BRB No. 98-1021

ROBIN T. MOODY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED: April 22, 1999
	)	
	)	
Self-insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

James K. Wetzel, Gulfport, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, P.L.C.C.), Gulfport, Mississippi, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-LHC-2877, 95-LHC-2878, 95-LHC-2879) of Administrative Law Judge C. Richard Avery denying benefits 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 the 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 the second time. To reiterate, claimant suffered three work-related injuries while working for employer. On June 18, 1992, claimant fell from a six foot ladder, injuring his right shoulder, wrist and neck. On

July 22, 1992, claimant injured his shoulder while pulling cable. On March 5, 1994, while assigned to work in an overhead section of a refrigerator room, claimant injured his knee while crawling on a stainless steel floor on his hands and knees. Following this injury, claimant was off work until June 16, 1994, at which time his treating physician, Dr. Winters, found he had reached maximum medical improvement. Claimant returned to light duty work with lifting restrictions. On or about September 12, 1994, claimant injured his back while moving a television set. Claimant received treatment from a physical therapist and from the VA hospital on September 12 and 14, 1994, for a lower back strain in connection with this incident. Claimant continued working until September 28, 1994, and sought disability benefits from October 21, 1994, and continuing. Tr. at 95.

In his first Decision and Order, the administrative law judge found that claimant's date of maximum medical improvement was June 16, 1994, relying upon Dr. Winters's assessment. The administrative law judge also found that claimant was not entitled to additional compensation because employer had shown a supervening, independent event, *i.e.*, claimant's "recklessness" in moving the television set, to be the cause of claimant's condition, reasoning that this incident caused claimant's permanent impairment because Dr. Winters did not assess claimant with a permanent impairment rating until after it occurred. Decision and Order at 9, 12. Claimant appealed, and the Board, in *Moody v. Ingalls Shipbuilding, Inc.,* BRB No. 96-0660 (Nov. 24, 1997)(unpub.), reversed the administrative law judge's determination that the non work-related injury was an intervening cause of claimant's disability. Specifically, the Board held that the administrative law judge's finding was not supported by substantial evidence, as he relied upon Dr. Winters's October 1994 opinion in reaching his conclusion, and Dr. Winters did not attribute any of claimant's restrictions to the lifting incident; in fact, he related claimant's restrictions to his work injuries. Thus, the Board remanded the case for the administrative law judge to consider all remaining issues.

On remand, the administrative law judge determined that claimant established a *prima facie* case of total disability, as claimant proved that he is unable to return to his former work duties due to his work-related injuries. However, the administrative law judge found that employer established the availability of suitable alternate employment by providing claimant with a light duty job at its facility at his pre-injury wages. The administrative law judge thus denied benefits, noting further that claimant voluntarily left this position on September 28, 1994, without a medical basis for doing so. The administrative law judge also found suitable alternate employment established by employer's offer of another light duty position in June 1995, as well as through a May 29, 1996, labor market survey which identified several job openings that claimant could have performed with his physical restrictions. Based

on these findings, the administrative law judge determined that employer is not liable for additional disability compensation.

Claimant appeals, contending that the administrative law judge erred in finding suitable alternate employment established, and therefore in denying additional disability compensation.[1] Employer responds, urging affirmance of the administrative law judge's decision on remand.

Where, as in the instant case, claimant is unable to perform his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden to employer to establish the existence of realistically available job opportunities within the geographical area where claimant resides which claimant, by virtue of his age, education, work experience and physical restrictions, could secure and perform if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1991); *see also Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). An employer can establish suitable alternate employment by offering an injured employee a light duty job at its facility which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.,* 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Larsen v. Golten Marine Co.,* 19 BRBS 54 (1986).

The administrative law judge's finding that claimant is not entitled to any benefits after he left the light duty job in September 1994 cannot be affirmed, as the administrative law judge did not fully address the relevant evidence. The administrative law judge found that employer established suitable alternate employment through a light duty position that claimant was working in since June 1994, inferring that this job remained available to claimant after September 28, 1994, because in his first examination after claimant left his position, Dr. Winters did not tell claimant to stop performing his light duty job and did not impose further restrictions

[1]We reject claimant's contention that the administrative law judge was bound to resolve all doubts in his favor. The Supreme Court has held that the true doubt rule is violative of the Administrative Procedure Act, which requires that a proponent bear the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994).

upon claimant.

Initially, we note that employer did not place into the record any evidence describing the light duty job claimant performed so that the administrative law judge could compare its duties with claimant's restrictions and determine whether the job was suitable. Moreover, contrary to the finding of the administrative law judge, and to his own decision, *see* Decision and Order on Remand at n.2, the uncontradicted evidence of record establishes that additional restrictions were indeed imposed upon claimant by Dr. Winters in October 1994. When Dr. Winters returned claimant to light duty work on June 20, 1994, he placed the following permanent restrictions on claimant: no lifting greater than 50 pounds occasionally or 25 pounds frequently and no pulling greater than 50 pounds. CX-3 at 19. When Dr. Winters next examined claimant on September 1, 1994, he found that claimant could return to work with his previous lifting restrictions. Vol. II, EX-5 at 4. However, when claimant returned to Dr. Winters on October 20, 1994, the following additional permanent restrictions were placed on claimant: no kneeling, no squatting, and no stair climbing.[2] CX-3 at 17. In a note dated November 2, 1994, Dr. Winters stated claimant could engage in limited ladder climbing. CX-3 at 15. Thus, contrary to the administrative law judge's determination, there is evidence of record which indicates that claimant's restrictions increased as of October 1994, potentially rendering him incapable of performing the light duty position provided him in June 1994.[3]

Furthermore, contrary to the administrative law judge's implication, the evidence does not support his conclusion that a light duty position within claimant's restrictions remained open to him perpetually after his departure in September 1994. The record contains a form from employer's "Return to Work Program" dated November 2, 1992, stating that claimant's restrictions preclude his working aboard ships or in bay areas, and that there were no current openings within claimant's restrictions available in shop areas. CX-3 at 16. The administrative law judge did not discuss this form in rendering his decision. Moreover, claimant testified that he was told by employer's representatives that they did not have a light duty position available for him, Tr. at 85; however, the administrative law judge did not consider this testimony nor assess claimant's credibility in determining whether employer continued to offer a light duty job to claimant which he was capable of performing. Under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), the administrative

[2]We note that claimant seeks benefits commencing after this date, when his restrictions changed.

[3]Dr. Winters subsequently revised claimant's restrictions on several occasions. *See* CX-3.

law judge must analyze, discuss and weigh all relevant evidence in reaching his conclusions, and must explicitly set forth the reasons as to why he has accepted or rejected such evidence. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990).

Consequently, we vacate the administrative law judge's determination that suitable alternate employment was available to claimant subsequent to September 28, 1994, based on the continuing availability of the light duty position provided to claimant between June and September 1994, and we remand the case for further consideration. On remand, in evaluating whether employer established suitable alternate employment based upon this position, the administrative law judge should determine whether the record contains evidence regarding the physical requirements of the position, and, if so, compare the requirements of the position with the restrictions imposed on claimant by Dr. Winters to determine if claimant was capable of performing the position subsequent to October 21, 1994. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

We also cannot affirm the administrative law judge's determination that employer established suitable alternate employment by offering claimant a light duty position in June 1995. The administrative law judge found that claimant acknowledged that employer's representative, Ms. Wiley, offered him a light duty position within his work restrictions, which would have paid claimant a dollar less than his pre-injury wages, but would not have reinstated claimant's pre-injury seniority level.[4] Decision and Order on Remand at 6, citing Tr. at 84-88. However, the administrative law judge did not consider claimant's testimony that Ms. Wiley never offered him a position in June 1995; claimant testified that she told him that she would call him back if she found a job but never phoned back. *See* Tr. at 88; Vol. II, EX-11 at 33-34. In order for a job in employer's facility to constitute suitable alternate employment, it must actually be available. *See Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Furthermore, we cannot determine from the administrative law judge's decision whether the evidence of record is sufficient to support the conclusion that employer met its burden of proof to demonstrate suitable alternate employment based upon an offer of a position in June 1995, as the administrative law judge did not identify the position offered to claimant, and did not

[4]The loss of seniority was due to the fact that claimant withdrew his pension money from the retirement plan when he formally resigned after meeting with employer's representatives and allegedly being told no suitable work was available. The fact that this position would have paid less than claimant's pre-injury wages could provide the basis for an award under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

assess whether the physical requirements of the offered position were within the physical restrictions imposed upon claimant by Dr. Winters at that time. *Diosdado*, 31 BRBS at 73. As the administrative law judge failed to adequately explain his conclusions, we vacate the administrative law judge's finding that employer established suitable alternate employment via a light duty job offer from Ms. Wiley in June 1995 and remand for further consideration of this issue.

Finally, claimant contends that the administrative law judge erred in finding that employer met its burden of establishing the availability of suitable alternate employment based upon Mr. Walker's labor market survey dated May 29, 1996. Vol. II, EX-9 at 7. Based on the work restrictions imposed on claimant by Dr. Winters at the time,[5] *i.e.,* limited kneeling and climbing, no pulling overhead more than 30 pounds and no carrying overhead greater than 30 pounds, Mr. Walker identified 12 specific job opportunities he believed to be suitable for claimant; in each case, he described the physical requirements of the position, and compared these requirements with claimant's physical restrictions as imposed by Dr. Winters. *Id.* Mr. Walker testified at the hearing that these positions represented real job openings which were available to claimant as of the date of the report. Tr. at 105.

We reject claimant's contention that the administrative law judge erred in finding suitable alternate employment established as of May 29, 1996. Claimant argues that the administrative law judge should not have relied upon this report because it was not provided to claimant in advance, contending that employer was under the obligation to do so in order for him to have an opportunity to determine whether the positions identified were indeed available and whether the jobs were compatible with his restrictions. Employer, however, need not act as an employment agency for claimant, *Turner*, 661 F.2d at 1031, 14 BRBS at 156, place claimant in a specific job, or establish that he was offered a specific job. *Trans-State Dredging v. BRB,* 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). Employer is not required to inform claimant in advance of alternate job opportunities it has located. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Contrary to his contentions, claimant was provided with an adequate opportunity to contest the reliability of the survey, as Mr. Walker testified at the hearing, and claimant was provided with an opportunity to cross-examine the vocational specialist at that time. *See generally Richardson v. Perales*, 402 U.S. 389 (1971). We also reject claimant's contention that the report was insufficient to meet employer's burden of proof because it was

[5]At the time the labor market survey was prepared, the most recent opinion of Dr. Winters was dated June 7, 1995, wherein he stated that he was revising the "no kneeling and climbing" restriction to limited kneeling and climbing. CX-3 at 2. The original restrictions on lifting were still in place also.

"hypothetical," as the vocational counselor testified at the hearing that these were actual job openings which were available as of the date the report was prepared. Tr. at 105. Consequently, as the jobs identified are realistically available and are within claimant's restrictions, we affirm the administrative law judge's determination that employer demonstrated the availability of suitable alternate employment as of May 29, 1996.[6] *See generally P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

Finally, we agree with claimant that the administrative law judge erred in failing to consider his testimony that he diligently attempted to secure alternate employment but was unable to do so. Once employer makes a showing of suitable alternate employment, claimant nonetheless may be totally disabled if he demonstrates that he diligently tried and was unable to secure similar suitable 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); *see also Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991). The administrative law judge did not consider this issue in his Decision and Order on Remand, ending his inquiry by finding that employer established suitable alternate employment. On remand, the administrative law judge must consider claimant's diligence in this regard, discussing all relevant evidence of record, including claimant's testimony.

In sum, we vacate the administrative law judge's determination that employer established suitable alternate employment as of September 28, 1994 through May 29, 1996, and remand for further consideration on this issue. We also remand for the administrative law judge to determine whether claimant exercised due diligence in attempting to secure suitable alternate employment. We note that, even if on remand the administrative law judge finds that claimant is not entitled to total

[6]However, these jobs cannot support the denial of all benefits, as they paid a lower wage than claimant was earning before his last injury. *See* 33 U.S.C. §908(c)(21). Moreover, they are relevant only to the extent of disability after the date of the survey, May 29, 1996. *Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991).

disability compensation, he still may be entitled to permanent partial disability compensation pursuant to Section 8(c)(21), (h) of the Act, 33 U.S.C. §908(c)(21), (h). *See generally Guidry,* 967 F.2d at 1039, 26 BRBS at 30 (CRT); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). In this event, the administrative law judge must calculate the amount of permanent partial disability benefits due claimant.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.[7] In the event that claimant is awarded permanent disability compensation for more

[7]We reject claimant's contention that the administrative law judge demonstrated bias in this case, as evidenced by his unfavorable ruling denying compensation. Evidence of an unfavorable ruling alone will not suffice to support an allegation of bias. *Marcus v. Director, OWCP,* 546 F.2d 1044, 5 BRBS 307 (D.C. Cir. 1976).

than 104 weeks, the administrative law judge must consider employer's request for relief pursuant to Section 8(f). The administrative law judge's finding that employer established suitable alternate employment through the labor market survey dated May 19, 1996, is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge