BRB No. 92-0270

ELMER JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Paulette E. Chapman (Koonz, McKenney, Johnson & Regan, P.C.), Washington, D.C., for claimant.

James J. Gallinaro (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (88-DCW-0020) of Administrative Law Judge Charles P. Rippey 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501-502 (1973) (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).

Claimant sustained an injury to his back on August 28, 1979, while in the course of his employment as a bus driver for employer. Employer voluntarily paid claimant compensation for temporary total disability, 33 U.S.C. §908(b), from August 29, 1979, to September 7, 1980, and for various periods of temporary total disability through 1985. At the formal hearing, the parties disputed claimant's entitlement to compensation for temporary total disability from March 1, 1989 to

October 15, 1990, and for permanent total disability from November 27, 1990 and continuing.[1] After the hearing, but prior to issuance of the administrative law judge's Decision and Order, claimant died on June 25, 1991.

In his Decision and Order, the administrative law judge found that claimant was totally disabled, and that his estate was therefore entitled to temporary total and permanent total disability benefits for the requested periods until the date of his death. In rendering this award, the administrative law judge specifically relied upon the medical opinions of Drs. Shuster and Jenkins to find that claimant was unable to perform the job duties of a bus driver.

On appeal, employer challenges the administrative law judge's award of total disability benefits to claimant. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred by crediting the medical opinion of Dr. Jenkins; specifically, employer asserts that the administrative law judge mischaracterized Dr. Jenkins's testimony since, it avers, that physician opined that claimant had no residual back impairment due to the August 28, 1979, work injury. Additionally, employer argues that the administrative law judge erred by failing to address relevant evidence that claimant was not disabled due to a back condition from March 18, 1989 to November 7, 1989.

It is well-established that claimant bears the burden of establishing the nature and extent of his disability. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, claimant must show that he is unable to perform his usual employment due to his work-related injury. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In his decision, the administrative law judge credited the opinions of Drs. Shuster and Jenkins in concluding that claimant was unable to resume his usual employment duties with employer. As causation and disability are separate issues, and Dr. Jenkins opined that claimant was incapable of returning to his usual employment duties as a bus driver, *see* EX-15, we reject employer's allegation of error and hold that the administrative law judge committed no reversible error in relying upon that physician's opinion, regarding claimant's ability to perform his usual employment duties since the administrative law judge may accept or reject any part of any witness' testimony according to his judgment. *See Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154, 157 (1993).

[1]Claimant returned to work between October 15, 1990, and November 27, 1990.

We agree with employer, however, that in awarding compensation for temporary total disability from March 1, 1989, to October 15, 1990, the administrative law judge erred by failing to address evidence which, if credited, could establish that claimant was not disabled due to his work injury from March 18, 1989, to November 8, 1989. Specifically, employer submitted into the record evidence that Dr. Shuster released claimant to return to work as a bus driver on March 17, 1989, and that claimant returned to work from March 23, 1989, until April 24, 1989, when he left work due to stomach pains. *See* EXs 9, 16; CX 10 at 40. Additionally, employer's worker's compensation specialist, Cynthia MacDonald, testified that claimant did not provide any documentation for his work absence from April 25 to November 8, 1989, other than when he reported stomach pains on April 24, 1989.[2] Tr. at 64-65; *see also* EX 9. We hold that the administrative law judge's failure to discuss this evidence violates the Administrative Procedure Act's requirement for a reasoned analysis. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187-188 (1988). We therefore vacate the administrative law judge's award of benefits for temporary total disability from March 17, 1989, through November 7, 1989, and we remand this case for the administrative law judge to address the totality of the evidence regarding the duration of claimant's temporary total disability.

Employer next argues that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment. Specifically, employer argues that the administrative law judge erred by failing to address its May 23, 1991, labor market survey, and by discrediting evidence that claimant could have worked for employer as a subway station manager. Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides, which claimant is capable of performing. *See generally Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish actual, not theoretical, job opportunities. *See, e.g., Lacey v. Raley's Emergency Road Service*, 23 BRBS 42 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991); alternatively, employer may meet its burden by offering claimant another position, *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989).

In the instant case, employer attempted to establish the availability of suitable alternate employment through the testimony of Edwin Quick, a rehabilitation specialist. Mr. Quick conducted a labor market survey which identified numerous positions with employer and in the open labor market which he opined that claimant could physically perform; additionally, Mr. Quick testified he had begun efforts to attempt to place claimant with employer as a subway station manager, a light-duty position for which claimant was qualified. The administrative law judge specifically rejected the subway station manager position as evidence of suitable alternate employment, reasoning that employer had not offered claimant that position; the administrative law judge did not, however, address the labor market survey or Mr. Quick's testimony regarding that survey.

[2]On November 8, 1989, claimant was examined by Dr. Shuster and found unable to work due to low back pain. CX 1; EX 7.

We affirm the administrative law judge's determination that the subway station manager position identified by Mr. Quick was not sufficient to establish the availability of suitable alternate employment. Mr. Quick testified that employer had not posted the position, as there were no current openings at the time of the formal hearing on May 29, 1991. We hold that the administrative law judge rationally held that this position is insufficient to show the availability of suitable alternate employment, as Mr. Quick's testimony does not establish the subway station manager position was realistically available. *See Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 343-344 (1988); *see also Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984), *rev'd on other grounds sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C Cir. 1990). However, as the administrative law judge failed to address the labor market survey submitted into evidence by employer, we vacate the administrative law judge's award of benefits for total disability. On remand the administrative law judge must address employer's labor market survey and Mr. Quick's testimony of available job openings and determine whether employer established the availability of suitable alternate employment.

Accordingly, the administrative law judge's findings regarding the extent of claimant's disability are vacated, and the case is remanded for further proceedings consistent with this opinion. In all other respects, the Decision and Order - Award of Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge