BRB No. 06-0989

D.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 06/28/2007
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

James P. Berryman (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Peter D. Quay, Taftville, Connecticut, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-01252, 01253. 01254, 01254) of Administrative Law Judge Daniel A. Sarno, 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). 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).

Claimant commenced employment with employer as a welder in December 1976. After sustaining a work-related injury to his left knee in late 1979 or early 1980, claimant was reassigned to employer's tool room where he worked as an attendant. The parties stipulated that claimant subsequently sustained work-related injuries on June 28, 1988, September 10, 1992, and October 1, 1995, that claimant's average weekly wage at the time of his 1995 work-injury was $1,029, and that employer voluntarily paid claimant temporary total, temporary partial, permanent partial, and medical benefits for various periods of time from July 18, 1988, through April 14, 2004. Claimant has not worked for employer since the 1995 injury. In 1996 or 1997, claimant founded a horseshoe club

which he continued to manage through the date of the hearing. Following the termination of employer's voluntary payments of compensation to claimant, claimant sought additional disability and medical benefits under the Act.

In his Decision and Order, the administrative law judge found that, although claimant is not able to return to his usual job as a tool room attendant with employer, employer established the availability of suitable alternate employment as of April 15, 1999, and claimant had not shown that he diligently tried and was unable to secure such employment. As claimant did not aver that his work-related conditions had reached permanency, the administrative law judge awarded claimant temporary partial disability compensation from April 15, 1999, through April 14, 2004, as well as medical benefits. 33 U.S.C. §§908(e), 907.

On appeal, claimant challenges the administrative law judge's determination that employer established the availability of suitable alternate employment. Alternatively, claimant contends that the administrative law judge erred in concluding that suitable alternate employment was available as of April 15, 1999, and in finding that claimant did not diligently seek such employment. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the instant case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89(CRT) (2d Cir. 1997); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must establish that job opportunities are available within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Pietrunti*, 119 F.3d 1035, 31 BRBS 89(CRT); *see Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Turner*, 661 F.2d 1031, 14 BRBS 156; *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

In his appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternate employment as of April 15, 1999. Claimant initially asserts that the administrative law judge erred in relying upon the labor market survey prepared by employer's vocational expert, Ms. Black, over the transferable skills analysis prepared by his vocational witness, Ms. King. We disagree. The administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon the July 29, 2004, labor market survey and subsequent testimony of Ms. Black, employer's vocational consultant, which set forth specific sedentary positions which Ms. Black opined were suitable for and available to

claimant. EXs 9, 15. In this regard, the administrative law judge found Ms. Black's vocational opinion to be well-reasoned since she took into consideration claimant's latest work restrictions and identified non-skilled, entry-level employment opportunities which required neither a high school diploma or specific skills. Decision and Order at 13. Ms. Black testified that she took into consideration the latest opinion of Dr. Willets regarding the restrictions to be placed on claimant when addressing claimant's post-injury employment prospects.[1] Specifically, while Ms. Black acknowledged that her July 29, 2004, labor market survey addressed Dr. Willets's January 29, 1999, and March 27, 2002, medical reports, Ms. Black stated she also considered Dr. Willets's subsequent decision in July 2005 to reduce claimant's lifting restriction from 20 to 10 pounds and concluded that this reduction affected only two of the specific employment opportunities that she had previously identified as being suitable for claimant.[2] EX 15 at 8-9, 31-32. Thus, contrary to claimant's contention, Ms. Black considered claimant's most recent physical restrictions when offering her opinion regarding claimant's ability to work post-injury, and the administrative law judge subsequently reviewed her labor market survey in light of those restrictions. In contrast, the administrative law judge declined to rely upon the opinion of Ms. King, claimant's vocational expert, since she focused her testimony on claimant's ability to perform skilled, rather than unskilled, jobs.

We affirm the administrative law judge's decision to rely upon the opinion of Ms. Black rather than that of Ms. King in finding that employer established the availability of suitable alternate employment. 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). In this case, the administrative law judge addressed at length the evidence presented by the parties on this issue, and his decision to rely upon the opinion of Ms. Black is rational. Accordingly, as the labor market survey and testimony of Ms. Black constitute substantial evidence supporting the administrative law judge's finding that employer established the availability of suitable alternate employment, it is affirmed. *See Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

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[1]In discussing claimant's ability to work, the administrative law judge determined that the opinions of Drs. Matza and Abramovitz that claimant was incapable of gainful employment were not well-reasoned since both of these physicians were unaware of claimant's activities during the preceding ten years managing a horseshoe club located approximately 44 miles from his home. In contrast, the administrative law judge found that Dr. Willetts opined that claimant was capable of limited duty work despite his physical restrictions. Decision and Order at 10, 13.

[2] Ms. Black identified multiple clerk, cashier, and customer service positions as being suitable and available for claimant. EX 9.

Claimant next contends that his investigation of possible employment opportunities post-injury, and his failure to secure such employment, demonstrates that he remains totally disabled from gainful employment. We disagree. Where, as in the present case, 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 Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *see also 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); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997). In his decision, the administrative law judge found, based upon claimant's acknowledgement that he applied for only a couple of jobs since 1995 and that he has not sought sedentary employment during this period of time, that claimant did not diligently seek employment post-injury. Decision and Order at 14; Tr. at 41-42, 68-69. The administrative law judge properly recognized that it is claimant's burden to establish due diligence and, based upon his evaluation of claimant's efforts, concluded that claimant did not meet this burden. As it is supported by substantial evidence, the administrative law judge's finding that claimant did not diligently seek employment is affirmed. *See, e.g., Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

Claimant contends, in the alternative, that the administrative law judge erred in finding that suitable alternate employment was established as of April 15, 1999. Specifically, claimant avers that while the administrative law judge credited Ms. Black's July 29, 2004, labor market survey in determining that employer established the availability of suitable alternate employment, he thereafter erred in finding that such employment was available as of April 15, 1999, based upon a prior labor market study dated March 16, 1999. This argument requires further consideration by the administrative law judge.

Once employer has established the availability of suitable alternate employment, claimant's total disability becomes partial on the date that suitable alternate employment is shown to have been available. *See Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.). As we have discussed, the administrative law judge's finding that employer established the availability of suitable alternate employment is based upon Ms. Black's July 29, 2004, labor market survey identifying non-skilled, entry level positions which were suitable for claimant. Decision and Order at 13-14. In establishing the onset date of permanent partial disability, the administrative law judge cited an earlier labor market survey dated March 16, 1999, prepared by a Mr. Moshier, to find that claimant's disability changed from total to partial on April 15, 1999. Decision and Order at 14; EX 16A. While the administrative law judge noted the existence of this labor market survey in his summary of the evidence of record, Decision and Order at 10, in discussing the extent of claimant's disability, he did not address whether the jobs identified in the March

16, 1999, survey were suitable given claimant's restrictions and other relevant factors. As the administrative law judge did not analyze the jobs presented, discuss the qualifications of the vocational specialist who performed the survey or otherwise evaluate it, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment on April 15, 1999. The case is remanded for the administrative law judge to address the merits of the 1999 survey and reconsider the date on which employer established the availability of suitable alternate employment, thus converting claimant's disability from total to partial in accordance with case precedent.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment on April 15, 1999, is vacated, and the case is remanded for the administrative law judge to reconsider the date of onset of partial disability. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge