BRB No. 91-0126

JAMES M. DODD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

William S. Sands, Jr. (White, Johnson & Lawrence), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-LHC-1289) of Administrative Law Judge Lawrence E. Gray 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 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).

This is the second time that this case has been appealed to the Board. Claimant sustained an injury to his back on October 12, 1981, when he attempted to lift a manhole cover. Employer voluntarily paid temporary total disability compensation, pursuant to 33 U.S.C. §908(b), until May 23, 1982, at which time claimant failed to report to light duty work at employer's MRA facility. In a Decision and Order dated December 20, 1985, Administrative Law Judge Bradley rejected the parties' stipulation regarding claimant's average weekly wage at the time of his injury, determined that the Section 20(a), 33 U.S.C. §920(a), presumption had been rebutted and concluded, citing Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), that claimant's unreasonable refusal to undergo back surgery had resulted in a break in causation between the injury and whatever disability claimant now experiences; accordingly, the administrative law judge denied claimant's claim for compensation.

Claimant thereafter appealed the administrative law judge's denial of his claim for compensation to the Board. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). The Board determined that the administrative law judge failed to properly apply the Section 20(a) presumption, erred in applying Section 7(d)(4) retroactively to May 1982, erred in his analysis of claimant's failure to undergo surgery and erred in failing to inform the parties that their stipulation regarding claimant's average weekly wage at the time of his injury would not be accepted. The Board therefore remanded the case to the administrative law judge for reconsideration of claimant's claim for compensation. 22 BRBS at 248-250.

In a Decision and Order on Remand issued August 30, 1990, Administrative Law Judge Gray[1] found that employer failed to rebut the Section 20(a) presumption and that claimant's refusal to undergo surgery is neither unreasonable nor unjustified. Next, the administrative law judge determined that claimant had been released to perform light duty employment and that, as employer presented claimant with light duty employment opportunities in its own facility at his pre-injury wage, employer established the availability of suitable alternate employment; thus, after concluding that claimant has sustained no loss in wage-earning capacity, the administrative law judge denied the claim for compensation.

On appeal, claimant contends that the administrative law judge erred in finding that he is not totally disabled. Specifically, claimant contends that the administrative law judge erred in determining that claimant was capable of performing light duty work as of May 23, 1982, and that the administrative law judge erred in finding that employer established the availability of suitable alternate employment in its facility. Lastly, claimant contends that the administrative law judge erred in rejecting the parties' stipulation regarding claimant's pre-injury average weekly wage. Employer responds, urging affirmance.

Where, as in the instant case, claimant has established that he is unable to perform his usual employment duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In order to meet this burden, employer must show the availability of a range of job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Lentz,* 852 F.2d at 129, 21 BRBS at 109 (CRT); *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, No. 90-1491 (D.C. Cir. May 7, 1991). Employer may meet its burden of establishing the availability of suitable alternate employment by showing that such employment is available in its facility. *See Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984).

In the instant case, claimant initially contends that the administrative law judge erred in

[1]Administrative Law Judge Bradley's retirement resulted in the reassignment of this case to Administrative Law Judge Gray.

concluding that claimant was capable of performing light duty work as of May 23, 1982; specifically, claimant alleges that the administrative law judge erred in crediting the testimony of Dr. Markham. In concluding that claimant had been released to perform light duty employment, the administrative law judge set forth only the testimony of Dr. Markham, who opined that claimant, while possibly experiencing significant discomfort, could perform light duty work, with strict restrictions, as of May 23, 1982. *See* transcript at 144-151; CX-3 at 10. In contrast to Dr. Markham's testimony, claimant submitted into the record evidence which, if credited by the administrative law judge, would establish that claimant was incapable of performing light duty work as of May 23, 1982; this evidence was not discussed by the administrative law judge. Specifically, Dr. Hipol, claimant's initial treating physician, advised claimant on May 24, 1982, not to return to work. CX-2. Similarly Dr. Bourgard, in February 1982, recommended rest for claimant and opined that claimant's return to work in May 1982 pursuant to Dr. Markham's recommendation could have resulted in a permanent neurological problem. *See* Bourgard deposition at 36-37. It is well-established that, in rendering a decision, an administrative law judge must independently analyze and discuss the medical evidence, explicitly set forth the reasons as to why he has accepted or rejected such evidence, and adequately detail the rationale behind his decision, *see, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); failure to do so will violate the Administrative Procedure Act's requirement for a reasoned analysis. *See* 5 U.S.C. §557(c)(3)(A); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, we hold that the administrative law judge's failure to set forth, discuss and weigh the conflicting medical opinions of record when addressing claimant's ability to perform light duty work requires that the administrative law judge's finding on that issue be vacated and the case remanded to the administrative law judge for him to consider and discuss all of the medical evidence of record relevant to the issue of claimant's ability to perform light duty work.

Next, claimant contends that the administrative law judge erred in determining that employer had established the availability of suitable alternate employment by offering claimant employment in its MRA facility. The Board has previously recognized that a job in employer's MRA facility may constitute evidence of suitable alternate employment if the job is tailored to claimant's medical restrictions and the tasks performed are necessary to employer's business. *See, e.g., Peele v. Newport News Shipbuilding & Dry Dock*, 20 BRBS 133 (1987); *Darden v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 224 (1986). Thus, should the administrative law judge on remand conclude that claimant is capable of performing light duty work, the administrative law judge must determine whether the positions available in employer's MRA facility are within claimant's physical capabilities and restrictions. *See Peele*, 20 BRBS at 133.

Lastly, claimant contends that the administrative law judge erred in failing to inform the parties that their stipulation regarding claimant's average weekly wage at the time of his injury would not be accepted. We agree. As we stated in our initial decision, the administrative law judge in the first decision in this case erred when he led the parties to believe that their stipulation as to claimant's average weekly wage would be accepted. *See Dodd*, 22 BRBS at 245, 250. Accordingly, on remand, the administrative law judge must allow both parties the opportunity to present

additional evidence in support of their positions regarding this issue.[2]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]We note that, should overtime be included in claimant's pre-injury average weekly wage, a loss of overtime post-injury would be a factor in determining claimant's loss of wage-earning capacity. *See Peele,* 20 BRBS at 133, 137 n.3.