

LEON HAMILTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

SMITH, Administrative Appeals Judge :

Claimant appeals the Decision and Order (87-LHC-1115) of Administrative Law Judge Edward J. Murty, Jr., 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 third time this case has been before the Board. On July 18, 1984, claimant suffered the last of three job-related injuries to his back. Following treatment, surgery, and physical therapy, claimant returned to light duty work on August 18, 1985, but was "passed out" in February 1986 because there was no work available within his physical restrictions. Employer paid claimant temporary total disability benefits for various periods until March 4, 1987, when it began paying permanent partial disability benefits on the basis that claimant retained some residual wage-earning capacity. Claimant filed a claim seeking permanent total disability compensation.

In the first Decision and Order, Administrative Law Judge Aaron Silverman found

that claimant is unable to perform his usual employment, and that claimant reached maximum medical improvement on July 24, 1986. Next, the administrative law judge found that the jobs identified by employer, including that of security guard, were approved by Dr. Peach as within claimant's physical capacity and that claimant's continued unemployment is due to a lack of diligence on his part. Finally, the administrative law judge found that claimant has a post-injury wage-earning capacity based upon the wages for the security guard position. Thus, Judge Silverman awarded claimant permanent partial disability compensation of \$201.19 per week, stating that this amount represented the difference between claimant's pre-injury wages and those that claimant could have earned as a security guard. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant appealed the denial of his claim for permanent total disability benefits to the Board. *Hamilton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 88-2375 (June 29, 1990) (unpublished). The Board vacated Judge Silverman's finding that employer established the availability of suitable alternate employment and remanded the case for further findings on the availability of suitable alternate employment. In rendering its decision, the Board determined that Judge Silverman failed to consider whether the security guard job proffered by employer as suitable alternate employment met its burden in light of claimant's pre-existing criminal conviction; moreover, the Board stated that Judge Silverman on remand should specifically address the other identified positions by making findings regarding the job duties and claimant's physical restrictions and, if necessary, address claimant's due diligence in pursuing such positions.

In his Decision and Order on Remand, Judge Silverman did not discuss claimant's ability to obtain any of the security guard jobs; rather, he summarily stated that employer established the availability of suitable alternate employment by identifying five jobs that are within claimant's physical restrictions as set by Dr. Peach and that are appropriate given claimant's vocational and educational background. Judge Silverman specifically mentioned the job as a Public Information Clerk for the City of Virginia Beach as being available to claimant, and he used the wages of this position to determine claimant's post-injury wage-earning capacity. Claimant again appealed to the Board, contending that the administrative law judge failed to follow the Board's remand instructions and did not address all of the evidence relating to the issue of the availability of suitable alternate employment.

In its second decision, the Board determined that Judge Silverman erred in not discussing the impact of claimant's criminal record on the guard position as instructed and in failing to address the contrary testimony of claimant's vocational consultant regarding whether the other identified positions are realistically available to claimant. *Hamilton v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 91-1992 (Feb. 24, 1995) (unpublished) (*Hamilton II*). The case was therefore remanded for Judge Silverman to consider the availability of suitable alternate employment consistent with *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), by determining if employer had met its burden by identifying a range of jobs within claimant's restrictions which claimant could realistically secure. Additionally, the Board stated that if the security guard

positions were to be relied upon, Judge Silverman was to discuss the availability of these jobs in light of claimant's criminal conviction, and, if necessary, consider claimant's diligence in seeking appropriate employment.

On remand, Administrative Law Judge Murty (the administrative law judge) presided over the claim and issued a decision based upon his review of the written record and subsequently filed briefs. In his Decision and Order, the administrative law judge determined that employer had established the availability of suitable alternate employment and awarded claimant permanent partial disability compensation with a residual wage-earning capacity based on the wages paid in the security guard position.

On appeal, claimant contends that the administrative law judge erred by failing to follow the Board's remand instructions, in placing too high a burden on claimant regarding the availability of the security guard positions, in overlooking the conflict of interests of employer's vocational consultant, and in demonstrating obvious bias by finding, without sufficient explanation, that claimant did not display due diligence in seeking suitable alternate employment.¹ Employer responds, urging affirmance.

Where, as in the instant case, a claimant is unable to perform his usual job, claimant has established a *prima facie* case of total disability and the burden then shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); see also *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). A showing by employer of a single job opening is insufficient to satisfy employer's burden of suitable alternate employment; employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform. *Lentz*, 852 F.2d at 129, 21 BRBS at 109 (CRT); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). 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 *Tann*, 841 F.2d at 540, 21 BRBS at 10 (CRT); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988). Claimant's diligence in seeking employment is relevant only after employer meets its burden of demonstrating suitable alternate employment. *Id.*

We agree with claimant that the administrative law judge erred in failing to comply with the Board's remand order. Section 802.405(a) of the regulations, 20 C.F.R.

¹Given our disposition of this case, it is not necessary for us to address claimant's arguments regarding claimant's due diligence in seeking employment or the administrative law judge's alleged bias.

§802.405(a), governing the operation of the Benefits Review 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." In remanding the case for the second time, the Board specifically instructed the administrative law judge to consider whether employer has met its burden under the standard set forth in *Lentz*, to discuss all relevant evidence, and to set forth with specificity the evidence he relies on. Moreover, the Board stated that if the administrative law judge on remand relies on the security guard positions identified by employer as demonstrating the availability of suitable alternate employment, he must discuss the availability of these jobs in light of claimant's prior criminal conviction. See *Hamilton II*, slip op. at 4. On remand, however, the administrative law judge cursorily reviewed the evidence in this case, determined that employer had established the availability of suitable alternate employment without specifically addressing the positions at issue, awarded permanent partial disability compensation based upon the wages paid in the security guard position without fully addressing the evidence regarding whether claimant could obtain a license for such a job, and relied on claimant's lack of diligence in seeking employment in addressing suitable alternate employment. Thus, the administrative law judge on remand erred by failing to follow the Board's directive and the applicable case law. See *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157, 159 (1990).

Initially, we note that the administrative law judge's decision does not satisfy the requirements of the Administrative Procedure Act (APA) which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Furthermore, the administrative law judge must independently analyze and discuss the evidence; failure to do so will violate the APA's requirement for a reasoned analysis. See *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). An administrative law judge's failure to explicitly accept or reject the evidence of record makes it impossible for the Board to apply its standard of review.

In the instant case, the administrative law judge on remand briefly summarized the vocational evidence of record, noting that positions identified by Mr. Cooper, employer's vocational consultant, were approved as within claimant's physical restrictions by Dr. Peach, claimant's treating physician; that Mr. Vaughn, claimant's vocational consultant, disputed the realistic availability of two of these positions, *i.e.*, information clerk and toll collector; that claimant could have "easily" remedied any problems that prevented his obtaining the guard position; and concluded, therefore, that employer had established the availability of suitable alternate employment. Although the administrative law judge concludes that "there are jobs available...which [claimant] is able to perform and which are within his physical capabilities," see Judge Murty's Decision at 3, he did not specifically discuss these jobs or state which of the proffered jobs actually constitutes suitable alternate employment which is realistically available to claimant. Therefore, it is impossible for this Board to review his conclusion to determine if it comports with the requirements of the Act.

Moreover, in reaching these determinations, the administrative law judge failed to make the findings required by the Board in its second decision on remand. In this regard, the administrative law judge failed to address the other specific positions located by Mr. Cooper as instructed by the Board. Although he cursorily mentions the positions of public information clerk and toll collector, the administrative law judge did not discuss the other positions of traffic technician, cashier, and facility attendant which, if credited, could establish the availability of suitable alternate employment under the standard set forth by the United States Court of Appeals for the Fourth Circuit in *Lentz*. The administrative law judge failed to discuss the physical requirements of these jobs or whether they were realistically available to claimant. The administrative law judge's failure to explicitly set forth and discuss and accept or reject these positions makes it impossible for the Board to determine if the administrative law judge properly found employer established the availability of suitable alternate employment.² See *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

The administrative law judge also summarily addressed the opinion of claimant's vocational expert who found at least two of the positions, *i.e.*, public information clerk and toll collector, to be beyond claimant's physical capabilities, apparently discrediting it without explanation. The administrative law judge stated that Mr. Vaughn was a qualified vocational expert and that he opined that the commute involved in two job would be too much for claimant. He then found that Mr. Vaughn "reaches quite a bit" in eliminating the toll collector position, see Judge Murty's Decision at 3, but failed to elucidate his rationale for disagreeing with this opinion. Moreover, the administrative law judge then stated Mr. Vaughn did not seem to dispute that the "other jobs" are within claimant's restrictions, but he did not thereafter address those other jobs. Although credibility determinations are within the purview of the administrative law judge, the administrative law judge's discussion of Mr. Vaughn's opinion is incomplete; it does not explicitly reject the opinion, and it lacks a reasoned explanation for an implicit rejection to be affirmed. Thus, the case must again be remanded for the administrative law judge to address this opinion.

²Contrary to our dissenting colleague's suggestion, we cannot affirm the administrative law judge's decision based on these jobs, as the Board is not empowered to render findings of fact and the administrative law judge did not discuss these jobs or rely upon them in setting claimant's wage-earning capacity.

The administrative law judge also erred in his consideration of the effect of claimant's criminal conviction on his employability, again failing to follow the Board's directive that he reconsider the availability of security guard positions in light of claimant's record. The standard adopted by the United States Court of Appeals for the Fourth Circuit, in which this case arises, requires that some aspects of a claimant's background be considered in determining the availability of suitable alternate employment. See *generally Trans-State Dredging*, 731 F.2d at 199, 16 BRBS at 74 (CRT). A criminal conviction, like a limitation of education or literacy, incurred before a claimant's injury which disqualifies a claimant from obtaining a position, may render a position unavailable to claimant. See *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1982). In the instant case, the administrative law judge failed to follow the Board's instruction to discuss whether employer specifically established that a security guard position is realistically available to claimant. Instead, after noting that claimant was granted a temporary security guard license which was revoked on March 17, 1987, due to claimant's failure to disclose a criminal conviction on his license application, the administrative law judge merely recounted claimant's testimony that his lawyer told him the conviction should not have been on his record and stated claimant creates the impression that the problem could have been remedied had he made the effort, which he did not do. The administrative law judge concluded from this discussion that as a result of claimant's inaction he deleted from consideration a large number of job opportunities.

This discussion is insufficient as it is not based on evidence as to whether claimant could now obtain a security guard license, rendering such jobs available to him.³ Moreover, the administrative law judge placed the burden of proof on claimant to demonstrate his diligence in removing any pre-existing impediments to his obtaining this position, when employer bears the burden of proving the availability of alternate employment. Finally, the administrative law judge did not address the applicability of *Hairston*, as directed by the Board. If the administrative law judge had not relied on the security guard job to establish suitable alternate employment, such a failure would not be an error as the Board only instructed the administrative law judge to discuss the applicability of *Hairston* if he relied upon the guard position to meet employer's burden of establishing suitable alternate employment. See *Hamilton II*, slip op. at 4. For a claimant's residual wage-earning capacity to be based upon the wages of a proffered position, it must be found to constitute suitable alternate employment. See *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). In the instant case, as the administrative law judge did not make the required

³In arguing in support of the administrative law judge's decision, employer contends that *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 2 F.3d 64, 27 BRBS 100 (CRT)(4th Cir. 1993), in which the claimant lost a suitable alternate employment position because he falsified company records, is applicable to this case, not *Hairston*. Employer contends that the instant claimant could not obtain a security job because he lied on his state license application and that it is the lie, not the criminal conviction, that precludes such employment. Although employer's argument may have merit, we cannot address it due to the lack of relevant findings by the administrative law judge.

findings to support a conclusion that the security guard jobs constituted suitable alternate employment consistent with the Act and the Board's instructions, the administrative law judge erred in subsequently using the wages of this position to establish claimant's residual wage-earning capacity. Accordingly, we vacate his findings on claimant's residual wage-earning capacity.

Based upon the foregoing, we find it necessary to once again remand this case to the administrative law judge, as none of the opinions below contain reasoned and thorough findings of fact and conclusions of law regarding the issue of whether employer met its burden of establishing the availability of suitable alternate employment. In addressing this issue, we will state once again that, in order for the administrative law judge to rely on the security guard positions identified by employer, he must address the evidence regarding the realistic availability of these jobs in light of claimant's pre-existing criminal record, as stated in the Board's two prior decisions. The administrative law judge should also address employer's argument that *Hairston* is distinguishable as it is misrepresentation on claimant's application, rather than the criminal conviction itself, which caused claimant's licensing problem. See n.2, *supra*. Moreover, pursuant to *Lentz*, the administrative law judge must determine whether employer met its burden of identifying a range of jobs that are reasonably available and which claimant can realistically secure. In this regard, the administrative law judge must discuss all of the relevant evidence, specifically addressing the jobs identified by the specialists and determining whether these jobs are within claimant's medical restrictions and are suitable given his age, education and similar considerations. Once the suitable jobs are determined, the administrative law judge must consider whether they are reasonably available, stating his rationale and the evidence upon which he relies. As employer bears the burden of proof, claimant's diligence is not relevant until suitable alternate employment is fully addressed. If the administrative law judge finds employer met its burden of proving available suitable alternate employment, then at that point claimant's diligence in seeking employment should be addressed.

Accordingly, the administrative law judge's determinations regarding the availability of suitable alternate employment and claimant's residual wage-earning capacity are vacated, and the case is remanded for further consideration of these issues consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, dissenting:

I respectfully disagree with the decision of my colleagues that this case must again be remanded for the administrative law judge to again review the evidence and reconsider whether or not employer has established the availability of suitable alternate employment. Contrary to the majority's opinion that the administrative law judge has failed to specifically consider and weigh the evidence consistent with the Board's prior remand order, I would simply affirm the administrative law judge's decision. The administrative law judge specifically addressed the Board's instructions regarding the suitability of the security guard's position, considered the testimony of claimant and made findings of fact consistent with the Board's remand order.

The Board's standard of review requires that the administrative law judge's decision must be affirmed if there is a reasonable basis in the evidence for the conclusions and it is consistent with applicable law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Moreover, the Board in exercising its review authority is not free to disregard the findings of an administrative law judge simply because other inferences with respect to the evidence could be drawn. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). Thus, while the administrative law judge's opinion is brief and not a model of clarity, I believe that the decision adequately complied with the Board's remand order and as his ultimate decision that suitable alternate employment had been established is supported by substantial evidence of record, I would affirm the decision.

NANCY S. DOLDER
Administrative Appeals Judge