BRB No. 97-1739

JOHN T. BOYD	)	
	)	
Claimant-Respondent	)	DATE ISSUED:_____
	)	
v.	)	
	)	
SOUTHERN BULK INDUSTRIES	)	
	)	
and	)	
	)	
GEORGIA INSURERS INSOLVENCY POOL	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Order of Associate Chief Judge James Guill, and the Decision and Order on Remand -- Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Loberbaum), Savannah, Georgia, for claimant.

Edward T. Brennan (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Order of Associate Chief Judge James Guill, and the Decision and Order on Remand -- Awarding Benefits (90-LHC-1213) of Administrative Law Judge David W. Di Nardi 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).

This is the second time this case has come before the Board. To briefly summarize the facts, claimant injured his back on September 14, 1984, when he slipped and fell during the course of his employment. He underwent a laminectomy on June 2, 1986, and employer commenced voluntary payments of permanent partial disability benefits to claimant on April 11, 1990. Administrative Law Judge Shea found that claimant could not return to his usual work as a longshoreman and that employer established the availability of suitable alternate employment. Therefore, he concluded, had claimant fully cooperated in the rehabilitation effort, he would be gainfully employed, earning approximately $152 per week. Consequently, Judge Shea awarded claimant permanent partial disability benefits from April 11, 1990, based upon the difference between his pre-injury average weekly wage and his post-injury wage-earning capacity of $152 per week. Decision and Order at 6.

On appeal, the Board held that Judge Shea failed to make findings regarding claimant's physical restrictions and, therefore, failed to compare those restrictions to the job duties of the positions identified as suitable alternate employment. Accordingly, the Board vacated the finding that employer established the availability of suitable alternate employment. Additionally, the Board vacated Judge Shea's determination of claimant's post-injury wage-earning capacity, as he used the minimum wage in 1990 and failed to adjust the wage to its 1984 equivalent to account for the effects of inflation. Thus, the Board vacated his finding on this issue also, and it remanded the case for further consideration. *Boyd v. Southern Bulk Industries*, BRB No. 92-1639 (Jan. 31, 1996) (unpublished).

By Order dated October 30, 1996, Associate Chief Judge Guill informed the parties that this case would be assigned to another administrative law judge because Judge Shea was no longer with the Office of Administrative Law Judges. Employer objected and requested a *de novo* hearing. By Order dated December 12, 1996, Judge Guill denied employer's request, and the case was assigned to Administrative Law Judge Di Nardi (the administrative law judge) for a decision on the existing record. The administrative law judge set forth claimant's physical restrictions and noted that employer's vocational rehabilitation counselor was aware of claimant's restrictions, but that the counselor did not describe the duties of the identified jobs; therefore, the administrative law judge stated that he was unable to determine if the jobs are within claimant's physical restrictions. Additionally, the administrative law judge found that the counselor did not account for claimant's other medical conditions. He concluded, therefore, that employer failed to submit "credible and persuasive" evidence of suitable alternate employment. Consequently, he awarded claimant permanent total disability benefits from April 11, 1990, and he found it was unnecessary to address the remaining issue of claimant's post-injury

wage-earning capacity. Decision and Order on Remand at 12, 18-19, 23-24. Employer appeals the award, and claimant responds, urging affirmance.

Employer first contends Judge Guill erred in denying in its request for a *de novo* hearing. It argues that the credibility of claimant and the vocational expert are at issue and, because Judge Shea is not available to reconsider the case, a new hearing must be held so as to permit the new administrative law judge to hear the testimony and judge the credibility of the witnesses. Employer notes that Judge Di Nardi set forth his authority to determine issues of credibility and found that employer failed to produce "credible" evidence of suitable alternate employment; therefore, it argues the credibility of the witnesses is at issue.

A rehearing of the evidence or a reopening of the record is generally not required when the Board remands a case to an administrative law judge when the parties were afforded ample opportunity to develop the evidence prior to the issuance of the original decision. *See Dionisopoulous v. Pete Pappas & Sons*, 16 BRBS 93 (1984). However, when the original administrative law judge is not available and the credibility of witnesses is at issue, a party may request a *de novo* hearing, and the second administrative law judge may not then rely on the record developed before another administrative law judge in determining credibility of witnesses. *Creasy v. W. Bateson Co.*, 14 BRBS 434 (1981). In this case, Judge Shea retired and Judge Guill assigned the case to Judge Di Nardi, rejecting employer's request for a *de novo* hearing. Employer's objection to the transfer preserved this issue for appeal. *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981).

The Board remanded this case to the Office of Administrative Law Judges for the purpose of having a fact-finder determine the extent of claimant's physical restrictions, to compare those restrictions with the duties of the alternate jobs identified to ascertain their suitability, and to properly calculate claimant's post-injury wage-earning capacity. *Boyd*, slip op. at 3-4. Resolution of these issues required review of depositions and other documentary evidence rather than the assessment of the credibility of witnesses. Although Judge Di Nardi stated that he has the authority to judge the credibility of the witnesses and that employer provided no "credible" evidence of suitable alternate employment, this statement does not establish that the credibility of witnesses actually was at issue. Judge Di Nardi's former statement concerns the general authority his office holds, and while it does not pertain to the procedural circumstances of this case, it is a generally correct statement of law. *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). Moreover, his characterization of employer's suitable alternate

employment evidence as not "credible," also is harmless,[1] as his decision addresses the specific questions for which the case was remanded and sufficiently explains his reasons.

[1]In essence, the administrative law judge's finding is that employer's evidence is legally insufficient to establish suitable alternate employment.

The issues on remand, as Judge Guill aptly determined, did not require Judge Di Nardi assess the credibility of any witnesses testifying at the hearing.[2] Determinations of claimant's physical restrictions and whether employer established the availability of suitable alternate employment must be made from the documentary evidence alone in this case. Only one doctor assessed claimant's abilities and restrictions and only one vocational expert presented evidence of alternate employment. As neither of these individuals testified at the hearing, their credibility as witnesses was not at issue on remand. A *de novo* hearing therefore is not necessary. We also reject employer's argument that additional testimony from the vocational expert should have been allowed as it is necessary to determine whether the job opportunities identified were specific enough to satisfy employer's burden. To the contrary, had employer believed the vocational reports were incomplete or needed further explanation, it should have obtained such information prior to the time Judge Shea closed the record. Therefore, we affirm the denial of a *de novo* hearing on remand. *See Dionisopoulous*, 16 BRBS at 96-97.

Next, employer contends the administrative law judge erred in finding it did not establish the availability of suitable alternate employment. 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 existence of realistic job opportunities which the claimant is capable of performing, considering his age, 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 the availability 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. *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).

[2]Claimant was the sole witness to testify.

In this case, employer presented the reports of Mr. Waddington, a vocational rehabilitation counselor, to establish the availability of suitable alternate employment. The reports indicate that Mr. Waddington considered claimant's physical restrictions when he performed the job search, and that he believed claimant was limited to light or sedentary work.[3] Cl. Ex. 5. The reports also identify jobs such as parking lot attendant, information clerk, mail clerk, maintenance worker, janitor, mechanic's helper, cafeteria attendant and counter attendant as possible employment for claimant.[4] Cl. Ex. 5; Emp. Ex. 8. Judge Di Nardi found that employer failed to establish the availability of suitable alternate employment because Mr. Waddington's reports are too general and are "highly superficial[.]" Decision and Order on Remand at 19. He also found that employer has only identified the "general category of an attendant (whatever that is) at a Jiffy Lube[,]" and he stated he was unable to conclude the identified jobs are within the credited physical limitations. The administrative law judge found most important the fact that Mr. Waddington did not discuss the jobs within the context of the doctor's physical restrictions. He also noted that Mr. Waddington failed to account for claimant's heart condition and hypertension. *Id.* at 24. Consequently, he concluded that employer failed to meet its burden, and he awarded claimant permanent total disability benefits. *Id.*

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[3]Judge Di Nardi found that claimant cannot perform repetitive lifting over 30 pounds, and is restricted from kneeling, twisting, squatting, bending, climbing and lifting more than two hours per day; however, claimant may sit, stand, and walk for up to four hours per day, and he may perform a job which allows him to move around as necessary. Decision and Order on Remand at 18; Emp. Exs. 7, 11-12.

[4]Mr. Waddington also stated he gave claimant some leads for positions in restaurants as a cook because of claimant's interest in that type of work. He noted, however, that he was not certain such work suited claimant's physical abilities. Emp. Ex. 8.

Employer's argument on appeal hinges on the numerous jobs mentioned in the reports and on the fact that Mr. Waddington stated, a number of times, that although claimant believed himself capable of the jobs suggested and agreed to follow-up on job leads, he failed to do so. Thus, but for his lack of diligence, employer asserts that claimant would be employed. Contrary to employer's assertion, claimant's diligence is relevant only after employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 687, 18 BRBS at 79 (CRT). Therefore, we must determine whether substantial evidence supports Judge Di Nardi's finding that employer's evidence is not sufficient to meet employer's burden.

As noted, Mr. Waddington identified some general job categories for which he believed claimant was qualified considering his physical limitations. Some of the employers had openings when they were contacted by Mr. Waddington and some had had openings in the previous few months. Mr. Waddington's reports, however, do not delineate the specific physical requirements of any of the jobs, and therefore, Judge DiNardi found that he was unable to compare claimant's restrictions with the requirements of the potential jobs.[5] The administrative law judge must have sufficient information to perform his role as factfinder to determine whether jobs identified by a vocational expert are in fact suitable for claimant. In this case, the record supports Judge DiNardi's conclusion that the vocational evidence is insufficient to satisfy employer's burden of establishing the availability of suitable alternate employment. *See Williams v. Halter Marine Service, Inc.*, 19 BRBS 248 (1987). Consequently, we affirm his conclusion that claimant is totally disabled.[6]

[5]Mr. Waddington's reports note his opinion that claimant is limited to "light or sedentary" work based on Dr. Deriso's restrictions and that he looked for positions in this category. Mr. Waddington noted that generally, a "mechanic's helper" is classified as "medium" work in the *Dictionary of Occupational Titles*, but in his opinion the Jiffy Lube type positions are properly classified as "light" work. He did not, however, elaborate on the duties of the Jiffy Lube job, as the administrative law judge noted, and as a result the administrative law judge was unable to evaluate the suitability of the job. Contrary to the administrative law judge's additional reasoning, Mr. Waddington was not required to submit the proposed jobs to claimant's doctor for approval, as the administrative law judge may determine a position's suitability in view of claimant's restrictions. Moreover, Mr. Waddington rationally discounted claimant's heart condition in view of his and claimant's attorney's inability to obtain records from claimant's cardiologist. *See generally Fox v. West State, Inc.,* 31 BRBS 118 (1997).

[6]Accordingly, we need not address claimant's diligence in pursuing employment.

Finally, employer contends the administrative law judge erred in applying the law stated in *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981), to this case. The United States Court of Appeals for the Fifth Circuit held in *Holliday* that adjustments to compensation pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), which are made to permanent total disability benefits annually to reflect the rise in the national average weekly wage, are to include intervening adjustments occurring during the claimant's previous period of temporary total disability. *Holliday*, 654 F.2d at 415, 13 BRBS at 741; *contra Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (*en banc*) (overruling *Holliday*). The Eleventh Circuit has twice held that the rule in *Holliday*, which was decided prior to the creation of the Eleventh Circuit on September 11, 1981, is still binding in that circuit. *Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140 (CRT), *reh'g en banc denied*, 132 F.3d 48 (11th Cir. 1997), *petition for cert.* filed, ___ U.S.L.W. ___, (U.S. Feb. 24, 1998)(No. 97-1394); *Director, OWCP v. Hamilton*, 890 F.2d 1143 (11th Cir. 1989).

Because Judge Shea awarded permanent *partial* and not permanent *total* disability benefits, it was unnecessary for him to address the issue of Section 10(f) applicability. On remand, Judge Di Nardi awarded permanent *total* disability benefits, and it was appropriate for him to address the issue. As the Eleventh Circuit adheres to the ruling in *Holliday*, Judge Di Nardi correctly applied that law. *Brown*, 121 F.3d at 648, 31 BRBS at 140 (CRT).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge