BRB No. 86-758

RICHARD BERGGREN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAKE UNION DRY DOCK COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of James J. Butler, Administrative Law Judge, United States Department of Labor.

Richard Berggren, Kirkland, Washington, pro se.

Before: BROWN and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant, representing himself,[1] appeals the Decision and Order - Awarding

[1]By Order dated August 26, 1992, the Board acknowledged claimant's appeal, stating that since claimant filed this appeal without the assistance of counsel, the Board would review his case to determine whether the administrative law judge's findings are in accordance with law and supported by substantial evidence. Claimant was granted 30 days in which to file a statement in support of his appeal if he so chose, and employer and the Director were granted 60 days in which to submit response briefs. As no party has filed a brief pursuant to the Board's Order, we now proceed to review this case as provided in our previous Order.

Benefits (84-LHC-2445) of Administrative Law Judge James J. Butler 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). In reviewing this pro se appeal, the Board must affirm the administrative law judge's

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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); 20 C.F.R. §§802.211(e), 802.220.

Claimant sustained a back injury in December 1979 while working as a pipefitter for employer. Following this incident, claimant worked intermittently for employer until December 20, 1980. Claimant sought compensation for continuing temporary total disability pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b), or, in the alternative, for permanent total disability pursuant to Section 8(a), 33 U.S.C. §908(a), if claimant was found to have reached maximum medical improvement.

In his Decision and Order, the administrative law judge found that claimant is incapable of tolerating the hard physical work in a shipyard, that claimant reached maximum medical improvement on January 11, 1980, and that employer established the availability of suitable alternate employment. Claimant was thus awarded permanent partial disability compensation, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), commencing January 12, 1980. The administrative law judge additionally awarded employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Where, as in the instant case, a claimant establishes that he is unable to perform his usual employment, he has established a prima facie case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. See Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Employer must establish realistic, not theoretical, job opportunities; for the job opportunities to be considered realistic, employer must establish their precise nature, terms and availability. See Edwards v. Todd Shipyards Corp., 25 BRBS 49 (1991), appeal pending No. 91-70648 (9th Cir. Oct. 24, 1991); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. See Southern v. Farmers Export Co., 17 BRBS 64 (1985). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. See Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); Davenport v. Daytona Marine and

Boat Works, 16 BRBS 196, 199-200 (1984).

In the instant case, both claimant and employer submitted evidence into the record regarding the availability of specific suitable alternate employment opportunities. See Emp. Exs. 35-38; Deposition of Randy Schwinger. In his decision, however, the administrative law judge failed to set forth the specific jobs upon which he relied in finding that employer had established the availability of suitable alternate employment; rather, the administrative law judge summarily stated that "[t]here is evidence in the record that claimant is now physically capable of performing only jobs which have a starting pay of at least $3.35 per hour." See Decision and Order at 7-8. This failure by the administrative law judge to adequately detail the rationale behind his decision, and to specify the evidence upon which he relied, violates the Administrative Procedure Act's requirement for a reasoned analysis and makes it impossible for the Board to apply its standard of review. See Ballesteros v. Willamette Western Corp., 20 BRBS 184 (1988). We, therefore, vacate the administrative law judge's implicit finding that employer has established the availability of suitable alternate employment and remand this case for the administrative law judge to consider all of the medical and vocational evidence relevant to the issues in this case, make appropriate findings based on the relevant law and evidence, and give a written explanation of the reasons and basis for that determination.

Should the administrative law judge find, on remand, that employer has established the availability of suitable alternate employment, he must additionally reconsider the issue of claimant's post-injury wage-earning capacity. Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award of permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. In calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust the wages of the positions upon which he relied to find suitable alternate employment to the wage levels that those jobs paid at the time of claimant's injury. See Cook v. Seattle Stevedoring Co., 21 BRBS 4 (1988); Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691 (1980). In the instant case, the administrative law judge, without explanation, concluded that claimant has a post-injury wage-earning capacity of $200 per week. We vacate this finding, as it is unsupported by substantial evidence; if on remand the administrative law judge determines that employer has established the availability of suitable alternate employment, he must calculate claimant's permanent partial disability award pursuant to the statutory scheme established in Section 8(c)(21) of the Act. See Cook, 21 BRBS at 4.

Additionally, we vacate the administrative law judge's finding that claimant's condition became permanent on January 11, 1980. A disability is considered permanent as of the date of maximum medical improvement or if the condition has continued for a lengthy
period and appears to be of a lasting or indefinite duration. See Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969). In the instant case, claimant underwent extensive medical treatment, including a disc excision, subsequent to the date of permanency found by the administrative law judge. On remand, the administrative law judge must reconsider all of the medical evidence relevant to the question of when claimant's condition became permanent.

Lastly, we note that if permanent partial disability benefits are awarded on remand, the proper commencement date for those benefits is the date employer established the availability of suitable alternate employment. See Stevens v. Director, OWCP, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), cert. denied, 111 S.Ct. 798 (1991); see also Rinaldi v. General Dynamics Corp., 25 BRBS 128 (1991), vacating on recon. BRB No. 88-1721 (January 29, 1991)(unpublished).

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge