BRB Nos. 10-0624
and 10-0624A

ROBERT J. MATSON	)	
	)	
Claimant- Petitioner	)	
Cross- Respondent	)	
	)	
v.	)	
	)	
PACIFIC NORTHERN ENVIRONMENTAL	)	DATE ISSUED: 07/06/2011
	)	
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier- Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Neil J. Kohlman (Anderson, Stephens & Grace), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (2009-LHC-01074) of Administrative Law Judge Jennifer Gee 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 was employed as a project manager for employer, an environmental clean-up company. On August 20, 2008, claimant fractured his right leg while docking a skiff at employer's boat house. The parties stipulated, *inter alia,* that claimant sustained a work-related injury, that he reached maximum medical improvement on March 5, 2009, and that he has a 50 percent impairment rating to his right leg.[1] Employer continued to pay claimant his regular salary from August 20, 2008, the date of his work injury, through October 26, 2008; thereafter, employer voluntarily paid claimant compensation for temporary total disability from October 27, 2008 through March 8, 2009. Claimant, who has not worked since his August 20, 2008 injury, sought permanent total disability benefits under the Act.

In her Decision and Order, the administrative law judge found that claimant is unable to resume his usual employment, that employer established the availability of suitable alternate employment as of the date of its March 22, 2010 labor market survey, and that claimant's participation in a vocational rehabilitation program does not preclude his performance of suitable alternate employment. The administrative law judge thus awarded claimant temporary total disability benefits from August 21, 2008 through March 4, 2009, 33 U.S.C. §908(b), permanent total disability benefits from March 5, 2009 through March 21, 2010, 33 U.S.C. §908(a), and a scheduled award of permanent partial disability benefits based on a 50 percent permanent impairment of his right leg, 33 U.S.C. §908(c)(2), (19). The administrative law judge structured the award of scheduled permanent partial disability benefits to reflect that claimant is entitled to receive 288 weeks of benefits at 50 percent of his compensation rate. Lastly, the administrative law judge denied employer's request for a credit against any potential recovery from claimant's pending Jones Act claim.

On appeal, claimant challenges the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not establish that he was unable to work in alternate employment due to his participation in a vocational rehabilitation program. Employer responds, urging affirmance of the administrative law judge's findings on these issues. Claimant argues in

[1]On March 5, 2009, Dr. Sparling, claimant's treating orthopedic specialist, reported that claimant's arthritic right knee condition had been aggravated by his work injury, that he was medically stable with respect to that injury, and that he was restricted to sedentary work. CX 15.

the alternative that the administrative law judge erroneously calculated his scheduled permanent partial disability benefits; employer takes no position on this issue. BRB No. 10-0624. In its cross-appeal, employer contends that the administrative law judge erred by not finding that claimant's entitlement to total disability benefits ended at a date prior to the date of employer's labor market survey. Employer further challenges the administrative law judge's failure to grant employer a credit against any potential recovery from claimant's pending Jones Act claim. Claimant responds, urging rejection of employer's arguments with respect to these issues. BRB No. 10-0624A.

We first address claimant's contention that the administrative law judge erred in finding that employer established the availability of suitable alternate employment with the five positions identified in employer's labor market survey. Once, as here, the claimant establishes his inability to perform his usual work due to his work injury, the burden shifts to employer to establish the availability of specific jobs claimant can perform, which, given the claimant's age, education, and background, he could likely secure if he diligently tried. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hawaii Stevedores, Inc. v. Ogawa,* 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). In addressing the availability of suitable alternate employment, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See, e.g., Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *see also General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Stevens,* 909 F.2d 1256, 23 BRBS 89(CRT); *Bumble Bee Seafoods*, 629 F.2d 1327, 12 BRBS 660. A claimant's entitlement to total disability benefits ends as of the date suitable alternate employment is shown to be available. *See Stevens,* 909 F.2d 1256, 23 BRBS 89(CRT); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991).

In this case, the administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment based on the March 22, 2010 report and hearing testimony of employer's vocational expert, Ms. Seyler. Specifically, the administrative law judge found that all five of the specific employment opportunities identified in Ms. Seyler's labor market survey constitute suitable alternate employment.[2] Decision and Order at 17-18; EXs 1, 4. Claimant contends that the

[2]The administrative law judge rejected claimant's argument that he was not afforded sufficient notice of the job openings listed in Ms. Seyler's labor market survey and thus was unable to rebut the suitability or availability of those jobs. The

administrative law judge's finding that claimant possesses the vocational skills necessary to obtain and perform these five approved jobs is not supported by substantial evidence.[3] We agree that this finding cannot be affirmed as the administrative law judge did not render adequate findings of fact with respect to the conflicting evidence of record.

The burden of proof is on employer to demonstrate that claimant is capable of performing the jobs presented. The claimant's physical ability to perform a job is not the exclusive determinant as to whether the job is suitable; an administrative law judge must also consider whether the claimant has the vocational skills to successfully obtain and work in a potential job. *Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1999); *Hairston,* 849 F.2d at 1196, 21 BRBS at 23(CRT); *Bumble Bee Seafoods,* 629 F.2d at 1330, 12 BRBS at 662. In her decision in this case, the administrative law judge had noted that claimant was born

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administrative law judge correctly stated in this regard that the jobs were identified by employer to satisfy its burden of establishing the availability of suitable alternate employment and not to facilitate claimant's job search. Decision and Order at 18-19. It is well-established that employer is not required to inform claimant in advance of alternate job opportunities it has located. *See Palombo,* 937 F.2d at 74, 25 BRBS at 6-7(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543, 21 BRBS 10, 15(CRT) (4th Cir. 1988); *Ion v. Duluth, Missabe & Iron Range R'way Co.,* 31 BRBS 75, 79 (1997); *Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290, 292 (1990).

We disagree with claimant's contention that the decision of the United States Court of Appeals for the Ninth Circuit in *Bumble Bee Seafoods,* 629 F.2d 1327, 12 BRBS 660, compels reversal of the administrative law judge's finding regarding this issue. In *Bumble Bee Seafoods,* the employer offered the claimant modified work in its own facility the day before the hearing. The Ninth Circuit upheld the administrative law judge's finding that this job offer did not satisfy employer's burden of establishing suitable alternate employment on the basis that the evidence regarding the availability of the job and the claimant's ability to perform it was unpersuasive. 629 F.2d at 1330, 12 BRBS at 662. The court additionally noted that the last minute notice could reasonably have led the administrative law judge to doubt the sincerity of the employer's job offer. 629 F.2d at 1330 n.4, 12 BRBS at 662 n.4. We do not construe this remark to impose a general requirement that employers provide claimants with advance notice of alternate jobs identified in a labor market survey.

[3]The approved jobs are as a room service host cashier for Hilton Portland, a customer service representative for Ultimate Staffing, a service associate for Ace Cash Express, an at your service agent for Portland Marriott, and a parking lot cashier for Standard Parking. EXs 1, 4.

in 1948, that he does not have a high school diploma or a GED, and that Ms. Devine, claimant's vocational rehabilitation counselor, reported that claimant was "functionally illiterate" with overall academic skills at the fourth grade level.[4] Decision and Order at 4-6, 16; CX 22. In her discussion of whether the jobs identified in employer's labor market survey are suitable for claimant, however, the administrative law judge did not address this vocational evidence. Rather, the administrative law judge focused only on evidence that, as of the date of the hearing in this case, claimant had completed the first ten-week term of his six-month remedial computer skills and GED training program. Decision and Order at 18; Hearing Tr. at 58-60. The administrative law judge inferred, based on claimant's completion of the first term of his vocational and GED programs, coupled with his existing basic education, that claimant possesses the basic reading, writing, math, and computer skills required of the positions identified by employer's vocational expert. Decision and Order at 18.

The validity of the administrative law judge's inference is undermined by the absence from the record of evidence indicating the curriculum covered in the first term of these courses, and testing, to demonstrate that claimant had learned the subject matter in each course. Moreover, there is evidence in the record, not addressed by the administrative law judge, which could be viewed as contradicting the administrative law

[4]At claimant's request, the Office of Workers' Compensation Programs (OWCP) referred claimant to Ms. Devine for vocational services commencing on April 3, 2009. CXs 19, 20; Decision and Order at 5, 14. Ms. Devine referred claimant to Dr. Moore for vocational aptitude testing which was conducted on May 29, 2009. CXs 20, 21. Ms. Devine's summary of Dr. Moore's test report indicates that claimant was "functionally illiterate," that he had been enrolled in special education classes due to problems with math, reading and writing, that he had a "significant learning disorder" including "reading in a mirror image or backwards," and that his overall academic achievement was at the fourth grade level. CX 22; Decision and Order at 5-6, 16. *See also* Hearing Tr. at 74-75. Claimant testified that in performing his job with employer, he had clerical assistants who took care of all of the paperwork, computer work and billing. *See* Hearing Tr. at 61. After efforts to return claimant to modified work with employer and subsequently to obtain other employment in the environmental clean-up industry and related fields proved unsuccessful, CXs 20-25, Ms. Devine determined that claimant's functional illiteracy, lack of a high school diploma or a GED and lack of computer skills created a substantial barrier to his obtaining employment. CX 26; Decision and Order at 6, 16. On February 10, 2010, OWCP approved a proposed rehabilitation plan for pre-vocational training for claimant encompassing remedial computer skill improvement and GED training, to be provided at Clark Community College and the Worksource Center from January 25, 2010 through July 25, 2010. CXs 27, 34, 35; Decision and Order at 6, 20.

judge's inference that, by the time of the hearing, claimant had acquired the necessary vocational skills to perform the jobs identified in employer's labor market survey. We are unable to conclude whether the administrative law judge overlooked relevant evidence or whether, instead, she failed to discuss it because she deemed it incredible or irrelevant.[5] Specifically, although the administrative law judge alluded to claimant's testimony that he needs his wife's assistance to send and receive e-mails, she stated, nevertheless, that "there is no indication in the record" that claimant would be unable to perform the computer data entry duties of the jobs identified by employer's vocational expert. Decision and Order at 18. Furthermore, the record contains other testimony of both claimant and his wife regarding claimant's continued difficulties using a computer, which if credited, could be viewed as supporting the conclusion that, as of the time of the hearing, claimant had not yet attained the necessary proficiency in using computers to perform the identified jobs. *See* Hearing Tr. at 31-32, 59-61, 83. The administrative law judge made no mention of claimant's wife's testimony regarding claimant's reading difficulties. *See* Hearing Tr. at 77-78. If credited, this testimony could support a finding that claimant remained "functionally illiterate" at the time of the hearing and, thus, may not have possessed the basic reading skills required of the labor market survey jobs. As the record includes evidence contrary to the inferences drawn by the administrative law judge, which she should have addressed, we are unable to affirm her finding that the five positions identified by employer's vocational expert are suitable for claimant. Consequently, we vacate the administrative law judge's finding that the availability of suitable alternate employment was established and remand the case for the administrative law judge to consider all relevant evidence regarding whether employer established that claimant has the necessary vocational skills to realistically compete for and perform the jobs listed in employer's labor market survey. *See Hinton*, 243 F.3d 222, 35 BRBS 7(CRT); *Ledet,* 163 F.3d 901, 32 BRBS 212(CRT); *Hairston,* 849 F.2d 1194, 21 BRBS 122(CRT); *Bumble Bee Seafoods,* 629 F.2d 1327, 12 BRBS 660.

[5]We are mindful that the administrative law judge is vested with the authority to make findings of fact and to draw rational inferences from the record and that the Board may not substitute its views for those of the administrative law judge. *See, e.g., Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 1159, 36 BRBS 15, 16(CRT) (9th Cir. 2002); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 618, 33 BRBS 1, 2-3(CRT) (9th Cir. 1999). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, recently stated, however, "that [t]he ALJ is expected to consider the record as a whole, including all witness testimony and each medical report, before entering findings." *Hawaii Stevedores, Inc.,* 608 F.3d at 652, 44 BRBS at 51(CRT). In this case, the administrative law judge made no mention of relevant testimony regarding claimant's vocational skills and, thus, it is unclear whether such testimony was considered.

Claimant further contends that the administrative law judge erred in not finding that he was unable to work in suitable alternate employment due to his participation in an approved vocational rehabilitation program. Claimant can establish his entitlement to total disability benefits if suitable alternate employment is not reasonably available due to his participation in a rehabilitation program sponsored by the Department of Labor (DOL). *See Castro,* 401 F.3d 963, 39 BRBS 13(CRT); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Brickhouse]*, 315 F.3d 286, 36 BRBS 85(CRT) (4th Cir. 2002); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). Claimant, however, bears the burden of proving that he is unable to perform suitable alternate employment due to his participation in a DOL-approved vocational training program. *Kee v. Newport News Shipbuilding & Dry Dock Co.,* 33 BRBS 221 (2000). Claimant can meet this burden by establishing, *inter alia,* that the time needed for his commuting, classes and studying effectively precludes him from obtaining suitable alternate employment. *See Castro,* 401 F.3d at 972, 39 BRBS at 19-20(CRT); *Brown v. Nat'l Steel & Shipbuilding Co.,* 34 BRBS 195 (2001). In this case, the administrative law judge found that claimant did not meet his burden of proving he is unable to perform suitable alternate employment due to his participation in a vocational rehabilitation program. Decision and Order at 19-21. In this regard, the administrative law judge correctly stated that the record reflects that both claimant and his vocational counselor, Ms. Devine, intended that he continue an active job search while enrolled in the vocational training program.[6] *Id.* at 20-21; *see* Hearing Tr. at 61, 107; CX 27. Having correctly noted that claimant attended classes from 8 to 11:45 a.m. Monday through Thursday, Decision and Order at 20, the administrative law judge found that claimant did not offer any evidence demonstrating that he was unable to work on a part-time basis while enrolled in the vocational rehabilitation program.[7] *Id.* at 21. We reject claimant's assertion on appeal that, in the absence of evidence of the specific hours of the jobs identified in employer's labor market survey, the administrative law judge was constrained to assume that those jobs were available only on a full-time basis. As claimant has not shown reversible error, we affirm the administrative law judge's finding that claimant failed to meet his burden of establishing that his vocational training

[6]As noted by the administrative law judge, Ms. Devine originally proposed that claimant take evening classes so as not to interfere with his job search. Decision and Order at 20; CX 27. The administrative law judge correctly found that the record does not reflect the reason that claimant instead took courses during the daytime. Decision and Order at 20-21; *see* Hearing Tr. at 59, 61, 107-108; CX 34.

[7]Claimant presented no testimony or documentary evidence regarding the amount of time he spent commuting, preparing homework, and studying for his courses. *Cf. Castro,* 401 F.3d at 966, 39 BRBS at 15(CRT).

effectively prohibited him from performing alternate employment. *See Kee,* 33 BRBS 221.

Claimant next argues, in the alternative, that the administrative law judge erred in calculating the scheduled award of permanent partial disability benefits. As correctly asserted by claimant, a scheduled award runs for the proportionate number of weeks attributable to the loss of use of the body part, at claimant's full compensation rate. 33 U.S.C. §908(c)(19); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988); *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986). Accordingly, if, on remand, the administrative law judge finds claimant entitled to scheduled permanent partial disability benefits, she should award claimant the full 66⅔ of his average weekly wage for a period of 144 weeks (50 percent of 288 weeks) pursuant to Section 8(c)(2), (19).

In its cross-appeal, employer first argues that the administrative law judge should have found that claimant's entitlement to total disability benefits ended prior to the March 22, 2010 date of employer's labor market survey. Employer avers that claimant should have been found to have a permanent partial disability as of March 5, 2009, the date claimant reached maximum medical improvement or, alternatively, as of August 2009, when employer notified claimant that it did not have modified work in its own facility available to him. Employer's contentions are without merit. It is well-established that a claimant's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available; an employer may retroactively establish that suitable alternate employment was available at an earlier point in time, such as the time of maximum medical improvement, only with reliable evidence that suitable jobs existed at the earlier date. *Stevens,* 909 F.2d 1256, 23 BRBS 89(CRT); *see also Palombo,* 937 F.2d 70, 25 BRBS 1(CRT). In this case, the administrative law judge acknowledged that an employer may rely on a retrospective labor market survey but the administrative law judge correctly found that Ms. Seyler's March 22, 2010 labor market survey does not state that the identified jobs were available at an earlier date. Decision and Order at 22 n.16; *see* EX 1. In addition, the administrative law judge properly rejected employer's contention that claimant's failure to diligently search for employment outside his field of expertise supports an earlier commencement date for the award of partial disability benefits. Decision and Order at 22. Contrary to employer's contention on appeal, claimant need not establish that he diligently sought employment until employer has first identified suitable alternate employment. *See 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); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990); *see generally Edwards v. Director, OWCP,* 999 F.2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Accordingly, if, on remand, permanent partial disability benefits are again awarded to claimant, the

commencement date for those benefits, as the administrative law judge properly found, is March 22, 2010, the date employer established the availability of suitable alternate employment.[8]

Lastly, we reject employer's assignment of error to the administrative law judge's failure to award employer a credit against any amount awarded to claimant in his suit against employer for damages under the Jones Act which was pending in state court at the time of the hearing in this case. The administrative law judge correctly acknowledged that Section 3(e) of the Longshore Act, 33 U.S.C. §903(e), provides that any amounts paid to an employee for the same injury or disability pursuant to the Jones Act shall be credited against any liability under the Longshore Act. Decision and Order at 25-26; *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 26 BRBS 44(CRT) (1991); *Figueroa v. Campbell Industries,* 45 F.3d 311 (9th Cir. 1995). In this case, however, claimant had not yet been paid any amounts pursuant to the Jones Act. In the absence of an actual award under the Jones Act, the administrative law judge properly denied employer's request that it be awarded a credit under Section 3(e) of the Longshore Act. In the event that claimant receives an award under the Jones Act for the same injury or disability for which he received benefits under the Longshore Act, employer will then be entitled to seek a credit under Section 3(e). *See generally M.R. [Rusich] v. Electric Boat Corp.,* 43 BRBS 35 (2009).

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is vacated, and the case is remanded for further consideration of this issue consistent with this opinion. If scheduled permanent partial disability benefits are again awarded on remand, the administrative law judge's

[8]We reject claimant's contention that March 24, rather than March 22, 2010 represents the earliest date that the administrative law judge could have found the availability of suitable alternate employment to have been established. The administrative law judge could properly rely on Ms. Seyler's March 22, 2010 report, which includes her labor market survey, EX 1, rather than on Ms. Seyler's March 24, 2010 letter to claimant forwarding contact information for the prospective employers identified in the survey. EX 4.

Decision and Order is modified to reflect that claimant is entitled to receive benefits for the full 66 ⅔ of his average weekly wage for a period of 144 weeks. 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge