BRB No. 99-1182

BRIAN K. KOERNSCHILD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
W.H. STREIT, INCORPORATED	)	DATE ISSUED: 08/15/2000
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand and the Denial of Claimant's Motion for Reconsideration of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Laurence L. Smith (Neil A. Morris Associates, P.C.), Philadelphia, Pennsylvania, for claimant.

Stephen P. Pazan (Pazan & Shimburg, P.C.), Haddonfield, New Jersey, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Upon Remand and the Denial of Claimant's Motion for Reconsideration (93-LHC-1648) of Administrative Law Judge Ainsworth H. Brown 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 case is before the Board for the second time.[1] Claimant, a crane operator,

sustained a work-related injury on July 10, 1991, when he fell from a crane, landing on his back. Thereafter, claimant underwent a laminectomy and diskectomy at the left L4-5 level. It is undisputed that claimant is unable to return to his pre-injury employment. In his original Decision and Order, the administrative law judge credited the restrictions imposed by claimant's treating physician, Dr. Kirshner, over the conflicting opinion of employer's expert, Dr. Maslow. The administrative law judge, therefore, rejected the report of employer's vocational rehabilitation specialist, Ms. Mocarski, as "not probative" inasmuch as she did not take into account claimant's physical limitations as determined by Dr. Kirshner. Consequently, the administrative law judge found that employer failed to establish suitable alternate employment, and awarded claimant continuing permanent total disability benefits, as well as medical benefits.

Employer appealed to the Board, contending, *inter alia*, that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. With regard to this issue, the Board vacated the administrative law judge's finding that employer failed to establish suitable alternate employment, stating that Ms. Mocarski's report identified four jobs which *may* be within the restrictions imposed by Dr. Kirshner. The Board, therefore, remanded the case for the administrative law judge to determine whether these positions are suitable given claimant's restrictions, and thus constitute suitable alternate employment. *Koernschild v. W.H. Streit, Inc.*, BRB No. 97-888 (March 20, 1998) (unpub.).

On remand, the administrative law judge found that the four positions identified by Ms. Mocarski are within the restrictions imposed by Dr. Kirshner, and thus that employer established suitable alternate employment. The administrative law judge further found that claimant did not diligently seek alternate employment, and that claimant therefore is limited to an award of permanent partial disability benefits. 33 U.S.C. §908(c)(21). Claimant's motion for reconsideration was summarily denied.

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 here, claimant establishes that he is incapable of returning to his usual employment, the burden shifts to employer to prove that claimant is not totally disabled by presenting evidence of a range of jobs that are available in the relevant geographic market for which claimant is physically and educationally qualified. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir.1994); *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988); *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). In his initial decision, the administrative law judge credited the restrictions placed on claimant by Dr. Kirshner. Dr. Kirshner stated that claimant could perform only sedentary work which involved lifting no more than 10 pounds, no repetitive lifting, and where claimant could sit, walk, or stand, up to only one hour at a time, with breaks in between. Emp. Ex. 13 at 52. In a Residual Functional Capacity Questionnaire, dated August 8, 1995, Dr. Kirshner reduced the time he believed claimant could sit, stand, and walk at one time from one hour to one-half hour. Cl. Ex. 9.

On remand, the administrative law judge summarily found suitable the position of surveillance officer in an Atlantic City casino, two security officer positions in Atlantic City casinos, and a position as a Fleet Service Technician at ARI. Decision and Order on Remand at 4. These jobs are classified as sedentary to light duty, according to Ms. Mocarski, who relied on the *Dictionary of Occupational Titles* (DOT) in classifying the jobs in her labor market survey. *See* Emp. Exs. 14, 15. The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, has held that employer may rely on standard occupational descriptions, such as those found in the DOT, to fill out the qualifications of identified positions. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). The DOT, moreover, identifies the general physical requirements of sedentary and light jobs.[2]

In the instant case, the administrative law judge did not specifically analyze the identified jobs in terms of their descriptions in the DOT or in light of Dr. Kirshner's restrictions. We, therefore, must remand this case for further consideration. The administrative law judge should ascertain whether employer introduced sufficient evidence bearing on the jobs' requirements.[3] If so, the administrative law judge must determine if the jobs are suitable given all of Dr. Kirshner's restrictions, *see Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999); 5 U.S.C. §557(c)(3)(A), and thus whether employer has established the availability of a range of jobs claimant can perform.[4] *See Lentz*, 852 F.2d at 129, 21 BRBS at 109(CRT). Consequently, we vacate the administrative law judge's finding that employer established suitable alternate employment, and remand the case to the administrative law judge for further consideration of this issue.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge