BRB No. 90-549

WALTER SHAFFER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
AETNA LIFE AND CASUALTY COMPANY	)	DATE ISSUED:
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Dorsey Redland, San Francisco, California, for claimant.

Bill Parrish, San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-142) of Administrative Law Judge Alexander Karst 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).

Claimant sustained a back injury on April 20, 1986, while working as a marine machinist for employer. Employer voluntarily paid claimant temporary total disability compensation from May 17, 1986 to July 31, 1987, and temporary partial disability compensation from August 1, 1987 to April 2, 1988. 33 U.S.C. §908(b), (e). Claimant has not returned to work for employer since the April 1986 injury, and employer concedes that claimant is unable to perform his previous job.

In his Decision and Order, the administrative law judge accepted the parties' stipulations that claimant's work-related injury precludes performance of his former employment and that claimant reached maximum medical improvement on May 6, 1986. The administrative law judge thereafter determined that employer established the availability of suitable alternate employment. Claimant was thus awarded temporary total disability compensation, pursuant to 33 U.S.C. §908(b), from April 20, 1986 to May 6, 1986, and permanent partial disability compensation, pursuant Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), commencing May 7, 1986, and continuing. Lastly, the administrative law judge awarded employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant challenges the administrative law judge's determination that employer established the availability of suitable alternate employment. Claimant argues, in the alternative, that the administrative law judge erred in failing to consider evidence that claimant diligently tried and was unable to secure such employment. Employer responds, urging affirmance.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, it is uncontroverted that claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). Employer must establish realistic, not theoretical, job opportunities; for the job opportunities to be considered realistic, employer must establish their precise nature, terms and availability. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, has noted that a claimant's diligent yet unsuccessful job search may be used to rebut an employer's evidence of the availability

of suitable alternate work. *See Edwards v. Director, OWCP*, 999 F. 2d 1374, 1376 n.2, 27 BRBS 81, 84 n.2. (CRT)(9th Cir. 1993).

In the instant case, the administrative law judge determined that employer established the availability of suitable alternate employment based on the job surveys conducted by Gregory Gusha, a vocational rehabilitation specialist. Specifically, the administrative law judge found that six jobs as a laboratory technician or assistant and three jobs as a small appliance repairman were both within claimant's capabilities and reasonably available to him. Decision and Order at 3. On appeal, claimant contends that the nine jobs relied upon by the administrative law judge to find suitable alternate employment were either beyond claimant's physical capabilities, beyond his vocational experience, or unavailable to him; claimant additionally assigns error to the administrative law judge's failure to explain how these nine jobs are compatible with the medical restrictions imposed upon him by the examining physicians.

In his decision, the administrative law judge found that the aforementioned nine jobs are within claimant's capabilities, and that the average pay for these positions was $300.58 per week. *See* Decision and Order at 3. In making this finding, however, the administrative law judge failed to adequately detail the rationale behind his decision; thus, the administrative law judge's decision violates the Administrative Procedure Act's requirement for a reasoned analysis, making it impossible for the Board to apply its standard of review. *See* 5 U.S.C. §557(c)(3)(A); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Specifically, we note that the administrative law judge failed to explicitly identify the nine jobs he found suitable; we are, accordingly, unable to address claimant's specific contentions with the requisite degree of certainty that the nine jobs cited by claimant are, in fact, the positions considered by the administrative law judge.[1] Next, the

[1]Based on our review of Mr. Gusha's reports and employer's trial brief, it would appear that the administrative law judge found suitable alternate employment established by positions with the following nine employers:

1. Smith-Kline Bio-Science Labs
2. University of California, Berkeley-Zoology Department
3. Northview Pacific Lab
4. University of California, San Francisco
5. Cetus Corporation
6. University of California, Berkeley-Biochemistry Department
7. Pasta Bella
8. Grand Lake Sew'N Vac
9. Phil's Electric (cont.)

We note, however, that at least one of the above-cited jobs, the lab assistant position at the University of California, San Francisco, lacks sufficient information concerning the precise nature, terms and availability of the position to qualify as evidence of suitable alternate employment. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Further, it is not clear which of the

administrative law judge did not specifically compare the physical requirements of the positions listed in Mr. Gusha's job survey with the medical opinions regarding claimant's physical limitations. *See, e.g., Anderson v. Lockheed Shipbuilding and Construction Co.*, ___ BRBS ___, BRB No. 91-1967 (Oct. 27, 1994). Rather, the administrative law judge credited Mr. Gusha, who testified that he took into consideration the physical restrictions set forth by the examining physicians; our review of the physical restriction forms completed by Drs. Albee, Harris and Sampson reveals, however, that these forms, on their face, do not support a finding that each of the nine jobs cited in employer's trial brief is within claimant's physical capabilities. Moreover, the administrative law judge failed to make specific credibility findings with respect to these physicians' opinions regarding claimant's physical limitations; we note that there is medical evidence which, if credited, may render at least some of the jobs included in Mr. Gusha's job survey unsuitable for claimant. We, therefore, vacate the administrative law judge's finding that employer has established the availability of suitable alternate employment and remand this case for the administrative law judge to consider all of the medical and vocational evidence relevant to the issues in this case, make appropriate findings based on the relevant law and evidence, and give a written explanation of the reasons and basis for that determination.

Claimant further assigns error to the administrative law judge's failure to consider evidence that claimant diligently attempted without success to obtain the jobs identified by Mr. Gusha. Claimant raised this issue below and submitted evidence which, if credited, would support his contention that he unsuccessful attempted to secure alternate employment. Accordingly, on remand, should the administrative law judge find that employer has established the availability of suitable alternate employment, he must explicitly

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several positions at the University of California, Berkeley were relied upon by the administrative law judge; on remand, the administrative law judge must specifically determine which, if any, of these jobs are available, are within claimant's physical restrictions, and are compatible with claimant's education and work experience.

consider whether claimant rebutted that showing by demonstrating that he diligently tried but was unable to secure such employment.[2] *See Edwards*, 999 F.2d at 1376 n.2, 27 BRBS at 84 n.2; *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[2]We note that the administrative law judge commenced claimant's permanent partial disability award on May 7, 1986, the day following the date claimant reached maximum medical improvement. An award of permanent partial, rather than total, disability commences on the date employer establishes the availability of suitable alternate employment. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989), *cert. denied*, 111 S.Ct. 798 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), *modifying on recon.* BRB No. 88-1721 (January 29, 1991) (unpublished). Thus, should the administrative law judge on remand award claimant permanent partial disability benefits, the proper commencement date for the benefits is the date employer established the availability of suitable alternate employment.