BRB No. 92-1639

JOHN T. BOYD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
SOUTHERN BULK INDUSTRIES	)	
	)	
and	)	
	)	
GEORGIA INSURERS INSOLVENCY POOL	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order - Award of Benefits of Robert J. Shea, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Richard C.E. Jennings (Brennan, Harris & Rominger), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Award of Benefits (90-LHC-1213) of Administrative Law Judge Robert J. Shea 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).

On September 14, 1984, claimant sustained injuries to his back when he slipped and fell down steps during the course of his employment. As a result of the accident, claimant underwent a laminectomy on June 2, 1986. On April 11, 1990, employer commenced voluntary payments of permanent partial disability benefits to claimant.

In his Decision and Order, the administrative law judge found that claimant could not return to his usual employment duties as a longshoreman with employer. Next, the administrative law judge determined that employer established the availability of suitable alternate employment and, had the claimant fully cooperated in the rehabilitation effort, he would be earning $152 per week. The administrative law judge then awarded claimant permanent partial disability compensation from April 11, 1990, based upon the difference between claimant's average weekly wage at the time of his September 1984 injury and his post-injury wage-earning capacity of $152 per week.

On appeal, claimant challenges the administrative law judge's finding that employer established the availability of suitable alternative employment. Claimant further challenges the administrative law judge's calculation of his post-injury wage-earning capacity. Employer responds, urging affirmance.

Where, as in the instant case, it is uncontroverted that claimant cannot return to his usual employment, claimant has established a *prima facie* case of total disability, thus shifting the burden of proof to employer to demonstrate the availability of suitable alternative employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). 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 based upon his age, education, work experience and physical restrictions, and which he could realistically secure if he diligently tried. *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). For the job opportunities to be considered realistically available, employer must establish their precise nature, terms, and availability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In this regard, the Board has held that testimony which identifies only general job categories rather than actual job openings with specific employers does not establish the availability of suitable alternative employment. *See Price v. Dravo Corp.*, 20 BRBS 94 (1987).

In the instant case, the administrative law judge credited the reports of James S. Waddington, employer's vocational rehabilitation specialist, in concluding that employer established the availability of suitable alternate employment. Mr. Waddington, who reviewed claimant's medical reports and interviewed claimant, identified a series of unskilled light duty jobs which he believed were within claimant's physical capabilities and restrictions.[1] Employer's Exhibit 8. Although Mr. Waddington was aware of claimant's restrictions, his reports dated April 9, 1990 and August 16, 1990, do not describe the duties of the jobs he found suitable for claimant. Moreover, those reports,

[1]The positions identified are that of parking lot attendant, information clerk, mail clerk, an attendant in a Jiffy Lube, and a cook in a bar/restaurant. Employer's Exhibit 8.

while identifying available work, are ambiguous as to whether the positions set forth refer to general or specific jobs.[2] Employer's Exhibit 8.

Although the administrative law judge determined that claimant was capable of working as an attendant in a Jiffy Lube-like business or as a mail clerk in a bank or manufacturing plant, he made no findings regarding claimant's physical restrictions and, thus, did not compare claimant's restrictions with the requirements of the jobs identified by Mr. Waddington.[3] We hold that the administrative law judge's failure to both determine claimant's physical restrictions and compare those restrictions to the positions identified by Mr. Waddington requires that we vacate his finding that employer established the availability of suitable alternate employment. An administrative law judge must determine claimant's physical restrictions based on the medical opinions of record and compare those restrictions to the specific requirements of identified jobs. *See Villasevor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, *aff'd on recon.*, 17 BRBS 160 (1985) (Ramsey, C.J., dissenting on other grounds). Thus, in the instant case, since the administrative law judge failed to determine the physical restrictions of claimant, we are unable to apply our standard of review in order to determine whether the administrative law judge's decision to credit Mr. Waddington's reports is supported by the medical evidence of record, since such fact-finding functions reside with the administrative law judge. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). We, therefore, vacate the administrative law judge's finding that employer established the availability of suitable alternate employment, and we remand the case for the administrative law judge to determine claimant's actual physical restrictions, to compare those restrictions with the requirements of the positions identified by employer as constituting suitable alternate employment. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Additionally, on remand, the administrative law judge must determine whether the positions set forth by Mr. Waddington refer to general or specific employment opportunities.

Lastly, we agree with claimant that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity. In the instant case, the administrative law judge used the minimum wage for the positions of a Jiffy Lube-like attendant and a mail clerk, which in 1990 resulted in a weekly wage of $152, to determine claimant's post-injury wage-earning capacity. In order to neutralize the effects of inflation, however, the administrative law judge, when calculating claimant's post-injury wage-earning capacity, 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

[2]In his April 9, 1990 letter, Mr. Waddington wrote "I asked claimant to contact three different employers about work as a mechanics helper. These jobs were in these small establishments such as Jiffy Lube and Quik Tune/Quik Change. The work would have consisted of light work including such tasks as lubricating cars, changing oil and oil filters in cars, and replacing spark plugs. Again, because of his past experience the claimant indicated he would have no difficulty doing such work. While the job of mechanic's helper is listed in the DOT [Dictionary of Occupational Titles] as medium work, as it existed with these employers the work was light." Employer's Exhibit 8.

[3]We note that the record contains job limitations imposed by Dr. Deriso, claimant's treating physician, and that claimant suffers from heart problems. *See* Depositions dated April 5, 1988, May 1, 1990, December 12, 1990; Transcript at 30, 38, 39.

claimant's injury. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). Thus, we vacate the administrative law judge's finding regarding claimant's post-injury wage-earning capacity; 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, 33 U.S.C. §908(c)(21). *See Cook*, 21 BRBS at 4.

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. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge