BRB No. 08-0841

A.L.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY & AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: 07/23/2009
	)	
and	)	
	)	
CONTRACT CLAIM SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John Noble (Noble and Crow, P.A.), Rockville, Maryland, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-02061) of Administrative Law Judge Janice K. Bullard 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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 worked in a warehouse for employer performing manual labor for approximately 19 years prior to his 2005 work injury. Claimant's duties included receiving and storing shipments of beer, cigarettes, sodas, videos, top soil and lawn mowers. Claimant used a forklift to unload certain shipments. On April 8, 2005, claimant

injured his back at work and was diagnosed with a herniated disc at L5-S1. Previously, in 2001, claimant had sustained a work-related back injury for which he underwent surgery. At the time of the October 2007 hearing, claimant had not returned to any employment.[1]

In her decision, the administrative law judge found that claimant reached maximum medical improvement no later than October 19, 2005, and that he established his inability to return to his usual employment as a warehouse worker due to his April 8, 2005, accident. The administrative law judge found, however, that employer established the availability of suitable alternate employment and that claimant did not diligently seek work. Accordingly, the administrative law judge awarded claimant ongoing permanent partial disability benefits from April 7, 2006, based on the difference between claimant's average weekly wage of $485.24 and his post-injury wage earning capacity of $346.40. Amended Decision and Order at 2. The administrative law judge also awarded claimant medical benefits, including, if he chose, those for trigger point injections to his back as well as a work hardening program before he returned to work.

On appeal, claimant contends the administrative law judge erred in awarding him partial instead of total disability benefits. Employer has not responded to this appeal.

Once, as here, claimant establishes his inability to perform his usual employment, he is totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that a range of jobs exists and is reasonably available to claimant and suitable for him given his age, education, medical restrictions and vocational history. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). The administrative law judge found that employer identified six suitable jobs.[2] Decision and Order at 22-28.

[1] Employer voluntarily paid claimant temporary total disability benefits from June 6, 2005 through May 19, 2006, and temporary partial disability benefits from June 20, 2007, and continuing, for 70 weeks.

[2] The administrative law judge found suitable jobs as a: 1) Teller for Marriott Employee Federal Credit Union; 2) Call Center Customer Service Representative for Marriott Employee Federal Credit Union; 3) Customer Service Representative for Washington Post; 4) Customer Service Representative for Access World; 5) Telemarketer for Access World; 6) Answering Service Operator for Everest Answering Service.

Claimant contends that the administrative law judge's findings regarding his level of pain and his medication usage required the administrative law judge to find that claimant cannot perform any work. Specifically, in addressing claimant's inability to return to his usual work, the administrative law judge found credible claimant's testimony regarding his degree of pain, and she found that he credibly testified that he lost his home and had no income because he could not return to work after his April 2005 injury. Decision and Order at 19. In this regard, the administrative law judge found that claimant had experienced other injuries, including a prior back injury, which had not prevented him from returning to work. *Id.* The administrative law judge found that claimant's history suggests that he would rather have returned to work than been impoverished. *Id.* at 20. The administrative law judge also accorded weight to claimant's description of the effects of his medication. *Id.* at 21. She stated that "claimant experiences drowsiness and would be unable to operate machinery while taking pain medication." *Id.*

Despite these findings, the administrative law judge did not address the effects of claimant's medication usage on the suitability of the alternate jobs identified, and the case must be remanded for her to do so. Claimant does not challenge the administrative law judge's finding that the six jobs are suitable given the physical restrictions credited by the administrative law judge.[3] Moreover, contrary to claimant's contention, the administrative law judge did account for his pain by requiring that any position permit claimant to sit, stand or move around as needed.[4] Decision and Order at 22. The administrative law judge, however, did not address whether the jobs are suitable in view of claimant's pain medications. Claimant testified he takes a muscle relaxer and Tylenol 3 with codeine on a daily basis. Tr. at 4. He stated that this medication makes him drowsy and that he sleeps two or three hours per day. Tr. at 20-21. The administrative law judge credited claimant's description of the effects of his medication in finding claimant unable to perform his usual work, Decision and Order at 21, but did not discuss the effects, if any, on claimant's ability to perform the alternate jobs found to be otherwise suitable, although claimant raised this issue. *Id.* at 22. Therefore, we must remand this case for the administrative law judge to address the suitability of the six jobs in view of claimant's testimony and any medical evidence regarding the effects of claimant's pain medication. *See Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294

[3] The administrative law judge found that claimant can work at a sedentary level in a position that does not require repetitive bending or stooping, or lifting and carrying more than 10 pounds frequently; allows claimant to sit, stand, or move around at will; and does not involve sitting on a bench or stool. Decision and Order at 20.

[4] Claimant testified that he is unable to sit or stand for any length of time and must frequently change positions due to his pain. Tr. at 19.

(1992); *see also Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge's finding that employer established the availability of suitable alternate employment thus is vacated, and the case is remanded for further findings.

Accordingly, we vacate the administrative law judge's finding that employer established suitable alternate employment, and we remand the case to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge