BRB No. 99-0124

MARK G. WAINWRIGHT	)	
	)	
Claimant-Petitioner	)	
	)	
	)	
v.	)	
	)	
JACKSONVILLE SHIPYARDS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
ST. PAUL'S FIRE & MARINE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Bonnie J. Murdoch (Taylor, Day, Currie & Burnett), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-257) of Administrative Law Judge Vivian Schreter-Murray 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 if they 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 injured his back on August 22, 1980, while working for employer as a first class shipfitter. His medical care included five surgeries on his back over an 18 year period. He briefly returned to work for employer after the accident and then worked sporadically in various jobs, each usually lasting less than a year. Claimant continued to have various medical problems, with major complaints of low back and bilateral leg pain. In February 1994 claimant consulted Dr. Chaim Rogozinski, an orthopedic surgeon, who has been his principal physician since.

Employer voluntarily paid claimant compensation for various periods of temporary total and temporary partial disability from August 23, 1980 through February 14, 1997, including during periods of claimant's intermittent employment, and for permanent partial disability thereafter and continuing. Employer also paid for medical expenses, including four of the surgeries. On April 20, 1995, and May 30, 1995, Dr. Rogozinski performed a two stage multilevel fusion of claimant's back, assisted by Dr. Abraham Rogozinski. Dr. Rogozinski found that claimant reached maximum medical improvement on January 3, 1996, and released him for light-medium work with various restrictions. Dr. Franco, another orthopedist, evaluated claimant and agreed with Dr. Rogozinski's assessment of claimant's work restrictions. Cl. Ex. 108. At issue before the administrative law judge was the extent of claimant's disability after January 3, 1996.[1]

In her Decision and Order, the administrative law judge found that employer demonstrated the availability of suitable alternate employment on January 17, 1996, and that claimant did not establish diligence in seeking such employment. The administrative law judge thus awarded claimant permanent partial disability compensation based on a stipulated average weekly wage of $215. She awarded claimant weekly compensation of $59.65 after concluding that claimant's post-injury wage-earning capacity is $400, adjusted for inflation to $125.52, resulting in an $89.48 loss in wage-earning capacity. 33 U.S.C. §908(c)(21). On appeal, claimant contends that the administrative law judge erred in finding that he is only partially

[1]A formal hearing was previously held on this claim on March 12, 1990, before Administrative Law Judge Silverman. In an Order issued January 31, 1991, he awarded claimant temporary partial disability benefits. Claimant appealed to the Board. The Board vacated Judge Silverman's Decision and Order and denial of reconsideration and remanded the case. *Wainwright v. Jacksonville Shipyards, Inc.,* BRB Nos. 92-1625/A (April 27, 1995) (unpublished). Thereafter, employer agreed to pay for a radical, three level surgical procedure and to pay claimant temporary total disability compensation while claimant underwent treatment. Pursuant to the parties' agreement, the case was remanded to the district director on September 18, 1995.

disabled. Employer responds, urging affirmance of the administrative law judge's decision. Claimant replies, reiterating his original arguments.

As it is undisputed that claimant cannot return to his usual employment due to his work-related injury, the burden shifted to employer to establish the existence of available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In challenging the administrative law judge's finding that claimant is not permanently totally disabled, claimant initially alleges bias on the part of the administrative law judge. We reject this contention. Adverse rulings alone are insufficient to show bias, *Olsen v. Triple a Machine Shops, Inc.,*25 BRBS 40, 46 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988), and claimant has failed to point to any action by the administrative law judge in the instant case which can be construed as proof of bias.

We next hold that claimant's assertion that the administrative law judge applied an erroneous standard is without merit. The applicable standard of law which claimant argues should be used consists of a general recitation of cases which contain language urging liberal construction in favor of the claimant. While claimant concedes that credibility determinations are within the administrative law judge's domain, and argues that she did not apply a proper legal standard, he in fact challenges the administrative law judge's credibility determinations. As claimant fails to point to any erroneous standard articulated by the administrative law judge, and instead challenges the administrative law judge's weighing of the evidence and credibility determinations, claimant's argument is rejected.[2]

[2]The regulations require that a party raise specific issues, providing an argument on each issue and advocating a result. 20 C.F.R. §802.211. Here, claimant makes irrelevant allegations without assigning specific error. *See generally Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990). Moreover, claimant cites old cases which state that doubtful questions of fact are to be resolved in favor of

claimant. This is an incorrect statement of the current law. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994) (the "true doubt" rule violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d)).

We now turn to claimant's challenge to the administrative law judge's weighing of the vocational testimony. Jerry Albert, a rehabilitation counselor, prepared two labor market surveys. The first, covering January 4, 1996 to February 29, 1996, listed nine positions approved by Dr. Abraham Rogozinski. Emp. Ex. 14. The second labor market survey identified 16 positions available from January 17, 1996, through March 24, 1988, listing jobs paying between $5.25 and $12, plus commission; the jobs were approved by Drs. Chaim Rogozinski and Franco. Based on a review of claimant's employment and medical history, including a psychological evaluation by Dr. Harris, and contact with employers, Mr. Albert concluded that claimant has a wage-earning capacity of $10-$12 per hour and can fully compete in the open labor market. This market is the best he has seen in 30 years. Tr. at 121-123. Ms. Legree, another vocational counselor, evaluated claimant's prognosis for working as "fair to guarded" because of his physical limitations, and reported that efforts to place him in a position of ranger's aide were unsuccessful. The administrative law judge rationally credited Mr. Albert's opinion over that of Ms. Legree, reasoning that claimant's employment history and tax records support Mr. Albert's opinion that claimant is "either underplaying his academic abilities or finds a way around it" because "his work history demonstrates that he is functioning and has the capacity to function at a significantly higher level." Decision and Order at 7. She also noted that although claimant maintains that he can barely read or write, he has successfully filled out applications for jobs and it was he who voluntarily left many jobs, rather than being laid off for incompetence or inability to cope. Decision and Order at 8. The administrative law judge concluded that while she was unaware of Ms. Legree's qualification and experience, she doubted the competency of any vocational expert, familiar with claimant's medical history, who would consider placing him in employment as a ranger's aide, Cl. Ex. 109, and also because it appeared that Ms. Legree was unaware that numerous jobs available had been specifically approved by claimant's physicians.[3]

[3]The administrative law judge further rationally found that the evidence does not support claimant's assertion that since he obtained many of his jobs through friends, the employment was sheltered or qualified, noting that there was no evidence that claimant worked by extraordinary effort, and that, on the contrary, the evidence shows that when in pain, claimant quit his jobs. Decision and Order at 9. Sheltered employment is that for which the employee is paid even if he cannot do the work or which is unnecessary. *See Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *see also CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991). Claimant alleges that the administrative law judge does not give him credit for all his efforts to work, dismissing his work efforts by saying that at first sign of discomfort claimant walked off the job. Decision and Order at 9. The administrative law judge, however, made this observation in support of her finding

We next reject claimant's argument that in preparing the labor market study, Mr. Albert did not consider the reaggravation of his back injury in November 1997. We note that on May 11, 1998, after the incident in question, Dr. Rogozinski reiterated his opinion that claimant is physically capable of performing the jobs identified in the labor market survey which he had previously approved, and that claimant is able to perform jobs within the restrictions which he previously imposed on January 3, 1996. Emp. Ex. 20. Dr. Franco, specifically referring to this incident, expressed the same opinion. Emp. Ex. 17. *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995); *see generally Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Accordingly, as both Drs. Rogozinski and Franco reiterated their approval of the previously approved positions with knowledge of the incident, Mr. Albert's lack of knowledge of this fact did not affect the validity of his testimony or the labor market survey.

Next, claimant's argument that he must disclose all conditions to prospective employers is without merit. *See Fox v. West State, Inc.,* 31 BRBS 118, 121-122 (1997). If an employer will not hire applicants with claimant's history, it will be apparent when claimant demonstrates that his diligent job search was unsuccessful. *Id.* As it was within the administrative law judge's discretion to accept Mr. Albert's view with regard to claimant's employability and to credit it over the contrary opinion of Ms. Legree, and as the administrative law judge's finding is supported by the medical opinions of record, we affirm the administrative law judge's determination that employer established the availability of suitable alternate employment.

Claimant lastly asserts that the administrative law judge erred in finding that he did not establish that he diligently sought employment. A claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement for total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). In rationally concluding that claimant did not establish diligence, the administrative law judge first noted that claimant admitted that he did not look for work in 1996. She next found that although claimant applied for a job as a ranger's

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that claimant could not argue that he worked in spite of pain or only through extraordinary effort.

aide, this position is unsuitable given claimant's physical restrictions. She further reasoned that while claimant filed an application at Knight's Inn, he did not follow up, nor did he apply to several employers who were taking applications, because he was taking care of his baby. Tr. at 93-98. Because the administrative law judge's finding that claimant did not demonstrate diligence in seeking employment is rational and supported by substantial evidence in the record, we affirm this determination. Accordingly, as the administrative law judge's findings that employer established the existence of suitable alternate employment and that claimant failed to establish diligence are supported by substantial evidence, her finding that claimant is partially, rather than totally, disabled, is affirmed.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge