BRB No. 01-0508

MICHAEL BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Feb. 28, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Order Denying Claimant's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Warren L. Conway (Conway & Martin), Gulfport, Mississippi, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.) , Metairie, Louisiana, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand and Order Denying Claimant's Motion for Reconsideration (94-LHC-863) of Administrative Law Judge Richard D. Mills 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). This case is before the Board for a third time.

Claimant, a fiberglass laminator for employer, suffered a work-related injury to his lower back on June 10, 1991, which thereafter prevented him from continuing in his usual work for employer. After conservative treatment, claimant underwent a discectomy at the

L4-5 level in April 1992, but continued to complain of pain in his back and right leg. Employer voluntarily paid temporary total disability benefits from June 21, 1991 until March 2, 1993, and from October 25, 1994 until June 26, 1996.

In his initial Decision and Order Denying Benefits, issued on April 7, 1997, the administrative law judge found that claimant reached maximum medical improvement on December 20, 1992, that claimant established a *prima facie* case of total disability, and that employer established the availability of suitable alternate employment beginning on March 5, 1993. After finding that the wages paid by the alternate employment exceeded claimant's pre-injury wage-earning capacity, the administrative law judge determined that claimant was not entitled to any further compensation, but found that he was entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge denied claimant's motion for reconsideration.

Claimant appealed the administrative law judge's Decision and Order Denying Compensation Benefits and Order Denying Claimant's Motion for Reconsideration (the 1997 decisions) to the Board, BRB No. 97-1511, but prior to any disposition on the merits the case was remanded for modification proceedings. Following a second hearing, the administrative law judge issued his Decision and Order on Section 22 Modification, wherein he found that claimant established a change in condition based on evidence that his back injury had worsened as of August 25, 1997. The administrative law judge then concluded, in light of Dr. Whitecloud's opinion that claimant requires surgery and is unable to return to gainful employment, that claimant is entitled to temporary total disability compensation commencing on August 25, 1997. He further found that claimant was entitled to reimbursement for the treatment rendered by Dr. Whitecloud commencing on September 17, 1997, and all reasonable and necessary treatment as suggested by claimant's physicians, but denied reimbursement for the treatment rendered by Drs. Whitecloud, Aprill and Jackson prior to that date as claimant failed to seek authorization for their treatments. In a subsequent order, the administrative law judge denied both employer's and claimant's motions for reconsideration. Both parties appealed the Decision and Order on Section 22 Modification and Order Denying Petitions for Reconsideration (the 1999 decisions), BRB Nos. 99-1063/A. By Order dated September 22, 1999, the Board reinstated claimant's appeal of the administrative law judge's 1997 decisions, BRB Nos. 97-1511, and consolidated it with claimant's and employer's appeals of the 1999 decisions, BRB Nos. 99-1063/A, for purposes of decision.

With regard to the administrative law judge's 1997 decisions, the Board affirmed the administrative law judge's determination that claimant reached maximum medical improvement on December 20, 1992, but vacated his finding that employer established the availability of suitable alternate employment and thus his denial of permanent total disability benefits as employer's labor market survey dated March 5, 1993, did not provide sufficient

information to support a finding that the job duties were within the physical limitations imposed on claimant by Drs. Danielson and Russo. *Brown v. Avondale Industries, Inc*., BRB Nos. 97-1511, 99-1063/A (July 7, 2000)(unpub.). The Board therefore remanded the case for consideration of whether the remaining jobs listed in employer's labor market surveys, Employer's Supplemental Exhibit (ESX) 21, are within claimant's physical limitations, and if necessary, for a determination regarding claimant's efforts to seek alternate employment. *Id.* As for the administrative law judge's 1999 decisions, the Board affirmed the administrative law judge's findings that claimant established a change in his physical condition as of August 25, 1997, and that claimant is entitled to an ongoing award of temporary total disability compensation retroactive to that date. *Id*. The Board, however, vacated the administrative law judge's denial of reimbursement for certain treatment rendered by Drs. Whitecloud, Aprill and Jackson, and remanded for further consideration of this issue. *Id.*

On remand, the administrative law judge determined that employer established the availability of suitable alternate employment with the information proffered on several positions identified in its labor market survey, *i.e.*, jobs as a bartender, front desk clerk, security guard and optical plant worker (flat polisher, coating employee, lens cleaner), and that claimant did not diligently search for alternate employment subsequent to his injury. He therefore concluded that claimant is not entitled to permanent total disability benefits in the pre-August 1997 period. In addition, the administrative law judge denied any award of permanent partial disability benefits as claimant's post-injury wage-earning capacity, based on the average rate of pay for all of the alternate positions deemed suitable, exceeds his pre-injury average weekly wage. Lastly, the administrative law judge found that claimant is entitled to reimbursement for the treatment rendered by Drs. Whitecloud, Jackson and Aprill. Claimant's subsequent motion for reconsideration was summarily denied.

On appeal, claimant challenges the administrative law judge's findings that he is not entitled to permanent total disability benefits. Employer responds, urging affirmance.

Claimant initially argues that the administrative law judge erred in finding that he reached maximum medical improvement as of December 20, 1992. The Board, in its prior decision, held that the record contains substantial evidence to support the administrative law judge's determination that claimant reached maximum medical improvement on December 20, 1992. *See Brown*, slip op. at 4. We therefore decline to address claimant's contentions regarding the original date of maximum medical improvement as this issue was fully addressed and decided in our prior decision, which is the law of the case. *See, e.g.*, *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). That claimant later established a change in condition and is presently entitled to temporary total disability benefits does not prevent a finding that claimant's back condition was permanent at an earlier time. *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982).

Claimant next argues that contrary to the administrative law judge's decision, employer's labor market survey evidence, ESX 21, fails to establish the availability of suitable alternate employment as it does not identify work within the physical limitations imposed by Drs. Russo and Danielson. Claimant also contends that the administrative law judge exceeded the scope of the Board's remand instructions when he considered alternative jobs listed in employer's labor market survey which were allegedly available prior to 1996.[1] Alternatively, claimant argues that the administrative law judge erred in finding that he did not diligently search for suitable alternate employment following his work-related injury.

Where, as here, claimant establishes that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs in the geographic area where claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and which he could realistically secure if he diligently tried. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If 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. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *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); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

[1]Claimant further contends that the issue as to the availability of suitable alternate employment is, in any event, moot as Dr. Davis's opinion throughout the entire period in question, *i.e.*, from February 1, 1993, through August 1997, that claimant is totally disabled, is in and of itself, sufficient to establish his entitlement to total disability benefits. We reject this contention based on the law of the case doctrine, since in our prior decision, we affirmed the administrative law judge's decision to accord greatest weight to the limitations imposed by Drs. Danielson and Russo, *i.e.*, that claimant is capable of light duty with alternate sitting and standing, rather than to the 1993 opinion of Dr. Davis. *See Brown*, slip op. at 5-6.

In this case, the Board previously held that the available jobs identified in employer's March 5, 1993, job market survey were insufficient to meet employer's burden of establishing the availability of suitable alternate employment as they provided no means for determining whether the duties involved were within the physical limitations imposed on claimant by Drs. Danielson and Russo. The administrative law judge's finding that employer established suitable alternate employment via the March 5, 1993, job market survey was therefore vacated and the case remanded for a specific determination as to "whether the jobs listed in the remaining job market surveys submitted by employer, *see* 1996 Emp. Supp. 21, are within the physical limitations imposed by Drs. Danielson and Russo," *Brown*, slip op. at 6, and if so, for consideration as to claimant's efforts to seek alternative employment. Thus, the Board's remand instructions required only that the administrative law judge consider the "remaining job market surveys" as identified in employer's exhibit, ESX 21, and, contrary to claimant's contention, they did not limit the scope of the administrative law judge's remand query to consideration of only those jobs identified after 1996. We therefore reject claimant's contention and hold that the administrative law judge did not err by considering all of the remaining jobs identified in employer's exhibit, ESX 21, regardless of the date they became available.

On remand, the administrative law judge set out claimant's physical limitations and then considered the viability of all the remaining jobs identified by employer's job market surveys, ESX 21;[2] he concluded that the three bartending positions, the front desk clerk position, the security guard position, and the positions as a flat polishing technician and an optical lens coater, were within claimant's physical limitations. He thus found that employer established the availability of suitable alternate employment.

With regard to the bartending positions at Singing River Yacht Club, O'Charley's Restaurant, and Sneaky Pete's, the administrative law judge noted that although there is not specific information for each position, the information provided was sufficient to enable him to determine that the jobs are suitable for claimant. We disagree. The information contained

[2]The administrative law judge determined, based on the medical opinions of Drs. Danielson and Russo, that claimant was limited to lifting no more than 25-30 pounds, and was to perform functions which required only intermittent bending, stooping, squatting, and crawling. In addition, he noted that claimant should have the option to sit, stand, or ambulate as necessary. Decision and Order on Remand at 2.

in employer's exhibit for each of these positions consists merely of a notice as to the specific job opportunity, the approximate salary, and the contact person. ESX 21 at 209, 226, 246. It does not include any specific job descriptions, the duties and/or the exertional requirements for these positions. Thus, employer's evidence regarding the bartending positions provides essentially the same information as the driving positions listed in the March 5, 1993, job market survey, which the Board has already held are insufficient to establish suitable alternate employment. Any error the administrative law judge may have made in relying on these positions, however, is harmless as the remaining job postings provide sufficient information for the administrative law judge to find them within the physical limitations imposed on claimant by Drs. Danielson and Russo.

Specifically, the letter identifying the job with Swetman Security Company (Swetman), stated that claimant was eligible for a security training course with automatic placement by virtue of his disability, *i.e.*, the security training course was only available to individuals who are "disadvantaged" or who have some sort of "handicap," and employer's vocational expert explicitly stated that he contacted both the company offering the training, Gulf Coast Business Services, and Swetman, and they each felt that claimant would be qualified and eligible to attend this class, and thus ultimately to obtain suitable alternate employment as a security guard. *See* ESX 21 at 249. The administrative law judge therefore rationally found that claimant was ideally suited to this position because of his disability. In addition, while an initial letter, dated October 22, 1993, identifying potential positions at PFG Precision Optics is lacking essential information regarding the specifics of the jobs, a followup letter dated December 15, 1993, reveals that the position as an optical lens coater required very little lifting, and involved simply sitting and cleaning lenses prior to shipping; thus, although the work is tedious, it could be done by almost anyone. ESX 21 at 242, 248. Based on this evidence, the administrative law judge rationally inferred that the lens coater job is a sedentary position which claimant would be physically capable of performing.[3] Lastly, the letter regarding the front desk job at the Days Inn notes that it "was a completely sedentary position," and that the prospective general manager stated that she "would take anyone who would be reliable and train them for that position." ESX 21 at 200. The administrative law judge inferred that this position would not require lifting, stooping, or standing for long periods of time and that there is no question that claimant could, in this job, change positions almost at will. Thus, he rationally determined that this sedentary position was a suitable alternative for claimant. Consequently, we affirm the administrative law judge's conclusion that employer established the availability of suitable alternate

[3]It is not clear, however, whether the position as a flat polishing technician would fall within claimant's physical limitations. The follow-up letter implies that this position is more strenuous than that of the optical lens coater. ESX 21 at 242. Any error with regard to the viability of this position is harmless due to the availability of other suitable positions.

employment as a security guard with Swetman, an optical lens coater with PFG Precision Optics, and as a hotel desk clerk with Days Inn, as it is supported by substantial evidence. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995).

In considering claimant's post-injury search for work, the administrative law found that claimant gave misleading information about the jobs he had applied for, indicated that his restrictions were more serious than they actually were, and failed to timely apply for available positions that he could have filled. As cited by the administrative law judge, the record is replete with examples of claimant's lack of a diligent effort to obtain a job, including the following: in June 1993 claimant returned an employer contact sheet to his vocational rehabilitation counselor stating that he contacted several employers for jobs but the vocational counselor later learned, upon contacting these prospective employers, that the employers had no record of contact with claimant, ESX 21 at 260, 262; claimant was admonished by his vocational counselor on at least one occasion to put his best foot forward in his job interviews, thereby indicating that claimant was perhaps damaging his own applications for new employment, ESX at 240; claimant completely eliminated himself from other jobs by stating to prospective employers that he had many other serious physical restrictions in addition to those imposed by Drs. Danielson and Russo and by misrepresenting those doctors' restrictions, ESX 21 at 218; and on a number of occasions, claimant sabotaged employment opportunities job either by not applying for the position or by applying too late. ESX 21 at 208. Yet another example of claimant's less than diligent effort is exhibited by his failure to apply at the appropriate location for a specified job, *i.e.*, the record indicates that claimant applied to the wrong Days Inn. ESX 21 at 202.

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), and determinations in this regard must be affirmed unless they are "inherently incredible" or "patently unreasonable." *Cordero v. Triple Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge credited the statements and testimony of employer's vocational expert with regard to claimant's job search and in turn discredited claimant's contrary testimony on this issue. As it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not diligently search for suitable alternate employment. *See generally Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000).

These findings support the conclusion that claimant is not entitled to benefits for total disability for the full period in question. However, the administrative law judge did not make a finding as to the specific date upon which the availability of suitable alternate employment was established, which is the date when claimant's entitlement to permanent total disability

benefits ended. Moreover, in finding that claimant is not entitled to permanent partial disability benefits, the administrative law judge used the average of pay for all of the jobs he found to be suitable alternate employment. As this figure includes the three bartending positions and the flat polishing position which we have held cannot be relied upon to establish suitable alternate employment, the administrative law judge's calculation of claimant's post-injury wage-earning capacity and determination that claimant is not entitled to permanent partial disability benefits cannot be affirmed. We therefore remand this case for the administrative law judge to make a specific determination regarding the date of cessation of claimant's entitlement to permanent total disability benefits, and for a recalculation of claimant's post-injury wage-earning capacity and claimant's entitlement to permanent partial disability benefits. 33 U.S.C. §908(c)(21), (h); *Avondale Industries, Inc. v. Pulliam*, 137 F.3d 326, 32 BRBS 65(CRT) (5th Cir. 1998).

Accordingly, we affirm the administrative law judge's finding that employer established suitable alternate employment but the denial of permanent partial disability benefits is vacated, and the case is remanded for further consideration of this issue. In addition, on remand the administrative law judge must make a specific determination regarding the date of cessation of claimant's entitlement to permanent total disability benefits. In all other respects, the administrative law judge's Decision and Order on Remand and Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge