BRB No. 03-0431

ORIAS A. SCHLESINGER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PENNZOIL PRODUCING COMPANY	)	DATE ISSUED:MAR 17, 2004
	)	
and	)	
	)	
PACIFIC EMPLOYERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Arthur J. Brewster, Metairie, Louisiana, for claimant.

R. Scott Jenkins (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (02-LHC-1655) of Administrative Law Judge C. Richard Avery 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).

In 1975, claimant injured his left knee while working for employer; as a result of this injury, claimant underwent a meniscectomy to repair a partially torn meniscus. Dr. Atkins, the orthopedic surgeon who performed claimant's surgery, assigned him a five percent permanent partial disability rating of the lower extremity, and employer voluntarily paid claimant compensation under the schedule. Claimant subsequently developed problems with arthritis, and in 1991 Dr. Drez performed a tibial osteotomy. Following this procedure, Dr. Drez assigned claimant an additional 15 percent disability of the lower extremity. Claimant did not pursue a claim for benefits under the Act to provide compensation for his 1991 surgery and increased disability rating. In July 1997 claimant's arthritis worsened to the point where he could no longer work, and Dr. Drez recommended surgery for a total knee replacement. Claimant filed a claim against employer.[1] Each of the various insurers which had insured employer during this time, denied liability on the ground that it was not the responsible carrier. Dr. Drez performed total knee replacement surgery on May 3, 2000.

In a Decision and Order issued on February 14, 2001, the administrative law judge awarded claimant temporary total disability compensation from July 8, 1997, and continuing, as well as medical expenses. Claimant, based upon his physician's determination that his condition had reached maximum medical improvement, subsequently sought permanent total disability compensation. In a Decision and Order issued on February 19, 2003, the administrative law judge found that claimant reached maximum medical improvement on June 1, 2001, that claimant presently suffers from a 50 percent impairment to his left knee,[2] that employer established the availability of suitable alternate employment as of the date of maximum medical improvement, that claimant did not establish due diligence in seeking employment, and that claimant was therefore permanently partially disabled as of June 1, 2001. He thus awarded claimant

[1] At the time of claimant's injury, employer was insured by Continental Insurance Company (Continental). At the time of the 1991 surgery, it was insured by CNA Insurance Company (the successor to Continental). At the time Dr. Drez recommended knee replacement surgery, CIGNA, the predecessor of Pacific Employers Insurance Company (Pacific) was the insurer. In a letter dated January 21, 2003, employer's attorney informed the administrative law judge that Cigna Insurance Company had sold its property and casualty division, and that the current insurer was Pacific Employers Insurance Company.

[2] During their second hearing before the administrative law judge, the parties stipulated that June 1, 2001, was the date claimant reached maximum medical improvement and that claimant has a present 50 impairment to his left knee. ALJ EX 1; Joint Ex 1.

scheduled permanent partial disability benefits for a 50 percent impairment to his lower extremity pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2).

On appeal, claimant challenges the administrative law judge's denial of his claim for permanent total disability benefits. Specifically, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in this case, it is uncontroverted that claimant is unable to return to his usual employment duties with employer as a result of his work-related injury, the burden shifts to employer to demonstrate the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried.[3] *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th 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). 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. *See Turner,* 661 F.2d 1031, 14 BRBS 156; *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Claimant initially challenges the administrative law judge's finding that employer established the availability of suitable alternate employment; specifically, claimant avers that the administrative law judge erred in relying upon the testimony and reports of Ms. Guillet, employer's vocational consultant, since there was a lack of written documentation regarding Ms. Guillet's contacts with prospective employers. Additionally, claimant asserts that Ms. Guillet's non-specific job descriptions and her conflicting testimony renders her opinion insufficient to establish the availability of suitable alternate employment.

[3] Claimant's assertion that the administrative law judge erred in placing the initial burden on claimant to establish that he is totally disabled is without merit. In his decision, the administrative law judge unequivocally stated that "Claimant cannot return to his former employment," *see* Decision and Order at 4, and he then properly proceeded to address the issue of whether employer established the availability of suitable alternate employment. We therefore reject claimant's initial contention of error.

Employer sought to establish the existence of suitable alternate employment by means of labor market surveys prepared by its vocational counselor, Ms. Guillet. CX 2. Ms. Guillet testified that her first survey, dated October 9, 2001, was unsuccessful in identifying available employment opportunities for claimant, because the area where he resides, Lake Arthur, is rural and has a depressed labor market. EX 23 at 35-37. Ms. Guillet's second labor market survey, dated December 24, 2001, which expanded her job search area to include Lake Charles, located approximately 45 miles from claimant's home, identified employers who were accepting applications for positions which were to be filled after the first of the year.[4] EX 17; EX 23 at 39-40. A third survey, dated October 8, 2002, listed jobs in Jennings, located between 11 and 15 miles from claimant's home, and in Crowley, located less than 30 miles away.[5] During her subsequent deposition, Ms. Guillet discussed the jobs identified in her December 24, 2001, and October 8, 2002, labor market surveys. EX 23. The labor market survey which purports to reflect jobs which were available to claimant on June 1, 2001, the date of his maximum medical improvement, was prepared by Ms. Guillet during the week prior to the deposition, and was presented to claimant's counsel during that post-hearing deposition. EX 23 at 23-24, 67. She deposed that her finding was based on the searches she had done around June 1, 2001, for jobs in the Lake Charles area, for other clients with sedentary-type restrictions similar to claimant's.[6] EX 23 at 25-26. Ms. Guillet testified that her usual mode of researching for the purpose of preparing a labor market survey is to note the name of each potential employer after contacting it, and then write the job descriptions at home, based on what the employer has told her the job entails, and, if necessary, to supplement the descriptions with information previously received or found in the Dictionary of Occupational Titles. EX 23 at 45-46.

[4] The jobs listed were at Cinc, Don's Car Wash, Interface Security, Harless, Security Finance, Mr. Cash, Pay Day Loans, and Southland. CIGNA Ex. 17; EX 23 at 26-27.

[5] Ms. Guillet listed several openings in Jennings: desk clerk at the Days Inn; desk clerk at the Holiday Inn; sales representative selling mobile telephone equipment and accessories at Centennial; a similar position at U.S. Unwired; and a position at Travel Plaza as cage cashier, for which candidates were being hired, although it would not be available for about a month when the establishment obtained a gaming license. In Crowley, the positions were for a customer service associate at Express Check Advance, and a position at First Franklin. EX 23 at 12-15.

[6] Ms. Guillet provided descriptions of these positions in Exhibit 1 to her deposition. EX 23.

Claimant's argument on appeal regarding Ms. Guillet's testimony and reports has merit. In his decision, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment based upon his acceptance of Ms. Guillet's testimony. The totality of the administrative law judge's analysis, however, consists of the following:

> Employer's expert, Carthy M. Guillet, gave a 97 page deposition post-hearing on November 21, 2002, and her job surveys of December 24, 2001, and October 8, 2002, as well as her retroactive survey to Claimant's date of maximum medical improvement were discussed in great detail. Despite the jobs identified and despite the fact that most, if not all, did not violate the literal restrictions placed on Claimant by Dr. Drez, Claimant inquired about only two--hardly a diligent effort on his part. In sum, the schedule applies, claimant is not totally disabled.

Decision and Order at 5.

We hold that the administrative law judge's finding on this issue cannot be affirmed. As the trier-of-fact, the administrative law judge is entitled to weigh the evidence, and determine the credibility of witnesses, and his findings must be accepted if rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). However, in determining whether an employment position constitutes suitable alternate employment, the administrative law judge must compare the job's requirements with the totality of claimant's condition, including claimant's medical restrictions. *See Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). In the instant case, claimant raised specific objections to both the documentation methods utilized by Ms. Guillet in preparing her the labor market surveys and to the actual suitability of the identified positions. Tr. at 50; Claimant's Post-Trial Memo; EX 23. The administrative law judge, however, did not address these specific issues raised by claimant. We therefore vacate the administrative law judge's finding that employer established the availability of suitable alternate employment and remand the case to the administrative law judge for him to reconsider this issue in light of the claimant's objections to the testimony of Ms. Guillet. *See, e.g., Hernandez*, 25 BRBS 294; *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).[7]

[7] Decisions rendered under the Act are subject to the Administrative Procedure Act which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law

Claimant additionally argues that the administrative law judge erred in finding that employer established the availability of suitable alternate employment retroactive to June 1, 2001, the date of maximum medical improvement, based on a labor market survey performed post-hearing. Specifically, claimant challenges the credibility of Ms. Guillet's finding of jobs available in June 2001, since she had conceded that at the time of her October 2001 labor market survey she was unable to identify such employment. Additionally, claimant alleges that the submission of Ms. Guillet's post-hearing labor market survey was not timely since it was in violation of the administrative law judge's order setting deadlines for the exchange of expert reports.[8]

It is well established that an administrative law judge has broad discretion in determinations pertaining to the admissibility of evidence. *See, e.g., Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 44 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). In the case at bar, claimant specifically objected before the administrative law judge to the submission of Ms. Guillet's post-hearing labor market survey; specifically, claimant noted his objection to the survey both at Ms. Guillet's deposition, EX 23 at 21, and in his post-hearing brief to the administrative law judge. *See* Claimant's post-hearing br. at 8. In this regard, claimant averred that employer did not provide him with Ms. Guillet's report prior to her deposition, that this report was not contained in the vocational expert's file which he had subpoenaed, and that the report was presented to him for the first time at the deposition. Lastly, as he had done with Ms. Guillet's previous surveys, claimant challenged the suitability of the jobs listed in the post-hearing survey. In finding that employer established suitable alternate employment as of June 1, 2001, the administrative law judge relied upon Ms. Guillet's post-hearing survey without addressing claimant's specific objections. As these objections were timely raised, the administrative law judge was required to address them in his decision. Therefore, on remand, the administrative law judge must address and discuss claimant's objections to the admissibility of Ms. Guillet's post-hearing survey; if he ultimately receives this evidence, the administrative law judge must address the specific objections to the contents of that survey raised by claimant. *See generally Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 31 BRBS 75 (1997); s*ee also Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90(CRT)(5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991).

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judge must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In the instant case, the administrative law judge's failure to explicitly set forth the evidence upon which he relies makes it impossible to apply the Board's standard of review.

[8] In his June 6, 2002 pre-hearing order, the administrative law judge specified that not later than 10 days prior to the hearing counsel must pre-mark and exchange exhibits.

Accordingly, the Decision and Order of the administrative law judge is vacated, and the case is remanded for reconsideration in accordance with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge