BRB No. 10-0394

ALBERT R. LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARMY AND AIR FORCE EXCHANGE SERVICE	)	DATE ISSUED: 01/26/2011
	)	
and	)	
	)	
CONTRACT CLAIM SERVICES	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

John Noble (Noble & Crow, P.A.), Rockville, Maryland, for claimant.

Carlos E. Vergara (Army & Air Force Exchange Service Litigation Division), Dallas, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2006-LHC-02061) of Administrative Law Judge Janice K. Bullard 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. To reiterate, claimant worked for employer in a warehouse performing manual labor for approximately 19 years. Claimant's duties included receiving and storing shipments of numerous items such as beer, cigarettes, videos, top soil, and lawn mowers. His job required heavy lifting as well as the use of a forklift. On April 8, 2005, claimant injured his back at work and was diagnosed with a causally-related back injury for which he underwent surgery.

At the time of the hearing in October 2007, claimant had not returned to any work, and employer had paid claimant benefits for periods of disability and medical treatment. The administrative law judge found that claimant's condition reached maximum medical improvement no later than October 19, 2005, and that he established he was unable to return to his usual work. The administrative law judge also found that six of the jobs employer identified established the availability of suitable alternate employment and that claimant had not diligently sought alternate work.[1] Decision and Order at 18, 20-21, 28. Accordingly, the administrative law judge awarded claimant medical benefits as well as on-going permanent partial disability benefits from April 7, 2006, based on two-thirds of the difference between his pre-injury average weekly wage of $485.24 and his post-injury wage-earning capacity of $346.40. Amended Decision and Order at 2. Claimant appealed the administrative law judge's decision.

On appeal, claimant contended the administrative law judge erred in awarding him partial instead of total disability benefits. The Board agreed that the administrative law judge did not address the effects of claimant's medication usage on his ability to perform the duties of the six jobs found to constitute suitable alternate employment.[2] Accordingly, the Board vacated the administrative law judge's finding that suitable alternate employment was established and remanded the case for her to address the suitability of the six jobs in light of claimant's testimony and any medical evidence

[1]The administrative law judge found the following jobs suitable for claimant: a bank teller, three customer service representative jobs, a telemarketer, and an answering service operator. Decision and Order at 23-28.

[2]Claimant did not challenge the finding that the six jobs are suitable based on their physical requirements. The administrative law judge found that claimant can work at a sedentary level in a position that does not require repetitive bending or stooping, or lifting or carrying more than 10 pounds frequently, and which allows claimant to sit, stand or move as necessary, and does not involve sitting on a bench or stool. Decision and Order at 20; Tr. at 19. As the administrative law judge found that these positions permit claimant to change positions as needed, the Board rejected claimant's argument that the administrative law judge did not account for claimant's pain in addressing the suitability of these jobs. *A.L. [Lewis] v. Army & Air Force Exchange Service*, BRB No. 08-0841 (July 23, 2009); Decision and Order at 22.

pertaining to the effects the medication has on him. *A.L. [Lewis] v. Army & Air Force Exchange Service*, BRB No. 08-0841 (July 23, 2009).

On remand, the administrative law judge obtained from the parties additional briefs addressing their contentions on the issue on which the case was remanded. In her decision, she explained that, in her original decision, she "gave weight to Claimant's 'description of the effects of his medication[,]'" as she acknowledged that claimant "experiences drowsiness and would be unable to operate machinery while taking pain medication." Decision and Order on Remand at 2; Decision and Order at 21. Thus, she stated on remand, this would preclude claimant from returning to his usual job and disqualify him from prospective employment with the same or similar requirements. Decision and Order on Remand at 2. Because the six jobs found to be suitable are sedentary and office-based, the administrative law judge concluded that they do not require claimant to operate machinery "of equivalent complexity or danger." Thus, "none of these jobs pose a conflict with Claimant's use of pain medications." *Id.* As the jobs satisfy claimant's physical restrictions and allow him to change positions as necessary, she found that "[t]he preponderance of the evidence does not support a finding that side-effects from medication would prevent Claimant from performing any kind of work." *Id.* The administrative law judge again concluded that the six jobs are suitable and reinstated her award of partial disability benefits. *Id.* at 2-3. Claimant appeals this decision, and employer responds, urging affirmance.

Claimant again contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment because she did not consider the effect of claimant's medication in determining the suitability of the six jobs. Specifically, claimant argues that the administrative law judge failed to consider her own prior factual findings where she credited claimant's testimony regarding his need to lie down during the day due to drowsiness caused by the medications. We reject claimant's contention of error.

Once, as here, claimant establishes his inability to perform his usual employment, he is totally disabled unless and until his employer satisfies its burden of establishing the availability of suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). For an employer to meet its burden, it must supply evidence sufficient for the administrative law judge to determine that a range of jobs exists and is reasonably available to and suitable for him given his age, education, medical restrictions, and vocational history. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). If the employer establishes the availability of suitable alternate employment, then the claimant is partially, not totally, disabled unless he can show he diligently tried to find work but was unsuccessful. *Tann*, 841 F.2d 540, 21 BRBS 10(CRT).

The administrative law judge found that claimant's medications make him drowsy, such that he is unable to operate machinery in his usual work, Decision and Order at 21, or in alternate work, Decision and Order on Remand at 2. The administrative law judge also stated that she took into account the parties' contentions concerning the effects of the medications on claimant's overall ability to work, *id.;* moreover, in her original decision, the administrative law judge noted that Dr. Ammerman, who prescribed claimant's medication, approved the sedentary jobs as suitable for claimant. As claimant has not raised any reversible error in the administrative law judge's finding that the preponderance of the evidence does not support a finding that claimant's medication usage or side-effects therefrom renders the six sedentary jobs unsuitable, we affirm the administrative law judge's determination that employer established the availability of suitable alternate employment. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Seguro v. Universal Maritime Service Corp.*, 36 BRBS 28 (2002). Thus, the administrative law judge's award of permanent partial disability benefits is affirmed.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge