BRB No. 03-0683

ROBERT CAPOFARRI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL, INCORPORATED	)	DATE ISSUED: July 13, 2004
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-2227) of Administrative Law Judge Ralph A. Romano 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).

Claimant, a maintenance mechanic, sustained work-related head and neck injuries on July 9, 2001. Employer voluntarily paid claimant temporary total disability benefits from July 10, 2001 through April 21, 2002. Claimant sought continuing temporary total disability benefits from April 22, 2002.

In his Decision and Order, the administrative law judge found that claimant's condition was still temporary and that claimant established his *prima facie* case of total disability. The administrative law judge credited claimant's credible testimony regarding his pre-injury duties as a maintenance mechanic and relied on the fact that no doctor had opined that claimant is physically capable of performing those duties post-injury. On the issue of whether employer established the availability of suitable alternate employment by offering claimant a position as a TIR writer within its facility at his pre-injury wages, the administrative law judge found that the opinions of Drs. Zhou, Zimmerman, and Klingon that claimant is totally disabled "stand in equipoise" with the opinions of Drs. Benatar and Jeret that claimant can perform the TIR work and the opinion of Dr. Head that claimant can work without restrictions. Decision and Order at 10. The administrative law judge found that he did not consider any one doctor's opinion to be any more or less creditable than any other; he found them all "highly creditable." *Id.*

Nonetheless, the administrative law judge found that employer established that claimant is capable of performing the TIR writer job based on the testimony of Mr. Fallon, the director of maintenance and repairs at employer's facility and supervisor of TIR writers. Mr. Fallon stated that TIR writers do not engage in physically demanding work and can sit during the course of the day. The administrative law judge also credited the testimony of Mr. Davis, the insurance adjuster who offered claimant the TIR writer position on April 16, 2002, through his attorney, that the position would be modified to allow claimant to perform the job. Lastly, the administrative law judge credited the opinion of the vocational rehabilitation specialist, Mr. Lopez, that the TIR writer job is within claimant's capabilities. Decision and Order at 10; EX 0. The administrative law judge rejected claimant's testimony that the job is outside of his physical abilities. Thus, as the TIR writer job paid the same wages as claimant was earning pre-injury, the administrative law judge denied claimant additional disability benefits. The administrative law judge awarded claimant additional medical treatment for his work injuries, pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment. Claimant contends that the administrative law judge's decision is not supported by substantial evidence because he did not identify any medical support for his finding that the TIR writer job is suitable for claimant. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Once, as here claimant establishes that he is unable to return to his pre-injury employment because of his work injury, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience and physical restrictions, is capable of performing and for which he can realistically compete. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

We cannot affirm the administrative law judge's finding that the TIR writer position is suitable for claimant, as the administrative law judge has not made the necessary findings of fact. *See generally Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). In ascertaining the suitability of an alternate job, the administrative law judge must compare the duties of the position with claimant's physical restrictions and vocational abilities. *See Ceres Marine Terminal v. Hinton,* 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). In this case, the administrative law judge did not make a finding regarding any physical restrictions claimant has as a result of his work injuries. *Hernandez*, 32 BRBS at 113. Rather, although he found all the medical evidence "creditable," the administrative law judge refused to credit any particular opinion concerning claimant's ability to work post-injury. Decision and Order at 10. Without this critical information, the administrative law judge's reliance on the testimony of Mr. Fallon and Davis that the job is physically suitable for claimant cannot be affirmed, as the medical foundation for their opinions is lacking. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, although the vocational expert, Mr. Lopez, also stated that the job is within claimant's capabilities, his opinion is based on the restrictions imposed by Dr. Benatar, whose opinion the administrative law judge did not credit. EX 0. Thus, Mr. Lopez's opinion cannot support a finding that the TIR position is suitable. *See generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995).

We must remand this case for the administrative law judge to reweigh the conflicting medical evidence. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994). The administrative law judge discussed the medical evidence at some length, *see* Decision and Order at 3-6, but did not provide any reason for finding it to be in equipoise. He seemingly based his finding in this regard on the fact that three doctors stated claimant is totally disabled and three doctors stated

claimant could work to some degree.[1] *Id.* at 10. On remand, the administrative law judge must evaluate the medical evidence in a more critical manner, in light of such factors as the doctors' qualifications, the extent to which their opinions are reasoned and documented, and their status as treating and/or examining physicians. *See generally Lango v. Director, OWCP*, 104 F.3d 573 (3d Cir. 1997). The administrative law judge then must re-evaluate the suitability of the TIR writer job in light of the medical evidence he credits, as well as in view of the vocational evidence, claimant's testimony concerning his limitations, and any other relevant evidence of record.[2] *See Ceres Marine Terminals*, 243 F.3d 222, 35 BRBS 7(CRT); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). If the administrative law judge finds that the TIR writer job is not suitable for claimant, he should address employer's labor market survey, EX E, in order to determine if employer established the availability of suitable alternate employment on the open market and whether claimant has a loss in wage-earning capacity. *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *see also* 33 U.S.C. §908(e), (h).

[1] Drs. Zhou, Zimmerman, and Klingon opined that claimant is totally disabled. CX 19 at 28-30; CX 28 at 15-16; CX 26 at 28-29. Drs. Benatar and Jeret stated that claimant could perform the TIR job. Tr. at 173; EX N at 23-24. Dr. Head opined that claimant could work without restrictions. EX M at 37. If the administrative law judge had provided a valid reason for finding the evidence to be in equipoise, the administrative law judge would have been required to find that employer, as the proponent, failed to establish that claimant could perform the identified alternate job. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

[2] For example, the administrative law judge should consider the suitability of the identified positions in light of any medications claimant is taking, *see Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992), and employer's surveillance videotape. Contrary to claimant's contention, the administrative law judge acknowledged the testimony of Ms. Piccone and Father Wutulich, *see* Decision and Order at 3 n. 2, and implicitly determined it was not entitled to probative weight.

Accordingly, the administrative law judge's Decision and Order denying additional disability benefits is vacated, and the case remanded to the administrative law judge for proceedings consistent with this opinion. In all other respects the administrative law judge's Decision and Order 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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BETTY JEAN HALL
Administrative Appeals Judge