BRB No. 97-1339

GEORGE LIVINGSTON	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: June 24, 1998
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2813) of Administrative Law Judge Stuart A. Levin 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]Employer notified the parties of its bankruptcy on September 30, 1996, while the case was before the Office of Administrative Law Judges. Prior to filing a response brief with the Board, employer's former counsel moved for leave to withdraw due to employer's bankruptcy and the law firm's lack of authority to act on employer's behalf. We hereby grant the motion to withdraw. 20 C.F.R. §802.219.

Claimant injured his right ankle on August 2, 1989. He underwent arthroscopic surgery on February 18, 1991, and his doctor, Dr. Tandron, stated that his condition reached maximum medical improvement on May 24, 1991, with a permanent partial disability of 14 percent. Cl. Ex. 1 at 5-6. Employer voluntarily paid temporary total disability benefits from August 3, 1989, through September 19, 1990, permanent partial disability benefits from September 20, 1990, through March 5, 1991, temporary total disability benefits from March 6 through May 23, 1991, and permanent partial disability benefits from May 24 through September 16, 1991.[2] Emp. Ex. 3. In 1991, claimant returned to his usual work for a few months, but he was unable to continue because of his injury and because employer had no light duty work available; therefore, he was laid off. Claimant filed a claim for permanent total disability benefits.

The administrative law judge found that claimant cannot return to his usual work, but that employer satisfied its burden of establishing the availability of suitable alternate employment. Decision and Order at 6, 8. Therefore, he denied the claim for permanent total disability benefits. Claimant appeals the denial of benefits.

Claimant contends he is entitled to permanent total disability benefits because employer failed to satisfy its burden of establishing the availability of suitable alternate employment. Specifically, claimant argues that three of the four positions identified by employer are unsuitable and that the one remaining position is insufficient by itself to satisfy employer's burden.[3] Claimant also argues that suitable alternate employment was not found, if at all, until December 1995, and that the administrative law judge erred in denying benefits prior to that date.

Claimant was born on October 17, 1935, and he has a third-grade education. He is considered illiterate and usually has his daughter or his friends read and write

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[2]Prior to the surgery, Dr. Tandron had declared September 20, 1990, to be the date of maximum medical improvement. Cl. Exs. 1-2.

[3]The vocational expert, Terri Mast, identified 42 jobs for claimant. Dr. Tandron approved 29, but given claimant's illiteracy, Ms. Mast stated that only four jobs are considered appropriate. Tr. at 42-43.

for him. In approximately March 1991, after his injury but prior to the date of maximum medical improvement and before the showing of suitable alternate employment, claimant's driver's license was suspended for five years as the penalty for two driving-under-the-influence (DUI) convictions. Dr. Tandron, who stated that claimant has a 14 percent permanent impairment to his lower extremity as of May 24, 1991, testified that claimant can work full time but cannot climb ladders or work on uneven ground and is limited to sedentary work. Cl. Ex. 1 at 6-7; Cl. Ex. 2. Although claimant testified that he looked for work, he has not worked since 1991. Cl. Ex. 7; Tr. at 16-18, 27. Claimant sustained a heart attack in 1994, and his driver's license suspension was lifted in March 1996. Cl. Ex. 4; Tr. at 20-21.

Under the Act, the claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Const. Co.*, 17 BRBS 56 (1985). Where, as here, it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternate employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the availability of realistic job opportunities which the claimant is capable of performing, considering his age, background, education, work experience, and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). However, the claimant can rebut the employer's showing of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *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.), *cert. denied*, 479 U.S. 826 (1986).

In this case, the administrative law judge found that claimant cannot return to his usual work. Employer submitted four positions identified by Ms. Mast to show that alternate work is available for claimant. It submitted, as evidence of suitable alternate employment, work in a bindery,[4] work as a school bus driver, and two positions with companies driving rental cars. Claimant argues that the three driving

[4]This job would require claimant to stuff envelopes and run a shrink-wrap machine. Emp. Ex. 1; Tr. at 56.

jobs are not realistically available to him because at the time they were located he had no driver's license. With those jobs being unavailable, he argues, citing *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), that the one remaining position in a bindery is insufficient to establish suitable alternate employment, especially since he was not made aware of that position.[5]

In finding that driving jobs constitute available suitable alternate employment, the administrative law judge reviewed two cases wherein the claimant was incarcerated, and he concluded in this case that claimant's legal penalty, and not his injury, precluded him from obtaining the three driving positions prior to the return of his driver's license. In *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987), and *Allen v. Metropolitan Stevedore*, 8 BRBS 366 (1978), the Board held that a claimant's post-injury incarceration does not preclude an award of total disability if the employer does not show the availability of suitable alternate employment during the period of incarceration. However, the United States Court of Appeals for the Ninth Circuit has held that a claimant's criminal record, in existence at the time of the work injury, can prevent a bank guard position from being "realistically available" to the claimant, as the claimant could do nothing to overcome the disqualifying effect of his criminal record. Thus, where the bank position was unavailable and the employer failed to show the availability of other suitable alternate employment, the claimant was found to be permanently totally disabled. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). In a case in which it followed *Hairston*, the Board held that a claimant's prior felony conviction made submitted security guard positions unavailable, and it affirmed the administrative law judge's finding that the claimant was permanently totally disabled. *Piunti v. I.T.O.*

[5]Claimant argues in his brief that he did not receive notice of the jobs the counselor found; however, he testified that he received some leads from the vocational counselor in the mail and his daughter read them to him. Moreover, contrary to claimant's assertion, an employer need not notify a claimant of the jobs it locates to demonstrate suitable alternate employment, as it is not required to act as an employment agency. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981); *Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990).

Corp. of Baltimore, 23 BRBS 367 (1990).

In *Rivera v. United Masonry, Inc.*, 948 F.2d 774, 25 BRBS 51 (CRT) (D.C. Cir. 1991), *aff'g* 24 BRBS 78 (1990), the United States Court of Appeals for the District of Columbia Circuit held that the Board correctly determined that a claimant's status as an illegal alien was not a factor necessary for consideration in determining the availability of suitable alternate employment. *Rivera*, 948 F.2d at 775-776, 25 BRBS at 54 (CRT). Specifically, the Board held that such status would make any job legally impossible to obtain and that consideration of such a factor would permit an injured employee who was working illegally to obtain a benefit that a legal employee would not get given the same physical status. *Rivera*, 24 BRBS at 82. Moreover, it stated that the claimant's status could change.

In this case, the events which claimant contends make the driving positions unavailable and unsuitable occurred after he was injured, and before employer engaged Ms. Mast to conduct a job search in 1995.[6] We conclude however, that the administrative law judge properly found that the driving positions constitute suitable alternate employment based on the facts of this case. Unlike the situation which arose in *Hairston*, claimant's convictions in this case did not occur prior to his injury. Thus, the convictions were not a prior impediment to claimant's obtaining employment otherwise suitable for him. Moreover, the criminal convictions in *Hairston* and *Piunti* forever prohibited the claimants from obtaining the submitted bank and security guard positions. Here, however, claimant's license was suspended only temporarily. Like the changeable legal status of the claimant in *Rivera*, claimant's authority to drive can, and did, change; in March 1996, just after employer located the positions, claimant's driving privileges were returned to him. Thus, within a reasonable period after the jobs were identified claimant's prohibition from driving ended, rendering the positions suitable and available. Consequently, we distinguish this case from the circumstances in *Hairston* and *Piunti,* and we hold that employer has satisfied its burden of establishing the availability of suitable alternate employment by presenting evidence of jobs which are suitable and available given claimant's background and physical limitations. Therefore, we affirm the administrative law judge's finding. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. However, the administrative law judge failed to address claimant's argument that he diligently sought work but was not hired due to his physical restrictions and his

[6]Although claimant suffered a post-injury heart attack, there is no evidence of record indicating he has any physical restrictions due to this injury. Cl. Ex. 4. Ms. Mast testified that she reviewed the doctor's reports, but when she listed restrictions, she listed only those related to the ankle injury as established by Dr. Tandron. Tr. at 41, 53-54.

illiteracy.[7] Remand is necessary for the administrative law judge to make specific findings regarding the nature and sufficiency of claimant's efforts to seek employment. *See Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). Claimant's entitlement to permanent total disability benefits after November 1995, *see infra*, shall be contingent upon whether, on remand, the administrative law judge determines that claimant has rebutted employer's suitable alternate employment showing by demonstrating that his job search efforts were diligent.[8]

[7]In mentioning his physical restrictions, claimant includes his post-heart attack condition, Tr. at 20, but, as noted, there is no medical evidence of record concerning restrictions due to the heart attack. Claimant testified that he sought work but was turned down. Cl. Ex. 7; Tr. at 24-28. The administrative law judge found that employer's identified jobs are suitable, but he did not address claimant's diligence in seeking work beyond stating: "Claimant by virtue of DUI convictions was unable to diligently try to secure such employment." Decision and Order at 9. While the DUI convictions are relevant to claimant's diligence, we note that such an inquiry need not be limited to his diligence in seeking jobs identified by employer.

[8]Because we hold that employer has established the availability of suitable alternate employment based on the submitted driving and bindery positions, we need not address claimant's remaining argument that employer did not present more than one job to satisfy its burden.

Next, claimant contends the administrative law judge erred in denying all permanent total disability benefits. In particular, he argues that the administrative law judge's ruling makes employer's establishment of the availability of suitable alternate employment retroactive to the date of maximum medical improvement. Claimant contends he is entitled to permanent total disability benefits until such date as employer demonstrates the availability of suitable alternate employment. As claimant correctly asserts, partial disability does not commence until employer establishes the availability of suitable alternate employment. *Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991) (decision on recon.). Therefore, because claimant established his inability to return to his usual work in 1991 after he was laid off, and employer did not present evidence of suitable alternate employment until November 1995, we vacate the denial of benefits and modify the decision to reflect claimant's entitlement to permanent total disability benefits from the date of the last installment of permanent partial disability benefits, September 16, 1991, through November 20, 1995.[9] If, on

[9]Ms. Mast located the bindery job and the bus driver job on November 20, 1995, and sent them to Dr. Tandron for approval on November 29, 1995. Dr. Tandron approved them on December 5, 1995. Emp. Ex. 1. Ms. Mast located the car rental jobs on February 20 and 22, 1996, and sent them to Dr. Tandron for approval on February 23, 1996. Dr. Tandron approved them on March 4, 1996. Emp. Ex. 1. The doctor's approvals on December 5, 1995, and in March 1996, are not necessary steps in ascertaining the availability of suitable alternate employment, as the administrative law judge may determine a position's suitability based on claimant's restrictions. Therefore, suitable alternate employment was shown to be

remand, the administrative law judge finds claimant to have been diligent but unsuccessful in finding work, then claimant is entitled to continuing permanent total disability benefits. However, if he is found not to have diligently sought employment, and employer's showing of suitable alternate employment prevails, then claimant's benefits cease as of November 20, 1995, as permanent partial disability benefits for his ankle injury were paid in full in accordance with the schedule during his period of employment.[10]

Accordingly, the administrative law judge's denial of permanent total disability benefits is modified to reflect claimant's entitlement to permanent total disability benefits from September 16, 1991, through November 20, 1995. The case is remanded to the administrative law judge for consideration of claimant's entitlement to continuing permanent total disability benefits thereafter. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

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available as of November 20, 1995.

[10]Under the schedule, claimant is entitled to 40.32 weeks of benefits. Employer voluntarily paid benefits for 43 weeks; therefore, claimant is not entitled to additional permanent partial disability benefits. 33 U.S.C. §908(c)(2); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15 (CRT) (4th Cir. 1998); Emp. Ex. 3.

REGINA C. McGRANERY
Administrative Appeals Judge