BRB No. 03-0199

STEVEN YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:Oct. 31, 2003
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for self-insured employer.

Thomas G. Giblin (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting Counsel for Longshore), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-LHC-3081, 2000-LHC-1692) of Administrative Law Judge Daniel A. Sarno, 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 administrative law judge=s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for a second time. To briefly reiterate the facts and procedural history, claimant worked as a welder for employer from June 1977 until May 1989. On February 25, 1988, he injured his right hand while moving a piece of equipment at work, and subsequently had a ganglion cyst surgically removed from his right wrist. Claimant returned to work after this surgery, but sustained a left elbow injury on March 25, 1988. He returned to work in May 1988, but continued to complain of bilateral arm, shoulder and neck pain. He stopped working in May 1989, and has not worked since that time. Claimant was diagnosed with thoracic outlet syndrome (TOS) in 1988, and a disc herniation and bone spurs at C6-7 in 1999. Claimant underwent four additional surgeries between 1990 and 2000. Claimant sought benefits under the Act.

In his original Decision and Order, the administrative law judge found that claimant established that his TOS and cervical spine problems are causally related to his employment pursuant to Section 20(a), 33 U.S.C. '920(a), and that employer established the availability of suitable alternate employment. Thus, the administrative law judge awarded claimant permanent partial disability benefits. 33 U.S.C. '908(c)(21). In addition, the administrative law judge denied employer=s claim for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. '908(f).

This decision was appealed to the Board. Initially, the Board affirmed the administrative law judge=s finding that claimant=s TOS and cervical condition are work-related. *Young v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 01-0543/A (Mar. 18, 2002). In addition, the Board held that claimant is entitled to temporary total disability benefits from the date of his surgery, January 18, 2000, until the date suitable alternate employment was established, July 27, 2000. However, the Board vacated the conclusion that employer did not establish suitable alternate employment prior to that time and remanded the case to the administrative law judge for consideration of employer=s evidence of suitable alternate employment allegedly available beginning in 1992. The Board held that the rejection of the proffered labor market survey identifying these jobs on the basis that no doctor approved the identified positions was improper, as such approval is not required. Lastly, the Board affirmed the administrative law judge=s finding that employer is not entitled to Section 8(f) relief.

On remand, the administrative law judge found that the positions identified in the July 26, 2000, labor market survey do not establish suitable alternate employment. Therefore, the administrative law judge found that employer was not entitled to a credit for total disability benefits paid to claimant prior to that time against its liability for ongoing partial disability benefits. Employer appeals, contending that the administrative law judge erred in finding that the positions identified do not establish suitable alternate employment.[1] Claimant responds, urging affirmance of the administrative law judge=s decision on remand.

[1] Employer also reiterates its contentions that the administrative law judge erred in considering claimant=s TOS and cervical spine injuries as they were not properly raised, that the administrative law judge erred in finding that claimant=s TOS and cervical spine condition are work-related, that claimant is limited to a scheduled award, and that the administrative law judge erred in finding that employer is not entitled to relief under Section 8(f) of the Act. The Director, Office of Workers= Compensation Programs, responds, urging the Board to reaffirm the administrative law judge=s finding that employer is not entitled to relief under Section 8(f). The Board has held that where a party appeals a Decision and Order on remand raising issues addressed by the Board in its prior decision, the first decision of the Board constitutes the law of the case absent a change in law or clear error in the prior decision. *See Jones v. U.S. Steel Corp.*, 25 BRBS 353 (1992). As neither condition is present here, we decline to address employer=s contentions regarding these issues, as they were fully resolved in the Board=s first Decision and Order and thus that decision constitutes the law of the case.

The instant case was remanded to the administrative law judge to specifically consider the availability of suitable alternate employment prior to claimant=s spinal fusion on January 18, 2000. *See Young*, slip. op at 8. Where, as here, it is undisputed that claimant is physically unable to return to his pre-injury employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment that claimant is capable of performing.[2] In order to meet its burden, employer must demonstrate the availability of a range of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his age, education, work experience, and physical capacity and restrictions, is capable of performing. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Trans-State Dredging v. Benefits Review Board [Tarner]*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). A vocational specialist=s opinion and survey which properly considers claimant=s vocational background and experience, and mental and physical capacities may be sufficient to establish that claimant is capable of performing available jobs. *Jones v. Genco, Inc.*, 21 BRBS 12 (1988). In addition, employer may attempt to establish suitable alternate employment with a retrospective labor market survey. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

On remand, the administrative law judge considered the evidence of positions available from 1992 to 1998, based on employer=s supplemental labor market survey of July 26, 2000. Emp. Ex. 58. However, two of the positions identified in the original labor market survey dated July 14, 2000, were noted to be available in 1999.[3] Emp. Ex. 53 at 14-15. In identifying the positions as suitable, the vocational counselor testified that she used claimant=s then-current restrictions which included no repetitive elbow flexing, no lifting greater than 10 pounds and no overhead work. H.Tr. at 74-76. In his decision on remand, the administrative law judge did not address the suitability of these positions. Thus, as there is relevant evidence of record which the administrative law judge did not address, we vacate the administrative law judge=s finding that employer failed to establish the availability of suitable alternate employment prior to claimant=s January 2000 surgery, and remand the case to the administrative law judge to discuss the proffered evidence and explain his treatment

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[2] The administrative law judge found that claimant=s restrictions were removed from March 21, 1996 to September 19, 1996, and thus that he is not entitled to compensation benefits for this period. This finding is affirmed as it is unchallenged on appeal.

[3] These positions are listed as a cashier at the College of William & Mary Dining Services and a parking attendant at the Colonial Williamsburg Foundation. Emp. Ex. 53 at 13-14.

thereof, consistent with the requirements of the Administrative Procedure Act, 5 U.S.C. ' 557(c)(3)(A); *see McCurley v. Kiewest Co.*, 22 BRBS 115 (1989); *see also Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998).

In addition, in reviewing the supplemental labor market survey, which purports to establish suitable alternate employment available from 1992-1998, *see* Emp. Ex. 58, the administrative law judge found that six of the 20 positions are not compatible with claimant=s physical and medical restrictions and his vocational and educational skill levels. With regard to four of the positions, the administrative law judge found that the description of the cashier position at the Best Western does not address the specific medical and physical demands of the job, that the cashier position at the Airport Exxon requires lifting over claimant=s 10 pound restriction, that the cashier position at the Cracker Barrel is not consistent with claimant=s grade school level reading and mathematics skills, and that the cashier position at Oyster Point Dodge does not comport with claimant=s limited educational and mental capabilities. As the administrative law judge=s finding that these positions are not suitable for claimant given his physical and educational limitations is supported by substantial evidence, and employer has not raised any reversible error in his reasoning, we affirm the administrative law judge=s finding that these four positions are insufficient to establish suitable alternate employment. *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *see also Moore v. Universal Maritime Corp.*, 33 BRBS 54 (1999).

The administrative law judge also rejected the positions as a cashier at the Wilco Gas Station and Old Hampton Seafood Kitchen because employer did not establish the precise nature, terms and availability of the positions. He found that although they are similar to jobs later found to be suitable after claimant=s spinal fusion in 2001, employer did not meet its burden for the period prior to the surgery. Contrary to the administrative law judge=s finding, the descriptions for the positions in the labor market survey dated July 26, 2000, indicate the physical requirements, the wages paid, and date of availability of these two positions. Emp. Ex. 58 at 3, 6. Nonetheless, as the Wilco position requires lifting over 10 pounds, the position is not suitable on this basis. However, we remand the case for the administrative law judge to consider the suitability of the position at Old Hampton Seafood

Kitchen and whether it is within claimant=s physical restrictions.[4]

[4] The description of the cashier at the Old Hampton Seafood Kitchen states that the employee may sit or stand if needed and that there is no lifting over 10 pounds. It also indicates that the position was available on August 21, 1998 and that the wages at that time were $5.15 per hour. Emp. Ex. 58.

In addition, the administrative law judge rejected the remaining 14 positions identified in the July 26, 2000, labor market survey based on his finding that the counselor relied solely on classified advertisements, holding it was thus insufficient to establish suitable alternate employment because the entries do not describe the precise nature, terms and actual availability of the positions. However, a review of the labor market survey indicates that the vocational counselor was unable to contact the employers to ascertain the jobs= requirements in only 11 of the identified positions.[5] Of the remaining three, the position at Miller Mart requires lifting between 10 and 15 pounds, which exceeds claimant=s lifting restrictions and therefore is not suitable. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). However, the administrative law judge rejected the position of delivery driver for Photo Associates and the cashier position with Dean and Don=s Farm Market solely on the basis that they do not state the wages paid for the relevant period. Decision and Order at 5. Ms. Whitfield testified that the jobs identified all pay minimum wage. H. Tr. at 91. The position descriptions include the physical requirements of the two positions as well as dates of availability. Therefore, the basis the administrative law judge gave for rejecting these two positions is not valid and cannot be affirmed. On remand, the administrative law judge must consider the suitability of these positions.

The Board generally will not interfere with the administrative law judge=s weighing of the evidence. *See, e.g., Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). However, the Board is not bound to accept an ultimate finding or inference if the decision discloses that it was reached in an invalid manner. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). As the administrative law judge did not provide adequate reasons for rejecting three positions identified in the labor market survey prepared by Ms. Whitfield on July 26, 2001, we vacate the administrative law judge=s finding that the evidence is insufficient to establish suitable alternate employment. Moreover, the administrative law judge did not address the suitability of two positions identified in the July 14, 2000, survey as being available prior to claimant=s surgery. The administrative law judge must reconsider the suitability and availability of the alternate work identified by employer consistent with claimant=s restrictions and other relevant factors. *See Tarner*, 731 F.2d 199, 16 BRBS 74(CRT); *Bryant v. Carolina Shipping*

[5] The vocational counselor noted in her labor market survey dated July 26, 2000, that she was unable to contact the PoFolks restaurant, Pro Blue, Hall Ford, Auto Best Car Wash, Carrollton Tobacco Company, Ripps Food Store, East Coast Oil Company, Phoebus Exxon and Denbeigh Exxon. We affirm the administrative law judge=s finding that these positions are insufficient to establish the availability of suitable alternate employment as the entries do not describe the nature, terms and actual availability of the positions, nor did the counselor flesh out the descriptions by reference to the *Dictionary of Occupational Titles. See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Manigualt v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

Co., 25 BRBS 294 (1992). If employer establishes through the five remaining positions that a range of suitable jobs existed prior to claimant=s January 2000 surgery, claimant is limited to an award of partial disability benefits for the relevant period. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

Accordingly, the Decision and Order on Remand of the administrative law judge finding that employer did not establish the availability of suitable alternate employment is vacated and the case is remanded for further findings consistent with this opinion. The administrative law judge=s decision is affirmed in all other respects.

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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PETER A. GABAUER, Jr.
Administrative Appeals Judge