BRB No. 93-1586

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| FLORENTINO SANTIAGO | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| NEW YORK PROTECTIVE COVERING | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| STATE INSURANCE FUND | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Howard Fishkin, New York, New York, for claimant.

Cornelius V. Gallagher (Gallagher & Field), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-1315) of Administrative Law Judge Ralph A. Romano 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). The Board must affirm the administrative law judge's findings of fact and conclusions of law if they 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).

On June 6, 1985, claimant sustained injuries to his left shoulder and lower back when he was struck by a piece of metal and fell during the course of his employment. Claimant has not returned to work since the date of his injury. In his Decision and Order, the administrative law judge found that although claimant cannot return to his usual job with employer, employer established the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from June 7, 1985, through August 15, 1989, and temporary partial disability benefits thereafter based on a post-injury wage-earning capacity of $210

per week.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Employer responds, urging affirmance.

Where, as in the instant case, claimant demonstrates an inability to return to his usual job because of a work-related injury, he is considered totally disabled within the meaning of the Act and the burden shifts to the employer to establish the availability of suitable alternate employment in the claimant's community. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon his age, education, work experience and physical restrictions, and which he could realistically secure if he diligently tried. *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish realistic, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds).

In addressing this issue, the administrative law judge initially set forth the report of Donna Kolsky, employer's vocational consultant, which identified six positions allegedly within claimant's physical and vocational restrictions. EX 7. Of the proposed positions, the administrative law judge eliminated all but one because they required either proficiency in English, which the administrative law judge found claimant lacks, manual dexterity undemonstrated by claimant, or failed to indicate the date upon which they were available in the job market. Based upon his subsequent finding that none of the medical experts of record who address the issue suggests that claimant is altogether incapable of doing any work, the administrative law judge determined that the job of Promotion Work, *i.e.*, handing out circulars on street corners, could be performed by claimant since it involved virtually no physical exertion or vocational proficiency. Based upon the identification of work of this type, the administrative law judge concluded that employer established the availability of suitable alternate employment.

We agree with claimant that the administrative law judge's finding that employer established the availability of suitable alternate employment cannot be affirmed, as his finding regarding claimant's ability to work is not consistent with the record. Dr. Stiller opined that claimant was totally disabled from performing his employment duties as of September 4, 1991, CX 9, Dr. Zuckermann found claimant disabled as of November 6, 1991, CX 3; and Dr. Weiner determined that claimant was totally disabled as of November 7, 1991, CX 2. Similarly, Dr. Post's testimony that claimant is capable of sedentary light-duty work on a part-time basis does not support a conclusion that claimant is capable of standing outdoors for six hours a day. Only Dr. Hochberg, in contrast, stated that claimant was able to perform the job of promotional work. EX 17 at 11-12.

In determining whether an employment position constitutes suitable alternate employment which claimant is capable of performing, the administrative law judge must compare the jobs' requirements with the claimant's physical restrictions. *See generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). As the administrative law judge's finding that employer established the availability of suitable alternate employment is premised upon an erroneous evaluation of the medical evidence of record, regarding claimant's ability to work, that finding cannot stand. We therefore vacate the administrative law judge's finding that employer established the availability of

suitable alternate employment, and we remand the case to the administrative law judge for reconsideration of the evidence of record regarding this issue.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge