BRB No. 10-0716

DAVID BAUMHARDT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCORPORATED	)	DATE ISSUED: 08/10/2011
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

David G. Mills (Mills & Associates), Cordova, Tennessee, for claimant.

Jerry R. McKenney and Karen A. Conticello (Legge, Farrow, Kimmitt, McGrath & Brown, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2008-LDA-00014) of Administrative Law Judge Jeffrey Tureck 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 Defense Base Act, 42 U.S.C. §1651 *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).

This case is before the Board for the second time. To briefly recapitulate the facts relevant to this appeal, claimant began working as a generator mechanic for employer in Kandahar, Afghanistan, on March 21, 2005. Claimant stated that his working conditions caused the gradual contraction of his fingers. On May 16, 2006, claimant felt his left shoulder pop when the handle of a bucket containing at least four gallons of oil became caught in his contracted fingers. The next morning claimant sought treatment at employer's medical facility for his shoulder problem, and he was subsequently repatriated for treatment of his medical conditions. On June 21, 2006, Dr. Weiss diagnosed Dupuytren's contractures (DC) of both hands. Dr. Weiss attributed claimant's shoulder complaints to bursitis or biceps tendonitis, although he gave no indication as to the etiology of this condition.

Dr. Weiss performed surgery on claimant's left hand on June 26, 2006, and on claimant's right hand on August 21, 2006. On July 28, 2006, claimant requested and received a release to return to full-duty work effective July 31, 2006. He returned to work as a mechanic in the Memphis, Tennessee, area on November 6, 2006, and has, since that time, held various mechanic jobs with intermittent periods of unemployment. Following an April 14, 2008, examination, Dr. Heller diagnosed impingement syndrome in claimant's shoulder, stating that torn tissue painfully impeded claimant's range of motion. Claimant subsequently sought temporary total and permanent partial disability benefits, as well as medical benefits, arguing that his work for employer accelerated the progression of his DC, and moreover, that he sustained a loss of wage-earning capacity due to the permanent impairment of his left shoulder that resulted from the May 16, 2006 work incident.

In his initial Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to both his DC and left shoulder conditions, but that employer established rebuttal in each instance. Weighing the evidence as a whole, the administrative law judge found that claimant's work for employer did not cause, aggravate, or accelerate either his DC or left shoulder conditions. The administrative law judge thus concluded that claimant did not establish that his DC and/or left shoulder conditions are related to his work for employer and, accordingly, he denied benefits. Claimant appealed this decision to the Board.

On appeal, the Board affirmed the administrative law judge's conclusion that claimant's DC condition is not related to his work with employer and his consequent denial of benefits for that condition. The Board vacated the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption with regard to claimant's left shoulder condition and remanded the case for the administrative law judge to address whether claimant's pre-existing left shoulder condition was aggravated by his

work with employer. The Board stated that if, on remand, the presumption was found not to have been rebutted and causation was therefore established, the administrative law judge was to address whether claimant's shoulder condition resulted in any disability, as well as any other remaining issues. *D.B. [Baumhardt] v. Service Employers Int'l, Inc.*, BRB No. 09-0204 (Aug. 26, 2009) (unpublished).

In his Decision and Order on Remand, the administrative law judge stated that, rather than address the issue of whether claimant's left shoulder condition is causally related to his employment with employer in accordance with the Board's remand instructions, he would assume, *arguendo,* that claimant's shoulder condition is work-related and proceed to consider whether the shoulder condition resulted in any disability. The administrative law judge summarily concluded that claimant is not totally disabled and that his shoulder condition did not result in any loss of wage-earning capacity; accordingly, the claim for disability benefits was denied.

On appeal, claimant challenges the administrative law judge's denial of his claim for his shoulder injury. Employer responds, urging affirmance of the finding that claimant is not disabled by his shoulder condition.

We must vacate the administrative law judge's conclusion that claimant's shoulder injury has not resulted in any disability or loss of wage-earning capacity and remand the case for further consideration. In this case, the administrative law judge did not undertake a proper analysis of the extent of any disability claimant may have sustained as a result of his shoulder injury. *See generally Gremillion v. Gulf Coast Catering Co.,* 31 BRBS 163 (1997) (Brown, J., concurring). The administrative law judge's decision does not contain any discussion of the relevant law or evidence of record, but merely states in a conclusory fashion that claimant failed to establish that his shoulder injury resulted in any loss of wage-earning capacity.

Disability under the Act is an economic as well as a medical concept; the extent of disability cannot be measured by the claimant's medical condition alone. *See Ledet v. Phillips Petroleum Co.,* 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998). It is claimant's initial burden to establish that he is unable to perform his usual work due to the work injury. *See, e.g., Wheeler v. Newport News Shipbuilding & Dry Dock Co.,* 39 BRBS 49 (2005); *Padilla v. San Pedro Boat Works,* 34 BRBS 49 (2000). This may be established by evidence of claimant's demonstrating a physical inability to perform the job or that his former job is no longer available to him and that this unavailability of his former job is related to, or was precipitated by, his work injury. *Id.; see Service Employees Int'l, Inc. v. Director, OWCP,* 595 F.3d 447, 455-456, 44 BRBS 1, 6(CRT) (2d Cir. 2010); *McBride v. Eastman Kodak Co.,* 844 F.2d 797, 21 BRBS 45(CRT) (D.C. Cir. 1988); *Rice v. Service Employees Int'l, Inc.,* 44 BRBS 63 (2010).

The record in this case contains medical and vocational evidence concerning claimant's shoulder condition which the administrative law judge did not discuss in terms of the relevant law. The administrative law judge must first determine whether claimant has any shoulder impairment or condition.[1] *See, e.g., Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). It is undisputed that claimant did not return to his job with employer after his May 16, 2006 work injury, but has worked intermittently for other employers in the United States. On remand, the administrative law judge must address whether claimant's former job is no longer available to him as a result of his work injury and/or whether any restrictions associated with claimant's shoulder condition prevent him from performing his usual work. *See Service Employees Int'l, Inc.*, 595 F.3d at 455-456, 44 BRBS at 6(CRT); *McBride*, 844 F.2d 797, 21 BRBS 45(CRT). If claimant has a shoulder condition that prevents him from returning to his usual work, the administrative law judge must determine whether employer established the availability of suitable alternate employment consistent with the applicable legal standards. *See Del Monte Fresh Produce v. Director, OWCP*, 563 F.3d 1216, 43 BRBS 21(CRT) (11th Cir. 2009); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The record contains evidence regarding claimant's intermittent periods of post-injury employment as well as a labor market survey conducted by employer's vocational expert.[2] *See, e.g.*, EX 30; Tr. at 52-56, 87. If employer established the availability of suitable alternate employment, the administrative law judge must ascertain claimant's post-injury wage-earning capacity to determine whether claimant is entitled to

[1]Employer states in its response brief that it does not waive the causation issue with respect to claimant's shoulder condition. *See* Employer's Brief at 12 n.1. The administrative law judge declined to address this issue on remand despite the Board's instructions that he do so. 20 C.F.R. §802.405(a). As employer's contention provides an avenue for affirming the denial of benefits, the issue may be raised in a response brief. *See Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 283 (1998); *see also Dalle Tezze v. Director, OWCP*, 814 F.2d 123 (3d Cir. 1987). As the administrative law judge made no findings, however, the Board has nothing to review. On remand, the causation issue remains properly before the administrative law judge pursuant to the Board's first decision. *Baumhardt*, slip op. at 5-6.

[2]In this regard, the administrative law judge must address whether claimant's periods of post-injury employment were sufficiently regular such that employer established the availability of suitable alternate employment with evidence of the jobs held by claimant following his work injury. *See Del Monte Fresh Produce*, 563 F.3d 1216, 43 BRBS 21(CRT); *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

compensation for partial disability.[3] 33 U.S.C. §908(c)(21), (e), (h); *Del Monte Fresh Produce,* 563 F.3d at 1221, 43 BRBS at 24(CRT). In addition, the administrative law judge should address employer's contention that claimant lost otherwise suitable jobs for reasons related to his misconduct. *See, e.g., Managaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996) (under such circumstances, claimant not entitled to total disability benefits, but can retain any partial disability benefits to which he was entitled).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[3]Although subsequent to the hearing in this case, the parties stipulated that claimant's average weekly wage is $1,337.03, the administrative law judge did not address this stipulation or make a finding with respect to claimant's average weekly wage. On remand, he must make such a determination. As the administrative law judge has not yet determined claimant's average weekly wage or post-injury wage-earning capacity, we need not address claimant's contentions regarding any tax exemptions associated with his earnings in Afghanistan and the proper calculation of his post-injury wage-earning capacity.