BRB No. 02-0526

PHILIP PARENT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: APR 24, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Wayne G. Zeringue, Jr., and Christopher S. Mann (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (99-LHC-2673) of Administrative Law Judge Clement J. Kennington 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 second time that this case has come before the Board. Claimant, a hydraulic operator, injured his back at work on June 13, 1997. Employer voluntarily paid

claimant temporary total disability benefits from June 14, 1997, to August 24, 1997, and February 3, 1998, to August 30, 1998, when he was off work due to his back injury. Claimant worked in a modified job at employer=s facility from August 25, 1997, to February 2, 1998, August 31, 1998, to October 6, 1998, and December 28, 1998, to June 8, 1999. Claimant did not return to work after June 8, 1999. Claimant sought temporary total disability benefits from October 7, 1998, to December 27, 1998, and from June 9, 1999, and continuing.

In the initial Decision and Order, the administrative law judge denied the benefits sought by claimant, finding that employer established the availability of suitable alternate employment by providing claimant with a job within his restrictions at its facility in 1997. Claimant appealed this decision to the Board.

On appeal, the Board initially determined that the administrative law judge acted within his discretion in rejecting claimant=s testimony that his modified job was not within his restrictions. The Board vacated, however, the administrative law judge=s finding that the job in employer=s facility constitutes suitable alternate employment and remanded the case for the administrative law judge to address and resolve the inconsistencies presented by the statements of Dr. Butler, Messrs. McCann and Doucet, Ms. Favaloro, and Ms. Knight. Specifically, the Board instructed the administrative law judge on remand to determine what claimant=s present physical restrictions are and what the duties of his modified work actually entail, and to compare the credited duties of the position with the credited medical restrictions. *Parent v. Avondale Industries, Inc.,* BRB No. 00-1198 (Sept. 19, 2001)(unpub.).

On remand, the administrative law judge addressed the evidence of record as instructed by the Board and determined that the modified hydraulic operator job in employer=s facility constitutes suitable alternate employment that is within claimant=s physical restrictions, that this position was available on August 31, 1998, and that therefore claimant was not entitled to compensation disability from October 7, 1998, to December 27, 1998, or from June 9, 1999, and continuing. The administrative law judge further found that employer did not establish the availability of suitable alternate employment on the open labor market. Accordingly, the administrative law judge denied claimant=s claim for benefits under the Act.

On appeal, claimant challenges the administrative law judge=s denial of disability benefits. Employer responds in support of the administrative law judge=s decision.

Claimant initially argues that he is limited to performing sedentary work and that the
administrative law judge=s interpretation of what constitutes sedentary work exceeds the definition provided by Taber=s Cyclopedic Medical Dictionary, the Dictionary of Occupational Titles, and the restrictions imposed upon claimant by Dr. Butler, claimant=s treating physician. In remanding this case, the Board instructed the administrative law judge to discuss and weigh the totality of Dr. Butler=s testimony; specifically, although he previously approved the written description of the modified job as within the June 30, 1998, Functional Capacity Evaluation (FCE) restrictions placed on claimant, Dr. Butler=s subsequent testimony indicated that the modified job offered to claimant by employer would not be within claimant=s restrictions. *See Parent,* slip op. at 3-4; EX 14 at 31-32, 38, 63.

Dr. Butler initially recommended that claimant undergo an FCE, which he thought would be an accurate way of assessing claimant=s physical abilities, and he explained to claimant that the FCE provided an objective outline of claimant=s physical limitations. EX 4 at 13, 14; EX 14 at 17-18. The June 30, 1998, FCE which was thereafter performed restricted claimant to sedentary work with occasional lifting and carrying in the 10 to 18 pound range; this evaluation further found that claimant was able to tolerate sitting, standing, walking, and reaching on a frequent basis, and squatting, kneeling, and climbing stairs on an occasional basis, while repetitive bending and crawling would not be tolerable. *See* EX 6; Decision and Order on Remand at 2. Thereafter, Dr. Butler deposed that he placed no specific restrictions on claimant upon his return to work other than those outlined in the June 30, 1998, FCE of claimant. He testified that the FCE was considered to be a valid test and that claimant=s activity level should be exactly as outlined in the FCE. *See* Tr. at 45-46; EX 4 at 13; EX 14 at 42-43. However, Dr. Butler then opined that claimant should be restricted from lifting or carrying heavy objects, bending into unusual positions, or being in cramped positions, and he thought that claimant should alternate sitting and standing. EX 4 at 18. Dr. Butler stated that working in confined spaces might be considered sedentary work, but depending on body position might be painful or uncomfortable, and that while a brief amount of discomfort might be acceptable, he would want to limit any activity which causes claimant a significantly increase in his pain. EX 14 at 31, 37-38, 62-63.

After taking into consideration all of the aforementioned evidence and

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[1]Dr. Butler deposed that claimant can sit 34-66 percent of the day and stand for the same amount of time. EX 14 at 47.

[2]Dr. Butler, on December 22, 1998, signed a statement following the written description of claimant=s modified job that, AI am in agreement that [claimant] is capable of performing these job tasks.@ *See* EX 15.

testimony, the administrative law judge concluded that the restrictions stated in the FCE, which Dr. Butler
specifically approved, provided the most credible and objective evidence of claimant=s limitations; thus, the administrative law judge determined that claimant is limited to sedentary work involving occasional lifting and carrying of 10-18 pounds; frequent sitting, standing and walking and reaching; occasional kneeling and stair climbing; and non-repetitive bending and crawling. EX 6. Additionally, the administrative law judge credited Dr. Butler=s restriction on ladder climbing, but he rejected his restrictions that claimant alternate sitting and standing, and that he avoid working in cramped or unusual positions and avoid using a bucket as a seat, because such restrictions were not supported by the FCE or even claimant=s complaints or testimony, but seemed to be based on surmise. Decision and Order on Remand at 3.

We affirm the administrative law judge=s findings regarding this evidence and testimony, and his consequent determination of claimant=s present physical restrictions. An administrative law judge may accept any part of a medical expert=s testimony or reject it completely. *See Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Thompson v. Northeast Enviro Services, Inc.,* 26 BRBS 53 (1992); *see also Pa. Tidewater Dock Co. v. Director, OWCP,* 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2002). In the instant case, Dr. Butler reiterated on multiple occasions his agreement with the restrictions set forth in claimant=s June 30, 1998, FCE. EX 4 at 13; EX 14 at 15-18, 42-43, 44-47. Moreover, when questioned about the additional restrictions he imposed on claimant which were not contained in the June 30, 1998, FCE, Dr. Butler deposed that if a work-related activity caused him pain, claimant should avoid it, regardless of its classification as sedentary work, but he did not repudiate the restrictions set forth in the FCE. *See* CX 2 at 31, 38, 43, 60. Therefore, as it was rational for the administrative law judge to rely on the June 30, 1998, FCE, and on Dr. Butler=s opinion to the extent that he agreed with the FCE, we affirm his finding that the June 30, 1998, FCE provides the most reliable evidence of claimant=s current physical restrictions.

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[3]The administrative law judge appears to make a distinction between frequent sitting and standing as permitted by the FCE, and alternate sitting and standing as imposed by Dr. Butler.

[4]Dr. Butler conceded that claimant did not report a problem with his sitting on a five-gallon bucket to him. EX 14 at 50.

[5]As the FCE defines claimant=s sedentary restrictions in terms of his specific physical capabilities, claimant=s argument regarding dictionary definitions is rejected.

Next, in complying with the Board=s instructions on remand, the administrative law judge discussed the testimony of Messrs. McCann and Doucet in order to determine the job duties required by claimant=s modified position. Mr. McCann, claimant=s supervisor, described claimant=s modified job as supervisory in nature, with no lifting, crawling, climbing, or crouching involved, but requiring claimant to maneuver a 60-step gangway in order to arrive at his work station. *See* Tr. at 316-319, 323, 327-329. Mr. McCann further testified that he informed claimant that his modified position was to supervise the job, that he never assigned claimant work outside of his restrictions, and that he would have accommodated claimant if he had informed him that he could not do a job. Tr. at 316, 325-326, 330. In contrast, Mr. Doucet, claimant=s co-worker, indicated that a typical work day for claimant would include activities such as getting into awkward positions, kneeling, bending over, occasionally crawling, working in confined spaces at times, and sitting on a five-gallon bucket. Tr. at 300-304. Mr. Doucet testified, however, that he was a second-class hydraulic operator, while claimant was a first-class operator, and as such, A[he] worked under [claimant]. Whatever he wanted me to do I=m supposed to do . . . carry whatever had to be carried or do whatever he directed me to do.@ Tr. at 274-275. Thus, while Mr. Doucet testified to what his job as a second-class hydraulic operator involved, he stated that he assumed or guessed that claimant had to perform some of the same activities. Tr. at 300-304. Moreover, he testified that claimant sometimes told him that he performed certain tasks which he knew he was not supposed to perform.

The administrative law judge credited Mr. McCann=s testimony that claimant=s duties were primarily mental with significant physical exertion left to other mechanics, and stated that he did not credit Mr. Doucet=s Aassumed@ or Aguessed@ testimony to the contrary. *See* Decision and Order on Remand at 3. After rendering this finding, the administrative law judge additionally stated that, even if he accepted Mr. Doucet=s description of claimant=s work as constituting part of claimant=s official duties, those duties were still within claimant=s functional capabilities. *Id.* at 3-4. We hold that it was within the administrative law judge=s discretion to credit the testimony of Mr. McCann, that claimant=s job was to supervise and not to engage in labor intensive activities and that he told claimant to work within his restrictions, over the Mr. Doucet=s testimony regarding this issue.

Additionally, the Board directed the administrative law judge to discuss Ms. Favaloro=s letter to claimant, dated November 23, 1998, in which she stated that, AI am still working with Avondale to determine if your previous position can be modified

within the work restrictions outlined in the [FCE].@ CX 8 at 9. Claimant alleges that the language contained in this letter supports his position that as of November 23, 1998, employer had not offered him a position which was suitable. Specifically, claimant, who had been working in the modified position since August 31, 1998, questioned whether that position was within the physical restrictions set forth in his June 30, 1998, FCE. In response to claimant=s inquiry, Ms. Debbie Hebert, a worker=s compensation adjuster, contacted Ms. Favaloro to clarify the physical demands of the modified job which claimant was performing; this communication resulted in Ms. Favaloro=s November 23, 1990, letter, which she testified she wrote because she had not yet finished talking with employer about the modified hydraulic position. The administrative law judge rationally inferred from Ms. Favaloro=s deposition testimony that when she wrote the letter at issue, it was not because she had doubts about the suitability of the position itself, but that she simply did not have enough information at that time to issue the job description sought by Ms. Hebert.

Finally, the Board directed the administrative law judge to discuss and weigh the hearing testimony of the Department of Labor=s vocational expert, Ms. Knight. Ms. Knight testified that claimant=s job description as written was within the framework of the FCE but exceeded Dr. Butler=s restrictions. Tr. at 59, 61, 65-68. The administrative law judge declined to credit Ms. Knight=s opinion in this regard, based upon a finding that she relied on inaccurate information from claimant. As previously discussed, the administrative law judge found that claimant voluntarily performed certain tasks beyond his physical limitations without the knowledge or permission of his supervisor and, in fact, in contravention of Mr. McCann=s instructions. Thus, it was within the administrative law judge=s discretion to discredit Ms. Knight=s opinion that the position employer offered claimant required him to work beyond his restrictions. Thereafter, based upon his evaluation of the testimony of Messrs. McCann and Doucet, as well as that of Ms. Favaloro and Ms. Knight, the administrative law judge concluded that claimant=s modified first-class hydraulic operator position required lifting of no more than 5 pounds, occasional stair and ramp climbing, operating equipment while either standing or sitting on a five-gallon bucket, carrying and using wrenches to tighten various components, walking on ships, directing helpers or other mechanics to do physical tasks such as pulling on wrenches and recording data while testing various pieces of equipment.

As the trier-of-fact, the administrative law judge is entitled to weigh the evidence, and determine the credibility of witnesses, and his findings must be accepted if rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991);

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[6]Ms. Favaloro thereafter prepared the December 14, 1998, job description which was approved by Dr. Butler. *See* fn. 4, *supra*.

Calbeck v. Strachan Shipping Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In determining the duties required by claimant=s modified position with employer, the administrative law judge in the case at bar fully considered and discussed all of the evidence as instructed by the Board, articulated the rationale for his credibility determination and thereafter concluded that claimant was capable of performing the modified position of first-class hydraulic operator offered to him in August 1998, as that position did not involve work which exceeded the credited functional limitations imposed by the FCE. We therefore affirm the administrative law judge=s finding regarding this issue as it is rational and is supported by substantial evidence. *See Mendoza*, 46 F.3d 498, 29 BRBS 79(CRT).

Lastly, claimant contends, in the alternative, that he is entitled to compensation benefits from October 7, 1998, through December 27, 1998, when he was off work. In remanding this case, the Board instructed the administrative law judge that, if he again found the modified job at employer=s facility to be suitable for claimant, he must determine when that position became available. Claimant avers that employer did not offer claimant suitable alternate employment until Ms. Favoloro=s description of the modified position was completed on December 14, 1998. We reject claimant=s assertion in this regard. As discussed above, while Ms. Favoloro=s written description of the modified position, which claimant started on August 25, 1998, was not completed until December 14, 1998, the dispositive date occurred when the modified position became available, rather than when the job description of that position was completed. As Ms. Favoloro explained regarding her November 23, 1998, letter to Ms. Hebert, she merely lacked sufficient information at that time to make a determination as to whether the proffered modified position was in fact suitable for claimant. Moreover, contrary to claimant=s argument that a modified duty position cannot exist without a written description of it, testimony as to what the actual duties entailed is sufficient. As the duties of the modified first-class hydraulic operator position were documented by Ms. Favoloro and approved by Dr. Butler, and as claimant had been performing that position since August 1998, the administrative law judge committed no error in concluding that employer offered claimant suitable alternate work as a modified first-class hydraulic operator in August 1998 and that claimant is therefore not entitled to compensation payments during the period from October 7, 1998 to December 27, 1998.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge