BRB No. 98-0300

WILLIE L. DAVIS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
SEACO	)	
	)	
and	)	
	)	
SIGNAL ADMINISTRATION INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order - Reconsideration of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Eugene C. Brooks, IV, Savannah, Georgia, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order - Reconsideration (92-LHC-2585) of Administrative Law Judge Edward J. Murty, Jr., 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 case is before the Board for the second time. To briefly recapitulate the facts,

claimant sustained an injury to his cervical spine on August 15, 1990, while operating a forklift for employer. Following his recovery from a cervical discectomy performed on October 29, 1990 and participation in a work hardening program, claimant attempted to return to work on three occasions in June and July 1991, but testified that he was unable to perform his assigned duties which required heavy exertion. Thereafter, claimant was granted disability retirement through his union on August 13, 1991. Employer voluntarily paid temporary total disability compensation to claimant from August 29, 1990 through July 1, 1991, and from July 19, 1991 through February 6, 1992, at the rate of $561.42 per week and permanent partial disability compensation from February 7, 1992 through July 29, 1993, at the rate of $283.07 per week. *See* 33 U.S.C. §908(b), (c)(21). Claimant sought permanent total disability compensation under the Act, as well as penalties and interest on past due compensation.

In his Decision and Order issued January 31, 1995, the administrative law judge denied the claim for permanent disability benefits, finding that claimant was capable of performing his usual work as of the time he reached maximum medical improvement on June 28, 1991, and that he had been voluntarily paid the benefits due from the date of his injury until that date consistent with the district director's determination that claimant had an average weekly wage of $991.63 and a loss of wage-earning capacity of $824.14.

Claimant thereafter appealed the administrative law judge's Decision and Order to the Board. On October 19, 1996, the Board issued a Decision and Order vacating the administrative law judge's denial of permanent disability benefits as well as his average weekly wage determination, and remanding the case to the administrative law judge for further consideration. *Davis v. SEACO,* BRB No. 96-0205 (Oct. 17, 1996) (unpublished). The Board held that the administrative law judge's denial of permanent disability compensation could not be affirmed because the administrative law judge neglected to fully consider all of the relevant evidence consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Specifically, the Board noted the administrative law judge's failure to address specific evidence relevant to several arguments made by claimant below concerning claimant's ability to perform his usual longshore work post-injury.

On remand, in a Decision and Order issued May 14, 1997, the administrative law judge again found claimant capable of returning to his usual employment, and, accordingly, denied the claim for permanent disability.[1] Thereafter, the administrative law judge summarily denied claimant's motion for reconsideration.

[1]The administrative law judge's findings on remand regarding claimant's average weekly wage are not challenged on appeal.

In the present appeal, claimant contends that the administrative law judge failed to comply with the APA when he did not consider specific evidence on remand regarding claimant's ability to perform his usual duties, as directed by the Board in its previous decision in this case. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge erred in failing to comply with the Board's remand order. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operations of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action *shall* be taken as is directed by the Board." (emphasis added). In the Board's first Decision and Order, the Board held that the administrative law judge, by not addressing specific evidence which was relevant to claimant's argument that he was unable to perform his usual employment duties with employer, failed to comply with the requirements of the APA. In remanding the case to the administrative law judge for reconsideration, the Board detailed the specific relevant evidence not addressed by the administrative law judge. Thus, in not addressing the evidence specifically identified by the Board in its initial decision, the administrative law judge on remand erred by failing to follow the Board's directive. *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157, 159 (1990).

As discussed in the Board's initial decision, a conclusion that claimant is able to return to his usual work requires a determination as to the job duties performed prior to his injury and a finding that these duties are within claimant's medical restrictions. *See, e.g., Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). On remand, the administrative law judge found that, in the year prior to his injury, claimant averaged at least three days a week working as a forklift driver, one day a week working as a hustler, *i.e.*, tractor-trailer, driver, and one day a week working either as a tie-on man or as a crane operator. The administrative law judge credited the job descriptions authored by Nancy Favaloro, employer's vocational expert, which he found to accurately represent the work requirements of those jobs.[2] Moreover, the administrative law judge relied on the November 11, 1993 written affirmation of claimant's treating physician, Dr. Novack, that the exertional requirements for a tie-on man, water boy, flagman, hustler driver and forklift driver, as described by Ms. Favaloro, were suitable for claimant, rather than on testimony previously given by Dr. Novack in a April 8, 1993 deposition. *See* May 14, 1997 Decision and Order at 2. Relying on Ms.

[2]We note that Ms. Favaloro provided job descriptions for three of the jobs the administrative law judge identified as claimant's usual pre-injury employment, tie-on man, hustler driver, and forklift operator, as well as for two jobs which were not claimant's usual employment, water boy and flagman; Ms. Favaloro did not provide a job description for the crane operator job, which the administrative law judge found to be one of claimant's usual longshore jobs. *See* EX-7.

Favaloro's representation that the jobs as tie-on man, hustler driver, forklift operator, water boy, and flagman were regularly available to workers with an "M" card or lower from the time claimant reached maximum medical improvement, the administrative law judge found that there has been work available in claimant's usual job as a longshoreman which he has been able to perform since the time that he reached maximum medical improvement. *See* May 14, 1997 Decision and Order at 2-3.[3]

As argued by claimant, however, the administrative law judge on remand once again failed to consider claimant's post-hearing affidavit of December 17, 1993, which had been submitted to show that Ms. Favaloro's job descriptions and video, allegedly depicting the available waterfront jobs which fell within claimant's limitations, did not accurately portray the exertional requirements of claimant's usual duties. Claimant's affidavit is relevant to his contention that the actual exertional requirements of his usual longshore work are incompatible with the medical limitations imposed by Drs. Novack and Baker, limiting claimant to medium work or to heavy work with climbing and overhead lifting restrictions. *See* CX-7, 8. Moreover, although the administrative law judge generally discussed the availability of jobs, as described by Ms. Favaloro, which claimant had the seniority to obtain, he did not explicitly address the provisions of the Collective Bargaining Agreement (CBA) with respect to the loss of seniority where assigned work is refused. *See* EX-24. Furthermore, the administrative law judge made no mention of the effect of the contract provision of the CBA regarding the use of prescription medications, such as those taken by claimant, which could interfere with the safe performance of the employee's work on claimant's ability to resume his usual employment. *See* EX-24. *See generally Bryant v. Carolina Shipping Company, Inc.*, 25 BRBS 294, 297-98 (1992). Lastly, although the administrative law judge credited Dr. Novack's written approval of the positions described by Ms. Favaloro over Dr. Novack's prior deposition testimony, *see* May 14, 1997 Decision and Order at 2, he failed to provide a sufficiently reasoned analysis of this determination. Specifically, the administrative law judge did not follow the Board's previous directive to reconcile Dr. Novack's deposition testimony that claimant was not capable of performing his usual job as a longshoreman because some of the requisite duties were not within his restrictions, CX-102 at 98, 99, 114, 119, 120, with Dr. Novack's subsequent approval of the

[3]The administrative law judge stated that, as the holder of an "L" card, representing greater seniority than an "M" card, claimant undoubtedly had better job opportunities available to him than did workers with "M" cards. *See* May 14, 1997 Decision and Order at 3.

positions described by Ms. Favaloro. *See McCurley v. Kiewest Co.*, 22 BRBS 115, 119 (1989).

Thus, as the administrative law judge has not addressed the specific evidence relied upon by claimant and discussed by the Board in its initial decision, we vacate the administrative law judge's denial of benefits, and we remand this case for a second time for the administrative law judge to set forth and address all of the evidence regarding the issue of the extent of claimant's disability.[4]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4]Lastly, claimant requests that, should the instant case be remanded, the case be assigned to an administrative law judge other than Administrative Law Judge Murty, who previously heard the case. We note, in this regard, that Administrative Law Judge Murty's retirement renders claimant's request moot.