

JOCELYN CLAY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLASS VI STORES, NIAGARA)	
FALLS AIR FORCE BASE)	DATE ISSUED:
)	
and)	
)	
AIR FORCE INSURANCE)	
FUND)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

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

David W. Covino, Buffalo, New York, for claimant.

Roy H, Leonard (Office of Legal Counsel, MWR and Services Agency), San Antonio, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (92-LHC-0779) 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured her right hand on March 17, 1989, while in the course of her employment

with employer as manager of its liquor store. She stopped working in May 1989 due to her complaints of pain. She was subsequently diagnosed as suffering from carpal tunnel syndrome, for which a surgical release was performed in June 1990. Employer voluntarily paid claimant temporary total disability benefits from June 1, 1989 through February 26, 1991. Claimant was released to return to light duty work on October 5, 1990 by her treating physician Dr. Feinberg, with a restriction against heavy lifting and repetitive use of her right hand.

Thereafter, claimant attempted to return to her former position. After working one day, she was informed by the PX manager that she had too many physical restrictions for her to perform her old job. Claimant has not returned to work and complains of pain in both hands. Further surgical intervention has been recommended by Dr. Bachwitt in April 1991, and Dr. Basak in May 1992. Dr. Feinberg stated on June 17, 1991 that claimant remains disabled for heavy use of her hands, and may require a finger trigger release. As of the date of the hearing, October 30, 1992, claimant has not undergone additional surgery.

Employer's vocational expert, Ann Marie Lennon, conducted labor market surveys in October and December of 1990, wherein several available telephone solicitation positions in the Buffalo geographic area were listed. During this time, claimant relocated to West Virginia after her husband obtained employment in that state. A labor market survey was not conducted for the area in West Virginia where claimant now resides.

In his Decision and Order, the administrative law judge found that since claimant is in need of further surgery, and a successful operation may have an effect on claimant's employability, claimant has not reached maximum medical improvement. The administrative law judge further found that employer conceded that claimant is unable to perform her previous employment and that employer failed to establish the availability of suitable alternate employment. The administrative law judge therefore awarded claimant continuing temporary total disability benefits.

Employer appeals, contending that the administrative law judge failed to discuss and evaluate the vocational evidence contained in the record, in violation of the Administrative Procedure Act, 5 U.S.C. §554 *et seq.* (APA). Claimant responds, urging affirmance of the administrative law judge's award of temporary total disability benefits.

The Act incorporates relevant provisions of the APA, *see* 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 Western Corp.*, 20 BRBS 184 (1988). In the instant case, the administrative law judge concluded, without discussion, that there is no temporary work available to claimant. In rendering this conclusion, the administrative law judge did not discuss the vocational evidence employer submitted into evidence and made no credibility determinations. Accordingly, as the administrative law judge's cursory finding fails to satisfy the requirements under the APA, his award of temporary total disability compensation must be vacated

and the case remanded. On remand, the administrative law judge must reconsider the issue of suitable alternate employment, addressing evidence of suitable alternate employment in the relevant geographic area. *See See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994). The administrative law judge must also provide an explanation for his findings consistent with the requirements of the APA.¹ *See, e.g., Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹We note that employer has requested that, on remand, the instant case be assigned to a different administrative law judge. The Board will reassign a case to a different administrative law judge only in extreme circumstances. *See, e.g., Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989). Herein, employer has not shown that the administrative law judge is prejudiced in any way, nor has it shown that the administrative law judge has abused his discretion. Accordingly, employer's request is denied.