BRB No. 13-0300

LAMONT BENSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Feb. 26, 2014
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-LHC-0509; 2012-LHC-0990) of Administrative Law Judge Colleen A. Geraghty 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 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).

Claimant worked for employer as a steel-trades supervisor, a position which required a substantial amount of walking. Claimant, who had a pre-existing right ankle condition from an injury with a prior employer, ceased working on July 18, 2011, stating that his employment had aggravated his ankle condition. In August 2011, claimant underwent fusion and ankle replacement surgery. The wound did not heal properly, and he has not worked since. Claimant also complained of problems with his right hand resulting from his long-term use of air tools. He filed a claim for disability benefits under the Act for both injuries.

The administrative law judge, *inter alia*, invoked the Section 20(a) presumption, 33 U.S.C. §920(a), for both claimant's right ankle and right hand conditions. She also found that employer presented substantial evidence rebutting the Section 20(a) presumption for both injuries; however, on weighing the record as a whole, the administrative law judge found both conditions to be work-related. Decision and Order at 15-19. The administrative law judge found that claimant has a four percent impairment to his right hand. With regard to his ankle condition, the administrative law judge determined that claimant established a prima facie case of total disability, as he cannot return to his usual work. She further found that employer presented evidence of suitable alternate employment and that claimant diligently sought, but was unable to secure, post-injury employment. Consequently, the administrative law judge awarded claimant temporary total disability benefits for his ankle injury and permanent partial disability benefits under the schedule, 33 U.S.C. §908(c)(3), for his hand injury in the event he ceases to be totally disabled. Decision and Order at 20-23, 25. Employer appeals the administrative law judge's award of temporary total disability benefits, asserting only that claimant did not diligently seek post-injury employment.[1] Claimant has not responded to the appeal.

After an employer establishes the availability of suitable alternate employment, as here, a claimant may retain eligibility for total disability benefits if he shows he diligently pursued alternate employment opportunities but was unable to secure employment.[2] *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *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.), *cert. denied*, 479 U.S. 826 (1986). In *Palombo*, the United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, stated that a "claimant, in proving due diligence, is not required to show that he tried to get the identical jobs the employer showed were available," but instead "merely must establish that he was reasonably diligent in attempting to secure a job, 'within the

[1] We affirm the remainder of the administrative law judge's findings as unchallenged on appeal. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[2] The administrative law judge noted that claimant's present ankle disability is largely due to his post-surgical unhealed wound. Dr. Berson, claimant's treating physician, referred claimant to a wound care clinic where he continues to treat for his unhealed wound. Claimant testified he may need a skin graft to heal his wound. Tr. at 32-36. The administrative law judge credited Dr. Berson's opinion that claimant can perform sedentary work, over that of employer's medical expert, Dr. Sullivan, who opined that claimant is totally disabled until his open wound is completely healed. EX 1, 12-14.

compass of employment opportunities shown by employer to be reasonably attainable and available.'" *Palombo*, 937 F.2d at 74, 25 BRBS at 8(CRT) (citing *New Orleans* (*Gulfwide*) *Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981)). The *Palombo* court further indicated that when a claimant offers evidence that he diligently tried to find a suitable job, the administrative law judge must consider this evidence and make specific findings regarding the nature and sufficiency of the claimant's efforts. *Palombo*, 937 F.2d at 74-75, 25 BRBS at 8-9(CRT); *see also Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

In this case, employer submitted two labor market surveys as evidence of the availability of suitable alternate employment. The administrative law judge found that only two of the 15 positions identified were suitable for claimant.[3] Claimant testified that he called or sent his résumé to all 10 employers identified in the first survey. He testified he was told one job was already filled, and that he was either rejected or did not hear back from the rest of the employers. Tr. at 43-46. The administrative law judge found this testimony credible and undisputed.[4] She, therefore, found that claimant conducted a diligent but unsuccessful work search and is entitled to total disability benefits. Decision and Order at 23. On the facts of this case, we affirm her finding.

Employer asserts the administrative law judge did not make "specific" findings or engage in a thorough discussion establishing that claimant's search was, indeed, "diligent." The crux of employer's argument is that, because only two of the identified jobs were ultimately found "suitable," claimant's mere inquiries or résumé-sending to those two employers is insufficient to constitute a diligent effort. We disagree that this establishes error in the administrative law judge's decision. The administrative law judge addressed all the evidence available to her, and she credited claimant's testimony regarding his efforts to seek work. Decision and Order at 23. Moreover, *Palombo*, on which employer relies, states only that the administrative law judge should address whether the claimant showed "diligence in searching for work within the sphere of available jobs shown to exist" by the employer. *Palombo*, 937 F.2d at 75, 25 BRBS at

[3] The first survey in May 2012 was based upon claimant's original work restrictions. After claimant's doctor set forth newer, more restrictive, restrictions, employer ordered a second survey in June 2012. Five of the jobs identified in the second survey duplicated five jobs from the original survey. Two of those jobs were the ones found suitable. Decision and Order at 23; EX 9, 11.

[4] The second survey was not presented until a few days before the hearing. The administrative law judge determined it would be unreasonable to expect claimant to have applied for the positions therein as of the date of the hearing. Decision and Order at 23, n.11. In any event, the two jobs found suitable were identified in both surveys.

9(CRT). Here, the administrative law judge found that claimant credibly testified that he applied to all of the jobs in the first labor market survey; thus, he searched "within the sphere" by seeking the exact jobs employer identified, some of which were not even suitable. Employer argues that claimant must do more to be "diligent," but no court has specifically held that a claimant's search must go beyond jobs identified by employer.[5] As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), the administrative law judge's finding in this case is supported by substantial evidence. Therefore, we affirm the findings that claimant undertook a diligent but unsuccessful post-injury employment search in this case, and that he is entitled to total disability benefits for his work-related ankle condition. *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998).

[5] Employer cites unpublished decisions to support its argument that the administrative law judge erred in this case. Unpublished decisions lack precedential value. *See Lopez v. Southern Stevedores*, 23 BRBS 295, 300 n.2 (1990). Moreover, those cases were reviewed under the substantial evidence standard, as is this case, and do not provide a legal standard for establishing "diligence."

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge