BRB No. 98-1646

NILES WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED	)	DATE ISSUED: 9/3/99
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-LHC-1604, 96-LHC-1605, 96-LHC-1606, 96-LHC-1607) of Administrative Law Judge John C. Holmes 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 is the second time this case is before the Board. Claimant injured his back on February 8, 1991, his right knee on April 4, 1992, and his left knee on January 19, 1994, and May 10, 1994, while working as a heavy equipment operator for employer. Claimant sought permanent total disability benefits for his back and knee injuries. The administrative law judge awarded claimant temporary total

disability benefits from February 10 through 14, 1991, for the 1991 back injury, from April 7 through September 30, 1992, for the right knee injury, and from May 10 through November 16, 1994, for the left knee injury.[1] Additionally, the administrative law judge awarded claimant scheduled permanent partial disability benefits for a 40 percent impairment to the right leg for the 1992 injury, and for a five percent impairment to the left leg for the 1994 injury, *see* 33 U.S.C. §908(c)(2), (19), and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, the Board vacated the administrative law judge's decision denying total disability benefits, as he did not consider claimant's claim for permanent total disability benefits in light of the medical evidence of record. Consequently, the Board remanded the case to the administrative law judge to discuss all relevant medical evidence of record and determine whether claimant established a *prima facie* case of total disability due to his right knee injury, the left knee injury, or the injuries to both knees in combination. The Board further stated that if, on remand, claimant establishes a *prima facie* case of total disability, and employer does not establish suitable alternate employment, claimant is entitled to permanent total disability benefits and is not limited to scheduled awards; alternatively, if suitable alternate employment was established by employer, claimant would be limited to two scheduled awards for his knee impairments. The Board further vacated the administrative law judge's finding that claimant has a 40 percent impairment to the right leg, as he did not discuss and weigh the relevant opinion of Dr. O'Hearn that claimant has a 60 percent impairment to the right leg, holding that, on remand, the administrative law judge must weigh Dr. O'Hearn's opinion with the opinions of Drs. Hunt, Honick, and Reahl.[2] *Williams v. I.T.O. Corp. of Baltimore, Inc.*, BRB Nos. 97-

[1]There was no time lost due to the January 19, 1994 left knee injury.

[2]The Board affirmed the administrative law judge's award of permanent partial disability benefits for claimant's left leg, if on remand, the administrative law judge finds that employer established suitable alternate employment. The Board affirmed

1217/A (June 4, 1998)(unpublished).

On remand, the administrative law judge stated that the Board had misrepresented his findings, and that he had previously found as a medical matter that claimant had not proven a *prima facie* case of total disability; thus, the administrative law judge reaffirmed this finding. The administrative law judge further found that since claimant could return to his usual work, suitable alternate employment need not be established by employer, but that alternative work was presented by employer. With respect to the disability rating of claimant's right leg, the administrative law judge stated that while not directly expressed in his conclusions, Dr. O'Hearn's opinion had been taken into consideration. Therefore, without further discussion, the administrative law judge reaffirmed his finding that claimant has a 40 percent impairment to the right leg.

On appeal, claimant contends that the administrative law judge erred in reaffirming his prior decision. Specifically, claimant asserts that, contrary to the Board's decision, the administrative law judge failed to consider all the medical evidence of record with regard to claimant's claim of total disability, and failed to discuss and weigh the opinion of Dr. O'Hearn with the opinions of Drs. Hunt, Honick and Reahl with regard to the percentage of permanent partial disability sustained to claimant's right leg. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

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the administrative law judge's cessation of temporary total disability benefits for the left knee injury on November 16, 1994, and further affirmed the administrative law judge's decision to consider the reports of Dr. Halikman, his finding that claimant's back injury was not work-related, and his award of an attorney's fee to claimant's counsel. *Williams v. I.T.O. Corp. of Baltimore, Inc.*, BRB Nos. 97-1217/A (June 4, 1998)(unpublished).

We agree with claimant that the administrative law judge erred in failing to comply with the Board's remand order; specifically, the administrative law judge erred by failing to discuss the relevant evidence of record with regard to claimant's claim of permanent total disability and with regard to the percentage of permanent partial disability to his right leg. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operations of the Board provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board." *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990); *Randolph v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 443 (1989). The Board's previous decision remanding this case to the administrative law judge explicitly instructed him to discuss all of the relevant medical evidence of record and determine whether claimant established his *prima facie* case of total disability due to the right knee injury, left knee injury, or the injuries to both knees in combination. On remand, however, the administrative law judge cited his finding in his initial Decision and Order that claimant could have returned to his normal longshore duties in November 1994, were it not for his disability retirement award.[3] Thus, on remand, the administrative law judge found that "as a medical matter," claimant had not proven a *prima facie* case of total disability. *See* Decision and Order on Remand at 1. This finding, however, runs contrary to the evidence of record, as well as the administrative law judge's own finding in his initial decision. In his discussion of claimant's *left* knee injury, the administrative law judge, in his initial decision, found that claimant could have returned to his normal longshore duties in November 1994, based on the opinion of Dr. Halikman. The administrative law judge found that this opinion was supported by the opinions of Drs. Hunt and Matz, stating that each of these physicians found "that Claimant's *left* knee is essentially normal, causing no impairment in Claimant's ability to work as a longshoreman." *See* Decision and Order - Granting Benefits at 13 (emphasis added). However, these opinions concerned only claimant's left knee condition. In fact, Drs. Halikman, Hunt and Matz each found that claimant suffered from a significant impairment in his ability to work as a result of his longstanding right knee condition.[4] After crediting these opinions, the administrative law judge then found

[3]In its initial decision, the Board noted that contrary to the administrative law judge's finding, the fact that claimant retired on disability is not relevant to the issue of whether claimant's work injury precludes his return to usual work. *See Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

[4]Dr. Halikman, in his November 16, 1994 report, stated that claimant has a significant impairment in his ability to work regarding his right knee. Emp. Ex. 16 at C5-2. In his May 15, 1995 report, Dr. Hunt agreed with Dr. Halikman that claimant could return to work, absent the degenerative right knee condition. Emp. Ex. 4 at B.

that Drs. Halikman, Hunt and Matz acquiesced in the position that claimant has a "continuing inability to return to work as a longshoreman, resulting from the continuing degenerative condition of his right knee." *Id.*, at 13-14. Thus, contrary to the administrative law judge's assertion on remand, the administrative law judge had not previously analyzed the issue of whether claimant established his entitlement to an award of permanent total disability compensation in a proper fashion. By not discussing on remand the medical evidence with regard to whether claimant established his *prima facie* case of total disability due to the right knee injury, the left knee injury, or the injuries to both knees in combination, we hold that the administrative law judge erred by not complying with the Board's remand order. Based upon the administrative law judge's failure to comply with the directives set forth by the Board in its previous decision, we are compelled to vacate the administrative law judge's determination that claimant did not establish a *prima facie* case of total disability, and remand the case once again for proper consideration of the record evidence in accordance with the Board's previous decision. *See Obert*, 22 BRBS at 157; *Randolph*, 22 BRBS at 443. If claimant establishes his *prima facie* case, on remand, the administrative law judge must discuss and analyze the evidence as to whether employer established suitable alternate employment.[5] As explained in the Board's previous decision, if employer establishes the availability of suitable alternate employment, claimant is limited to two scheduled awards for his knee impairments.[6] *See Williams*, slip op. at 3.

Dr. Matz opined that claimant suffered from longstanding, bilateral and progressive knee problems, and agreed with Dr. Hunt's conclusions. Emp. Ex. 3 at G.

[5]Based on the finding that claimant could return to his usual employment, the administrative law judge stated that employer did not need to establish suitable alternate employment, but that nevertheless, "such alternative work was presented by Employer as explained in my Decision and Order." Decision and Order on Remand at 2. Contrary to this assertion, the administrative law judge, in his initial decision, neither discussed nor analyzed the vocational evidence submitted into the record by both employer and claimant, *see* Emp. Ex. 5; Cl. Ex. 12, with regard to whether employer established suitable alternate employment. Rather, the administrative law judge summarily stated: "It was unnecessary, therefore, for Employer to conduct a job market survey, although given the liberality of the Act and the unusual fact situation here, Employer was fully justified in doing so in order to protect its own interests." Decision and Order - Granting Benefits at 14.

[6]To establish a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual employment due to his work-related disability. *See, e.g., Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Once claimant establishes an inability to perform his usual employment because of a job-related

With regard to claimant's right knee injury, the administrative law judge, in his initial decision, discussed and weighed the opinions of Drs. Hunt, Honick, and Reahl, who found that claimant suffered an impairment to the right leg of 50 percent, 45 percent, and 35 percent, respectively. Decision and Order at 11-12; Cl. Ex. 9; Emp. Exs. 4, 11. The administrative law judge found that a 50 percent impairment rating seemed a little high, and that a rating of 40 percent represented a reasonable approximation of impairment to claimant's right leg, after noting that he was not bound to accept any physician's report as definitive. Decision and Order at 12. In remanding the case for further consideration, the Board vacated this finding, holding that the administrative law judge did not discuss and weigh the relevant opinion of Dr. O'Hearn that claimant has a 60 percent impairment to his right leg. *See* Cl. Ex. 7. The Board expressly stated that if, on remand, the administrative law judge finds that employer established suitable alternate employment, he must discuss and weigh Dr. O'Hearn's opinion with the opinions of Drs. Hunt, Honick and Reahl. *See*

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injury, the burden shifts to employer to establish the availability of other jobs that claimant can perform given, *inter alia,* his age, medical restrictions and education. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). If employer does not establish suitable alternate employment, claimant is entitled to permanent total disability benefits and is not limited to scheduled awards. *PEPCO v. Director, OWCP*, 449 U.S. 268, 277 n. 17, 14 BRBS 363, 366-367 n. 17 (1980); *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT). If employer establishes suitable alternate employment, claimant is limited to two scheduled awards for his knee impairments. *PEPCO*, 449 U.S. at 268, 14 BRBS at 363; *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986); *Brandt v. Avondale Shipyards, Inc.*, 16 BRBS 120 (1984); 33 U.S.C. §908(c)(22).

Williams, slip op. at 4. On remand, the administrative law judge stated that while he did not address in his "conclusions" Dr. O'Hearn's opinion, this opinion was taken into consideration. Without further discussion, the administrative law judge stated that he saw no reason to change his finding that claimant suffered from a 40 percent impairment to his right leg. *See* Decision and Order on Remand at 2. Cl. Ex. 7.

We hold that the administrative law judge erred by failing to follow the Board's directive regarding this issue. The Act incorporates relevant provisions of the Administrative Procedure Act, *see* 5 U.S.C. §554 *et seq*. (APA); 33 U.S.C. §919(d), which requires that adjudicatory decisions 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); *see Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 412 U.S. 800, 806-808 (1973); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In rendering his decision on remand, the administrative law judge, without discussion, reaffirmed his finding that claimant suffered from a 40 percent impairment to his right leg, without discussing the evidence of record specifically identified by the Board in its initial decision, and making credibility determinations. As the administrative law judge's cursory finding fails to satisfy the requirements under the APA, it is not in compliance with the Board's remand order, and therefore, we vacate the administrative law judge's finding in this regard. Thus, on remand, if the administrative law judge finds that employer established suitable alternate employment, the administrative law judge is once again instructed to discuss and weigh Dr. O'Hearn's opinion with the opinions of Drs. Hunt, Honick and Reahl. *See generally Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993); *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053 (1978); *Bachich v. Seatrain Terminals of California,* 9 BRBS 184 (1978).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge