable of returning to the work force, he credited the opinion of claimant's treating psychiatrist, Dr. Trahms, that claimant is not psychologically stable enough to seek work at this time or to pursue further surgery. In addition, although Mr. Stauber testified on behalf of employer regarding a number of positions identified in a labor market survey, the administrative law judge noted that Mr. Stauber testified that Dr. Trahms did not approve of any of the positions for claimant. Tr. at 263. Moreover, the administrative law judge credited the testimony of Ms. Schissel that she had called a number of employers and told them of claimant's injury, his lifting capacity, his need to lie down part of the day, his depression, and his poor social skills, and that she found no employer willing to hire claimant. The administrative law judge also relied on his observations of claimant, as well as the medical record, to find that claimant was more or less in constant pain. *See generally Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Although, as employer contends, an employee must reasonably cooperate with his employer's rehabilitation specialist and submit to rehabilitation evaluations, *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1983), in the present case we hold that any error by the administrative law judge in not considering claimant's refusal to meet with employer's rehabilitation specialists is harmless as the administrative law judge credited evidence of record that claimant cannot perform any work. *See generally Brandt*, 16 BRBS at 277; *Lostaunau*, 13 BRBS at 227. Thus, as employer has raised no reversible error on appeal, we affirm the administrative law judge's finding that claimant is entitled to permanent total disability benefits as it is supported by substantial evidence based on credibility determinations that are rational and a proper exercise of his discretion. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge