BRB No. 97-883

CARROLL A. PAUL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHWEST MARINE IRON WORKS	)	DATE ISSUED:
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi Wilson Atchison, LLP), Portland, Oregon, for claimant.

Carrol J. Smith (SAIF Corporation), Salem, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-3262) of Administrative Law Judge Alexander Karst 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, a sheet metal worker, injured his left shoulder on August 2, 1988, when he tripped over a trench in the floor while moving a large piece of steel at work. Claimant underwent surgery on his shoulder on February 7, 1989. After claimant's shoulder reached maximum medical improvement on February 5, 1990, Dr. Isaacson, claimant's orthopedic surgeon, released claimant to return to work but not to his former employment. The administrative law judge found that employer established suitable alternate employment on October 3, 1990, and that claimant did not rebut employer's showing by demonstrating that

he diligently sought, but was unable to secure such employment. On June 18 or 19, 1991, claimant injured his back during a physical capacity evaluation. Upon his release to return to sedentary work on August 30, 1991, by Dr. Isaacson, the administrative law judge found that employer established suitable alternate employment on November 6, 1991. On April 13, 1995, claimant had back surgery, and subsequently was released to return to part-time work. The administrative law judge found that employer established suitable alternate employment again on November 30, 1995. Consequently, the administrative law judge awarded claimant benefits for varying degrees of disability from August 3, 1988, and continuing. *See* Decision and Order at 10-11.

On appeal, claimant challenges the administrative law judge's findings that employer established suitable alternate employment on October 3, 1990, November 6, 1991, and again on November 30, 1995. Claimant also challenges the administrative law judge's finding that claimant became medically stationary on October 17, 1995, in light of the parties' stipulation that claimant became medically stationary on April 13, 1995. Employer responds in support of the administrative law judge's award of benefits.

To establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). If claimant succeeds in establishing that he is unable to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction the present case arises, has held that employer must demonstrate that specific job opportunities, which claimant could perform considering his age, education, background, work experience, and physical restrictions, are realistically and regularly available in claimant's community. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Claimant may rebut employer's showing of suitable alternate employment by demonstrating that he diligently tried and was unable to secure such employment. *Edwards*, 999 F.2d at 1376 n. 2, 27 BRBS at 84 n. 2 (CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

Claimant first contends that the administrative law judge erred in finding that he did not establish diligence in pursuit of the jobs shown to be available by employer on October 3, 1990. Claimant contends that the administrative law judge erred in not considering his testimony that he was not willing to accept jobs paying less than $10-12 per hour because he was told by a vocational expert not to accept such positions. Claimant's contention lacks merit. After finding that the security guard jobs identified by Ms. Howard on October 3, 1990, constitute suitable alternate employment, the administrative law judge considered claimant's testimony that he was told not to accept jobs paying less than $10-12 per hour, but found that employer need only show specific jobs that claimant is capable of performing and likely to secure, not jobs which claimant would like to have, or jobs equal in pay,

benefits, and status to his pre-injury job.[1] *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986); Decision and Order at 8-9; Emp. Ex. 24; Tr. at 63. As this determination is rational, we affirm the administrative law judge's finding that employer established suitable alternate employment on October 3, 1990, and that claimant was only partially disabled thereafter.

Claimant next challenges the administrative law judge's finding that employer established suitable alternate employment on November 6, 1991. Claimant initially contends that Dr. Isaacson testified that he could not work from June 1991 to April 1995 based on his back and shoulder injuries; therefore, he alleges that the administrative law judge could not find that employer established suitable alternate employment before April 1995. Claimant also contends that the delivery driver jobs identified in Ms. Martin's labor market survey cannot constitute suitable alternate employment as she identified only one company with a part-time opening. Claimant further contends that the security guard positions identified in Ms. Martin's survey do not fall within claimant's limitations.

[1]Claimant sought to become a building inspector but it required a license and a two year educational program which was not authorized by the Office of Workers' Compensation Programs. Claimant also was looking for a job paying between $10-12 per hour with medical benefits.

Claimant's contentions are without merit. Although Dr. Isaacson testified at the hearing that claimant could not work from June 1991 through at least October 1995, her report of August 30, 1991, released claimant to sedentary work. Emp. Exs. 30, 31; Tr. at 30-31. The administrative law judge recognized this conflict in the evidence and found more convincing Dr. Isaacson's August 1991 contemporaneous evaluation of claimant's abilities. Decision and Order at 8 n. 6. As credibility determinations are for the administrative law judge, we affirm the administrative law judge's evaluation of Dr. Isaacson's opinion. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, Ms. Martin's survey identifies four delivery companies with openings after the date claimant's condition became stationary; one company had a part-time opening. *See Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); Emp. Ex. 38 at 128, 131-132. Additionally, Ms. Martin stated that the jobs did not require activities which exceeded claimant's physical restrictions as outlined by Dr. Isaacson. Consequently, the administrative law judge's finding that employer established suitable alternate employment on November 6, 1991, based on Ms. Martin's labor market survey is supported by substantial evidence and is affirmed.[2] *See Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995); *Fox v. West State Inc.*, 31 BRBS 118 (1997); Emp. Ex. 38.

Claimant further challenges the administrative law judge's finding that employer established suitable alternate employment on November 30, 1995, contending that the administrative law judge's inference that claimant can work 30 hours a week is not supported by the record. Claimant also contends that the administrative law judge erred in finding that employer established suitable alternate employment as of November 30, 1995, based on the testimony of employer's vocational expert, Ms. Shivell, that claimant is able to perform the available security guard positions, because it requires good hearing and the ability to move fast in emergencies which he cannot do.

The administrative law judge inferred from Dr. Isaacson's testimony that a 30 hour work week would be acceptable to her. Dr. Isaacson testified that, "I don't see [claimant]

[2]Any error in the administrative law judge's reliance on the security guard positions identified by Ms. Martin is harmless in light of the fact that Ms. Martin also identified four delivery driver and one part-time parking lot attendant positions for claimant. Emp. Ex. 38 at 128, 131-132. Ms. Martin's report states that with regard to the security guard jobs "each company indicated that not every job falls within Mr. Paul's physical capacities and it would be necessary to match the job site/order to the worker's needs." Emp. Ex. 38 at 134.

doing any type of work that's more than a minimum wage type job where he cannot necessarily work eight hours a day." Tr. at 35. She also stated, "I can't see it being every day for eight hours. It might have to be on a part-time basis." Tr. at 40. In light of Dr. Isaacson's testimony, the administrative law judge rationally found that claimant can work 30 hours a week. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); Decision and Order at 9; Tr. at 35, 40. The administrative law judge found that Ms. Shivell's testimony established that there were part-time security guard positions available in November 1995 which constituted suitable alternate employment despite claimant's testimony that his contacts with the companies led him to believe that they would not be appropriate for him. Decision and Order at 8-9; Tr. at 96-140. The administrative law judge credited the testimony of Ms. Shivell as she is a vocational expert well-versed in the physical requirements of different positions. Contrary to claimant's contention, the administrative law judge acted within his discretion in crediting Ms. Shivell's testimony that claimant is able to perform the available security guard positions based on her expertise over claimant's testimony that he could not perform the jobs. *See Fox*, 31 BRBS at 118; *Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990); *see generally Cordero,* 580 F.2d at 1331, 8 BRBS at 744; Decision and Order at 8-9; Tr. at 97-98. As the administrative law judge acted within his discretion in crediting Ms. Shivell's testimony over that of claimant and rationally determined that claimant could work part-time 30 hours a week based on Dr. Isaacson's testimony, we affirm the administrative law judge's finding that employer established suitable alternate employment on November 30, 1995.

Claimant lastly challenges the administrative law judge's finding regarding the date of permanency after claimant's back injury in June 1991. The administrative law judge concluded that the parties' stipulation that claimant's condition remained permanent from February 5, 1990, until his back surgery on April 13, 1995, was not supported by the evidence of record because logic dictated that when claimant was injured again on June 18 or 19, 1991, he was no longer stationary and, at that point, entered another period of temporary disability.[3] The administrative law judge found that back surgery was first discussed in August 1992 and was ultimately performed in April 1995. *See Kuhn v. Associated Press,* 16 BRBS 46 (1983). The administrative law judge found that claimant's back injury did not reach maximum medical improvement until October 17, 1995, the date assigned by Dr. Isaacson. Although claimant offered to stipulate that he was medically stationary until April 13, 1995, employer did not agree to it. Employer only agreed that

[3]Contrary to the administrative law judge's statement, the record does not reflect a stipulation that claimant was entitled to permanent disability benefits from February 5, 1990, through April 13, 1995. Claimant asserted at the hearing that he was medically stationary and permanently and totally disabled from February 5, 1990, until April 13, 1995, the date of his back surgery. Employer disagreed that he was permanently and totally disabled from February 5, 1990, until April 13, 1995, or that he was permanently and totally disabled from then on. Tr. at 9-10. Employer agreed that claimant was entitled to temporary total disability benefits from April 13, 1995, until October 17, 1995, when he again reached maximum medical improvement.

claimant was entitled to temporary total disability benefits from April 13, 1995, until October 17, 1995, when he again reached maximum medical improvement. Tr. at 9-10. As the administrative law judge's finding that claimant reached maximum medical improvement on October 17, 1995, after his back surgery, is supported by substantial evidence based on Dr. Isaacson's opinion, we affirm it, and the administrative law judge's consequent award of temporary total and partial disability benefits from June 20, 1991, to October 16, 1995. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); Emp. Ex. 61.

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

NANCY S. DOLDER
Administrative Appeals Judge