BRB No. 00-1142

EDWARD J. AUBIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AMERICAN SHIPYARD COMPANY	)	DATE ISSUED: Sept. 4, 2001
	)	
and	)	
	)	
BEACON MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Robert V. Chisholm (Chisholm, Chisholm & Kilpatrick), Providence, Rhode Island, for claimant.

James T. Hornstein and Richard M. Ciaramello, Jr. (Higgins, Cavanagh & Cooney), Providence, Rhode Island, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (00-LHC-0202) of Administrative Law Judge Daniel F. Sutton 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).

Claimant sustained an injury to his left knee while working as a ship superintendent

for employer on January 13, 1994. Dr. Yakavonis, an orthopedist, initially diagnosed a medial capsular strain of the left knee with a question of a medial meniscal tear, and returned claimant to work, on crutches, with employer on March 1994. Claimant performed office work for employer from March 1994 until late October 1994, at which time he sought treatment with Dr. Hulstyn, based upon his perceived lack of improvement.

Dr. Hulstyn immediately removed claimant from work and subsequently performed a left knee arthroscopy with synovectomy and plica excision on February 8, 1995. Dr. Hulstyn opined that claimant reached maximum medical improvement on June 30, 1995, with a 37 percent permanent partial impairment of the left lower extremity. He therefore released claimant from his care, and recommended a work evaluation program, which claimant completed on November 6, 1995, after having demonstrated an ability to work in the "sedentary" category consistent with his return to work for employer as a superintendent.

Claimant thereafter sought treatment from Dr. Parziale who, on August 20, 1996, concurred with Dr. Hulstyn's assessment that claimant had reached maximum medical improvement with a 37 percent impairment of the left lower extremity. On November 15, 1996, Dr. Parziale stated that claimant was permanently and totally disabled from his prior duties as a shipyard manager or supervisor but not from other types of work. In August 1997, employer offered and claimant accepted a light duty position as an assistant estimator in which he performed tasks such as sorting keypunch cards and copying blueprints, until April 1998, when he stopped working on Dr. Parziale's recommendation because he was having problems with weight increase, blood pressure, both knees and his left hip and groin.[1] On June 22, 1998, Dr. Parziale opined that claimant could return to work in a light duty position with the ability to work 40 hours a week.[2] Employer thereafter offered claimant full-time work as an estimator in June 1998, and again in September 1998, but claimant never replied to employer's offer nor returned to work.

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[1]Claimant's primary care physician, Dr. Perry, stated in a post-hearing deposition dated April 18, 2000, that based on a reasonable degree of medical certainty there is a relationship between claimant's work-related left knee injury and his inability to satisfactorily control his hypertension, weight, and cholesterol. However, on cross-examination, Dr. Perry admitted that he had been treating claimant for hypertension since 1987, that claimant had always been overweight, that he never told claimant he was unable to work because of his hypertension, and that claimant has been less than optimally compliant with taking his prescribed medications.

[2]Dr. Parziale placed restrictions on kneeling, crawling, climbing ladders, lifting or carrying more than 50 pounds, with an accommodation to sit or stand as needed. Claimant's Exhibit (CX) C.

On February 9, 1999, Dr. Hulstyn performed a second arthroscopic procedure on claimant's left knee and subsequently opined that claimant reached maximum medical improvement with a 38 percent permanent partial impairment rating for the left lower extremity. In addition, Dr. Hulstyn stated that claimant remained unable to return to his former employment and has permanent restrictions on his ability to climb ladders, crawl and squat. Dr. Parziale added, on July 12, 1999, that claimant remained permanently disabled from his regular job, but is capable of work in a light duty capacity, up to 40 hours per week, subject to his prior restrictions.

Employer voluntarily paid claimant for periods of temporary total and temporary partial disability, a scheduled award in accordance with Section 8(c)(2), 33 U.S.C. §908(c)(2), based on a 38 percent permanent partial impairment to claimant's left lower extremity, and appropriate medical benefits for treatment related to his work injury. Claimant thereafter sought additional benefits under the Act, alleging that he is permanently and totally disabled due to his work-related left knee injury, as well as his pre-existing medical problems, *i.e.*, hypertension, obesity, and hyperchoilesterolemia. Employer controverted the claim, and alternatively sought Section 8(f) relief, 33 U.S.C. §908(f), based upon claimant's pre-existing conditions.

In his decision, the administrative law judge initially found that claimant was unable to perform his regular duties as a result of his work-related left knee injury.[3] The administrative law judge then stated that although employer did not identify any suitable alternate employment, under *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), he nevertheless was not able to conclude that claimant is totally disabled from all work. Accordingly, he determined that claimant is not permanently and totally disabled and denied the request for additional benefits. Consistent with this conclusion, the administrative law judge declined to address employer's alternative request for Section 8(f) relief.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

[3]The administrative law judge determined that claimant's hypertension, obesity and hyperchoilesterolemia are not work-related.

Claimant argues that the administrative law judge erred in finding that claimant is not totally disabled as employer has not made an affirmative showing as to the availability of suitable alternate employment. In addition, claimant contends that the administrative law judge's application of the *Air America* rule in this case is erroneous as it is discordant with the evidence presented. Specifically, claimant maintains that unlike the situation in *Air America*, he does not possess the requisite "wide range of skills" which shows that he is employable in a variety of fields. Rather, relying on *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991), claimant asserts that the *Air America* rule is inapplicable as his medical impairment and job qualifications are such that his suitable job prospects would be expected to be very limited.[4]

[4]Claimant's alternative assertion that the *Air America* rule should be abolished must be rejected, as the Board is bound by that precedent in this case which arises within the jurisdiction of the United States Court of Appeals for the First Circuit.

In *Air America*, 597 F.2d 773, 10 BRBS 505, the United States Court of Appeals for the First Circuit rejected a mechanical rule requiring that an employer demonstrate the availability of an actual job opportunity whenever a claimant is incapable, as a result of his work-related injuries, of performing his pre-injury work.[5] *Air America*, 597 F.2d at 779, 10 BRBS at 512-13. The court held that it will not put the burden of proving that actual available jobs exist on the employer when it is "obvious" that there are available jobs that someone of claimant's age, education, and experience could do. *Id*., 597 F.2d at 781, 10 BRBS at 515. In that case, the claimant contracted tropical sprue while working as a pilot in Southeast Asia, a disease which left him with varying degrees of numbness in his limbs and extremities. As a result he could no longer work as a pilot. He did however possess a wide range of skills that made him employable in a variety of other fields. The court held that, when the employee's impairment only affects a specialized skill necessary for his pre-injury job, the severity of the employer's burden had to be lowered to meet the reality of the situation. *Id.*, 597 F.2d at 779, 10 BRBS at 512-513. The court therefore held that the testimony of an educated pilot, who could no longer fly, that he received job offers, established that he was not totally disabled. *Id.*, 597 F.2d at 780, 10 BRBS at 514.

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[5]Specifically, the First Circuit stated:

> The showing that the Board would require the Company to make is too stringent a burden in the circumstances present here. While some of the cited cases state the burden in broad terms, they must be read in light of their facts. So read, they do not support a mechanical rule, applicable in any and all circumstances, that the employer must always demonstrate the availability of an actual job opportunity whenever a claimant shows an inability to perform his previous work. Rather it is reasonable to require the employer to make such a strong showing when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience. The strength of the presumption of total disability, and hence the severity of the burden the employer must bear to overcome it, should reflect the reality of the situation. Where claimant's medical impairment affects only a specialized skill that is necessary in his former employment, his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him. In such a situation, it makes little sense to require the ALJ to find total disability unless the employer demonstrates a specific job opportunity available to claimant.

Air America, 597 F.2d at 779, 10 BRBS at 512-13.

In *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT), the First Circuit addressed its position in *Air America.* In that case, Legrow, who worked as a foreman, sustained a work-related back injury which left him unable to engage in heavy lifting. He continued to work, performing only supervisory functions, and then subsequently clerical duties on a part-time basis. He attempted to return to his usual work as a foreman but after three hours of manual labor began to experience severe back pain and had to stop. The First Circuit addressed employer's argument that "the well-established burden of showing suitable alternate employment should not apply to this case," but held that Legrow "is a long way from Air America." 935 F.2d at 435, 24 BRBS at 209-210(CRT). Specifically, the court held that although Legrow had a bachelor's degree in business administration, as well as prior office experience in addition to his managerial employment with employer, evidence of his failed efforts with the ten-hour a week office job with employer justified the Board's determination that the administrative law judge could not find that Legrow has any real ability to work in a typical office setting.[6] *Id.* The court then went on to reiterate that the standards of *Air America* are "inapplicable where 'the claimant's medical impairment and job qualifications [are] such that his suitable job prospects would be expected to be very limited, if existent at all.'" *Id.*, quoting *Air America,* 597 F.2d at 780, 10 BRBS at 513.

In the instant case, the administrative law judge determined that claimant is an intelligent man with a high school education, who successfully completed an apprenticeship program in shipyard management, and held a series of progressively responsible supervisory and managerial positions in the shipbuilding and ship repair industry. Considering claimant's education, his relatively young age (42), and his work experience in administrative and managerial positions, the administrative law judge concluded that claimant's inability to perform any work seems improbable in light of his physical limitations. Specifically, the administrative law judge noted that the medical opinions of Drs. Parziale and Hulstyn make it abundantly clear that claimant is capable of performing a range of sedentary and light work on a regular, full-time basis. Thus, the administrative law judge found that he is unable to conclude under *Air America* that claimant is totally disabled from all work.

[6]The Board had held that the part-time job provided claimant was sheltered employment as it was performed only on an as needed basis, and because claimant had a mattress in the office so that he could lie down, if needed, during the day.

We cannot affirm this decision, as the administrative law judge misapplied the decision in *Air America*. Initially, the administrative law judge's finding that claimant is not totally disabled rests solely on medical evidence that claimant is physically capable of sedentary or light duty work. In so finding, the administrative law judge obviated the need for employer to put forth any evidence of suitable alternate employment. Contrary to his decision, *Air America* did not hold that employer has no burden to show job availability. Rather, the court stated that "the strength of the presumption of total disability, and hence the severity of the burden the employer must bear to overcome it, should reflect the reality of the situation." *Air America*, 597 F.2d at 779, 10 BRBS at 512-13. Thus, employer's burden to show suitable alternate employment exists, but the quantum of evidence required to meet it varies depending upon the nature of claimant's injury and his job qualifications. Moreover, *Air America* did not hold that medical evidence that claimant is physically able to work is sufficient to defeat a claim for total disability, as employer still bears the burden of producing evidence regarding the economic effects on claimant's employability. *See, e.g., Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). On the facts in *Air America*, the administrative law judge had credited evidence that claimant had been offered a brokerage position which was suitable given his other skills. Under *Air America*, therefore, where claimant's disability is limited and his skills varied, employer need not prove that actual specific jobs exist.[7] In this case, the administrative law judge's decision must be vacated because the judge did not place *any* burden of showing suitable alternate employment upon employer.

[7]In this regard the holding in *Air America* is akin to the decision of the United States Court of Appeals for the Fifth Circuit in *P&M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991), which adopted a flexible standard for employer to meet its burden of showing that job opportunities existed for which the claimant is able to compete and which he could realistically and likely secure. In *P&M Crane*, the court declined to require evidence of specific available jobs, holding that one actual job coupled with evidence establishing the existence of numerous jobs in the local economy was sufficient to establish the availability of suitable alternate employment. In *Air America*, claimant testified that he was offered and turned down a job at a brokerage firm (in which field he had experience) and employer's vice-president testified (vaguely, the court said) that desk jobs in claimant's field were available to someone with claimant's qualifications. This evidence was sufficient to establish suitable alternate employment on the facts, without the need for employer to demonstrate specific actual jobs as required by the standard applied by the Board at that time. The view that *Air America* is not at odds with other decisions regarding employer's burden of proof is further supported by the Seventh Circuit's opinion in *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT)(7th Cir. 2000), wherein the court, citing, *inter alia*, *Air America*, stated that it would adopt the suitable alternate employment standard used by the First, Fourth and Fifth Circuits: evidence that a range of jobs exists that is reasonably available and that the disabled employee could realistically secure and perform. *Id.*

In addition, the administrative law judge erred in finding that the reduced standard of *Air America* should apply in this case given claimant's skills and impairment level. On its facts, the present case is more analogous to *Legrow*, a decision which the administrative law judge did not discuss, than to *Air America*. It is clear that *Air America* rested on claimant's extensive skills and the specialized nature of his injury, which ended his ability to pilot an aircraft but left most of his other skills intact. Indeed, after discussing cases applying the heavier burden of proving actual job opportunities are available, the court stated:

> In each of these cases, the claimant's medical impairment and job qualifications were such that his suitable job prospects would be expected to be very limited, if existent at all. It has been in this situation that the courts have required proof of actual employment opportunities to defeat a total disability claim.
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> The case before us is not of this genre. The medical evidence suggests disability only as to work requiring a high degree of coordination and dexterity as well as quick reflexes, and perhaps as to work that could not accommodate fairly frequent medical appointments.

Air America, 597 F.2d 780, 10 BRBS at 514. By contrast, in the present case claimant does not possess specialized skills which are uniquely affected by his injury. In fact, from a physical standpoint claimant is considerably restricted from performing work. As noted above, Dr. Parziale placed restrictions on kneeling, crawling, climbing ladders, lifting or carrying more than 50 pounds, as well as requiring an accommodation to sit and stand as needed. CX C at 17. Dr. Hulstyn echoed Dr. Parziale's assessment and, even more significantly, stated that claimant remained symptomatic on a daily basis, that he is limited in his ability to perform normal daily activities and that he is restricted in his ability to perform repetitive work activities. CX E at 37. In particular, the latter part of Dr. Hulstyn's restrictions seemingly preclude claimant from working even in a number of light duty positions. *Id.* Claimant's disability is thus far more restrictive than that sustained by the claimant in *Air America,* whose disability was primarily a limitation of the dexterity needed by a pilot; claimant's disability in this case is not limited to a specialized skill but significantly impedes his physical ability to perform work and normal daily activities.

Moreover, as claimant suggests, his education and experience are very different from those of claimant in *Air America.* With regard to education, claimant herein has a high school education, as opposed to the college education of the claimants in *Air America* and *Legrow.* Claimant's background is limited entirely to the shipbuilding industry. His apprenticeship program at General Dynamics provided him training in shipyard

management,[8] and his twenty plus years of work experience involved exclusively positions in shipbuilding, either as a laborer or a supervisor. Thus, again in contrast to the claimant in *Air America*, claimant does not possess "a wide range of skills" that make him "employable in a variety of fields." *Air America*, 597 F.2d at 779, 10 BRBS at 512-13. The instant case is thus similar to *Legrow*, and employer bears the burden of proving suitable alternate employment as enunciated in that decision.[9] Consequently, the administrative law judge's finding that claimant is not totally disabled from all work is vacated. *Legrow*, 935 F.2d 430, 24 BRBS 202(CRT). As the record contains evidence of a potential job offer made to claimant by employer within its facility, the case must be remanded to the administrative law judge for further consideration. In its pre-hearing statement dated July 2, 1998, employer notes that claimant's light duty job as an estimator was still available. Although claimant's employment in this job pre-dates his second surgery, this position, offered again by employer to claimant in September 1998, may have remained available even following claimant's second knee surgery in February 1999, and thus, may be sufficient to meet employer's burden. On remand, the administrative law judge must first discern whether employer's offer of this position remained viable following the second surgery, and then if so, determine whether it is suitable given claimant's restrictions, and thus, sufficient to meet employer's burden.[10] *Id.*

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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[8]Claimant's training qualified him for his usual employment as a shipyard superintendent, a position, as the administrative law judge found, which he is no longer capable of performing.

[9]The Board, in a decision issued before *Legrow* was decided, *Dixon v. John J. McMullen & Associates, Inc.*, 19 BRBS 243 (1986), affirmed an administrative law judge's determination that employer had the burden to establish actual suitable alternate employment pursuant to *Air America*, because the employee's work history qualified him only for a position in shipbuilding, he was unqualified for a job without physical labor, and his education was insufficient to enable him to find a desk job that would allow him to sit all day.

[10]If, on remand, the administrative law judge determines that claimant is entitled to permanent total disability benefits, he must then consider employer's request for Section 8(f) relief.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge