BRB No. 97-1074

RAMON PENA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THE DEPARTMENT OF ARMY/NAF/ CPO	)	DATE ISSUED:
	)	
and	)	
	)	
ARMY CENTRAL INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Ramon Pena, Hazelton, Pennsylvania, *pro se*.

Keith L. Flicker and Robert N. Dengler (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant, without legal representation, appeals the Decision and Order (96-LHC-2441) of Administrative Law Judge Ralph 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*., as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's Decision and Order under its statutory standard of review. 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 applicable law.

33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

On October 2, 1992, claimant injured his back while performing kitchen utility work for employer at the Thayer Hotel in West Point, New York. Claimant was taken to the Cornwall Hospital where he was initially diagnosed as having a lumbar strain. After a period of physical therapy failed to alleviate his pain, an MRI was performed, which was positive at the L2-3 level. Claimant ultimately underwent a lumbar discectomy on February 3, 1994. Claimant's complaints of pain continued, however, and he was evaluated by a number of physicians including Drs. Klein, Smith, Pelicci, and Sternleib. Employer voluntarily paid claimant temporary total disability compensation from October 3, 1992, until May 9, 1996. Claimant sought additional temporary total disability benefits from May 10, 1996, until September 11, 1996, and permanent total disability benefits thereafter,[1] as well as reimbursement for the unpaid medical bills of Dr. Pelicci.

In his Decision and Order, the administrative law judge denied the disability claim but awarded the requested medical benefits. The administrative law judge found that although claimant had sustained a work-related back injury he had no compensable disability as of May 10, 1996, because he was capable of performing his usual work or, alternatively, suitable alternate work identified by employer which paid wages equal or greater to those he had earned previously. Claimant, appearing without the benefit of counsel, appeals the decision of the administrative law judge. Employer responds, urging affirmance.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must initially establish that he is unable to perform his usual employment due to his work-related injury. If claimant succeeds in

[1]We note that the administrative law judge properly rejected claimant's assertion that he was entitled to permanent total disability benefits as of February 3, 1994, in view of the parties' stipulation that maximum medical improvement was reached on September 11, 1996. Tr. at 6, 50.

establishing his *prima facie* case, the burden shifts to employer to demonstrate the availability of realistic alternate job opportunities which claimant can perform, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991).

In determining that claimant failed to establish his *prima facie* case of total disability, the administrative law judge initially discredited claimant's testimony regarding his subjective complaints and functional restrictions in light of surveillance evidence introduced by employer and his determination that claimant had been evasive and less than forthcoming on cross-examination. Decision and Order at 6. The administrative law judge then determined that because he placed no probative value on claimant's assertions regarding the extent of his pain and functional restrictions, he also could not credit Dr. Pelicci's opinion that claimant is not capable of performing any work because these conclusions were based at least in part upon claimant's expression of pain and functional restrictions. *Id.* at 7. Thereafter, he stated that he relied upon the opinions of Drs. Sternleib, Smith, Klein, and Silver, EXS A-F, because their opinions that claimant is capable of some work are not "so much based upon Claimant's complaints of pain and functional restriction, but rather upon the objective clinical data in the record." Decision and Order at 6. Finally, the administrative law judge found that because the only competent evidence of record addressing claimant's former job duties was claimant's testimony that he "did everything that was related to cleaning, the dishwasher, I took out the garbage, cleaning of refrigerators, and that was it," Tr. at 13, 14, and this testimony was too vague to permit any finding on whether claimant is able to do this work, claimant failed to establish the level of physical exertion necessary to perform his prior work and accordingly failed to prove his inability to do that job as a matter of law.

The administrative law judge's decision to discredit claimant's assertions regarding his subjective complaints and his functional restrictions in light of employer's surveillance evidence and claimant's evasiveness on cross-examination is affirmed as it is a rational credibility determination within his discretionary authority. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Nonetheless, we are unable to affirm his ultimate finding that claimant failed to establish his *prima facie* case because he made several factual and legal errors in reaching this conclusion. Initially, we note that the administrative law judge discredited Dr. Pellici's testimony based on the fact that his conclusions were premised in part upon claimant's expression of pain and functional restrictions, but credited Drs. Silver, Smith, and Klein, whose opinions also relied on claimant's account. Moreover, the administrative law judge also erred in finding that Dr. Pelicci's opinion was not probative of claimant's work capacity on the basis that there was no evidence that he knew the exertional level necessary for claimant to perform his previous job. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990). Inasmuch, however, as Dr. Pelicci believed that claimant could not perform any work, his lack of knowledge of the specific requirements of claimant's former job duties is irrelevant.

In finding that claimant failed to establish his *prima facie* case, the administrative law judge also stated that he relied on the medical opinions of Drs. Sternlieb, Smith, Klein, and Silver that claimant is capable of some work, because they placed less emphasis on claimant's complaints than did Dr. Pelicci. The fact that claimant may be capable of some work, however, is not determinative of whether he established his *prima facie* case; the relevant inquiry in making that determination is whether claimant is unable to perform his usual work duties because of his injury. *See Diosdado v. Newpark Shipbuilding & Repair, In*c., 31 BRBS 70 (1997). Dr. Sternlieb's opinion that claimant exhibited no objective findings sufficient to support his subjective complaints could, if properly credited, provide substantial evidence to support the administrative law judge's finding that claimant is capable of performing his usual work. EXS-A, B. We are unable, however, to affirm his finding that claimant failed to establish his *prima facie* case based on this testimony because the administrative law judge also inconsistently credited Dr Smith's November 1995 functional capacity assessment, EX-M, which states that claimant is limited to sedentary work with no bending, squatting, climbing, kneeling, or twisting, is only able to lift from 0 to 10 pounds, and to sit, walk, and stand intermittently. In so concluding, he noted that Dr. Smith's conclusions in this regard were consonant with those of Drs. Silver and Klein, EXS-E, F.[2] *See* Decision and

[2]The September 7, 1993, medical report of Dr. Silver, rendered prior to claimant's back surgery, does not appear to bear any relevancy to the issue of claimant's disability as of May 10, 1996. EX-F. Of the remaining physicians whom the administrative law judge credited, Dr. Klein opined in a report dated October 26,

Order at 8.

In addition, in finding that claimant failed to establish his *prima facie* case the administrative law judge did not consider all of the relevant evidence. Contrary to the administrative law judge's determination claimant's testimony was not the only evidence of record which addressed claimant's former job duties, employer's vocational expert, Ms. Choudhri, also provided relevant testimony. In a report dated November 11, 1996, Ms. Choudhri stated that claimant's former job of utility worker would be defined by the Dictionary of Occupational Titles as requiring any combination of the following duties to maintain the kitchen work area and restaurant equipment and utensils in clean and orderly condition: sweeps and mops floors, washes pots and pans, polishes silver, transfers supplies and equipment, and may load and unload trucks. EX-J at 3. Moreover, she stated that because claimant's

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1994, that claimant had a moderate partial disability due to his 1992 work injury and that he could return to work with restrictions limiting his bending and lifting provided that he can sit or stand at his own volition. EX-E. In a report dated June 7, 1995, Dr. Smith opined that claimant has a moderate causally related disability and that he was able to work light duty with no heavy lifting. EX-C. Thereafter, after reviewing employer's April 29, 1995 surveillance video, Dr. Smith appears to retreat somewhat from his earlier opinion, stating that based on the activities observed on the tape, it did not appear that there was any restrictions on claimant's range of motion or on lifting. EX-D. Subsequently, however, in the November 1995 functional capacity evaluation which the administrative law judge relied upon in determining that employer had established suitable alternate employment, Dr. Smith opined that claimant is limited to sedentary work within the restrictions discussed previously. EX-M.

former job is classified as medium unskilled work requiring 50 pounds lifting, standing, walking, bending, and carrying, claimant was not capable of performing this job due to his physical limitations. *Id.* Ms. Choudhri's testimony in conjunction with the administrative law judge's crediting of Dr. Smith's functional capacity evaluation limiting claimant to sedentary work could establish that claimant is unable to perform his former job duties. Inasmuch as the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A)(APA), requires that the administrative law judge consider, analyze, and discuss all of the relevant evidence in resolving the issues before him, we vacate his finding that claimant failed to establish his *prima facie* case of total disability based on his failure to consider Ms. Choudhri's testimony as well as for the reasons discussed previously. The case is remanded for the administrative law judge to reconsider whether claimant established a *prima facie* of total disability in light of all of the relevant evidence consistent with the requirements of the APA and the applicable legal standards.

We are also unable to affirm the administrative law judge's denial of benefits based on his alternate finding that even if claimant had established a *prima facie* case of total disability, he was not entitled to the compensation claimed because employer established the availability of suitable alternate employment paying equal or greater wages than he had earned previously. The administrative law judge found that employer met its burden of establishing the availability of suitable alternate employment as of November 1996 through the vocational testimony of Ms. Choudhri, an employee of Genex, Incorporated. After reviewing an interview conducted by a rehabilitation nurse with Genex,[3] and various medical records, Ms. Choudhri performed two labor market surveys based on the November 1995 functional capacity evaluation of Dr. Smith, EX-M, and identified a number of available job opportunities which she considered suitable for claimant. EXS- I, J. Although the administrative law judge rationally found that the jobs Ms. Choudhri identified were consistent with the sedentary work restrictions imposed by Dr. Smith,[4] in order to meet its burden of establishing the availability of suitable alternate employment, employer must additionally establish that the alternate work identified is

[3]The report from this interview is not a part of the record.

[4]Ms. Choudhri determined that claimant was able to perform work as a lens inserter, implant polisher, assembler, label cutter, and embossing machine operator and was able to identify specific available job opportunities within those categories. EXS- I, J. As Ms. Choudhri conducted her labor market surveys both in the Bronx, New York, where claimant resided immediately after his 1992 work injury, and in Hazleton, Pennsylvania where claimant relocated as of 1996, the alternate jobs identified were clearly located within the appropriate relevant labor market(s). *See generally Wood v. U. S. Dept. of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *Wilson v. Crowley Maritime*, 30 BRBS 199, 203-204 (1996).

consistent with claimant's age, education, and work experience, and that he would have a realistic opportunity to secure such work if he diligently tried. *See generally Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). In this regard, claimant argued below that the jobs which Ms. Choudhri identified were not sufficient to meet employer's suitable alternate employment burden because he speaks little English and requires an interpreter, and Ms. Choudhri did not take his language problem into account in conducting her labor market surveys. The administrative law judge rejected this argument summarily in his Decision and Order, stating:

> Relative to claimant's position that these jobs do not indicate accommodation for a Spanish-speaking individual, I note that there is no evidence that Claimant enjoyed such an accommodation in his previous job. Further, as I do not find claimant credible as to pain complaints and assertions of physical restrictions *supra*, I do not credit the implicit assertion (by way of the use of interpreters at deposition and trial) of minimal, if any, English-speaking and understanding capacity.

Decision and Order at 9, n 5.

The administrative law judge's determination that claimant had no real need for any type of accommodation based on his inability to speak English on this basis cannot be affirmed because in reaching this conclusion he failed to consider relevant testimony. The record is replete with unsolicited opinions from numerous medical practitioners and adjunct personnel, which the administrative law judge neglected to consider, which suggest that claimant's command of the English language was minimal. *See, e.g.,* CX-1 at 25; CXS- 2,6,9, 10. Moreover, we note that Ms. Choudhri's November 11, 1996, report, EX-J, also states that employer's counsel had requested that a revised transferable skills analysis be performed keeping in mind claimant's limited English language skills, and that thereafter in this same report she states that claimant's job experience would lend itself to unskilled situations with an average requirement for verbal and mathematical skills. Inasmuch as the administrative law judge did not address this testimony, we vacate his finding that the jobs identified by Ms. Choudhri constitute suitable alternate employment, and remand for him to reconsider this issue in light of the evidence consistent with the requirements of the APA.

Even if the administrative law judge properly found that employer met its burden of establishing the availability of suitable alternate employment, his finding that claimant had no compensable disability as of May 10, 1996, was in error because his analysis of the extent of claimant's disability was incomplete. Although

a claimant may rebut employer's showing of suitable alternate employment and thus retain entitlement to total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment, the administrative law judge did not consider this issue. *See generally Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT)*; Roger's Terminal and Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). Accordingly, if the administrative law judge ultimately concludes on remand that employer met its burden of establishing the availability of suitable alternate employment, in evaluating the extent of claimant's disability he must consider whether claimant demonstrated due diligence in attempting to secure alternate work.

In addition, the administrative law judge erred in concluding that even if claimant established his *prima facie* case, claimant had no compensable disability as of May 10, 1996, because Ms. Choudhri did not identify any alternate work available prior to November 11, 1996. If claimant established his *prima facie* case, he would be entitled to total disability benefits from May 10, 1996 until November 11, 1996, because a claimant's entitlement to total disability benefits continues until the date when suitable alternate employment is first found to be available to claimant. *See, e.g., Palombo,* 937 F.2d at 70, 25 BRBS at 1 (CRT).

Finally, we hold that the administrative law judge also erred in finding that even if claimant established his *prima facie* case he was not disabled as of May 10, 1996, because Ms. Choudhri identified suitable job opportunities paying wages equal or greater than those he had earned previously. In making this determination, he failed to adjust the wages paid in those jobs to those paid at the time of claimant's injury. *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), *aff'd in part and vacated in part on recon. en banc*, 28 BRBS 271 (1994) (Brown and McGranery, JJ., concurring), *aff'd in pert. part and rev'd on other grounds sub nom. Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, ___ U.S.___, 117 S.Ct. 1333 (1997). In attempting to determine whether claimant sustained a loss in his wage-earning capacity, the administrative law judge should have taken the wages paid in the alternate jobs at the time of claimant's injury and then compared them with claimant's average weekly wage to account for inflationary effects. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Although Ms. Choudhri only provided testimony regarding wages paid by the alternate jobs in 1996, the percentage increase in the National Average Weekly Wage, *see* 33 U.S.C. §906(b)(1)-(3), may be used to adjust the wages paid in the alternate jobs downward if the actual wages paid at the time of injury in those jobs is unknown. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Accordingly, we must also vacate the administrative law judge's denial of claimant's disability claim on this basis. If, on remand, the administrative

law judge concludes that employer met its burden of establishing the availability of suitable alternate employment, he should compare claimant's average weekly wage with the wages paid in the alternate job at the time of claimant's injury to determine whether claimant established a loss in his wage-earning capacity. *See generally Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (1996).

Accordingly, the administrative law judge's denial of claimant's claim for disability compensation is vacated and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge