BRB No. 00-1198

PHILIP PARENT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: Sept. 19, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster, Metairie, Louisiana, for claimant.

Wayne G. Zeringue, Jr. and Christopher S. Mann (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for self-insured employer.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1999-LHC-2673) of Administrative Law Judge Clement J. Kennington 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 which 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 hydraulic operator, injured his back at work on June 13, 1997. Employer voluntarily paid claimant temporary total disability benefits from June 14, 1997 to August 24, 1997, and February 3, 1998 to August 30, 1998, when he was off work due to his back injury. Claimant worked in a modified job at employer's facility

from August 25, 1997 to February 2, 1998, August 31, 1998 to October 6, 1998, and December 28, 1998 to June 8, 1999. Claimant did not return to work after June 8, 1999. Claimant sought temporary total disability benefits from October 7, 1998 to December 27, 1998, and from June 9, 1999, and continuing. The administrative law judge denied benefits, finding that employer established the availability of suitable alternate employment by providing claimant a job within his restrictions at its facility since claimant first returned to work in 1997.

On appeal, claimant challenges the administrative law judge's denial of disability benefits. Employer responds in support of the administrative law judge's decision.

Claimant contends that the administrative law judge erred in finding that employer established the availability of suitable alternate employment at its facility. Specifically, claimant contends there are inconsistencies in the evidence regarding the suitability of the job at employer's facility, and claimant therefore contends employer did not meets its burden of establishing suitable alternate employment. Employer responds that the modified job at its facility is suitable or, alternatively, that it established the availability of suitable alternate employment on the open market through the labor market survey of its vocational expert, Ms. Favaloro. Once, as here, claimant establishes his *prima facie* case of total disability, the burden shifts to employer to demonstrate within the geographic area where claimant resides, the availability of realistic opportunities for employment which he, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and for which he can compete and which he could reasonably expect to secure. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet this burden by offering claimant a light duty position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

The administrative law judge found that claimant was able to perform the sedentary to light duty work offered to him by employer, as the assigned work is within his restrictions.[1] The administrative law judge found that claimant voluntarily

[1]The job at employer's facility was as a modified hydraulic operator which entailed testing and repairing equipment aboard a ship, and gathering and recording data. Ms. Favaloro compiled a written description of the modified job on December 14, 1998. The modified job required carrying tools weighing not more than five pounds, stair climbing not to exceed two and one-half hours in an eight hour shift, no climbing vertical ladders, operating equipment either sitting on a five gallon bucket or standing, testing equipment and recording data with three to four people, and walking on a ship but not usually requiring crawling, bending, or heavy lifting. Emp.

exceeded his restrictions even though he was told by employer not to do so. The administrative law judge discussed claimant's testimony that the job was not within his restrictions and acted within his discretion in rejecting this testimony in light of evidence to the contrary.[2] *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); Decision and Order at 7 n. 2, 25; Tr. at 103, 139-142, 163-165, 176-177, 206-214. In this regard, the administrative law judge relied on Mr. McCann's testimony that he told claimant to work within his restrictions, and that claimant's job was to supervise, and not to engage in labor. In addition, the administrative law judge noted that Mr. McCann assisted Ms. Favaloro in the compilation of the written job description, which is within the restrictions set out in claimant's functional capacities evaluation (FCE).[3] Emp.

Exs. 5, 11, 15.

[2]Claimant testified that when he returned to work in August 1998, he repaired equipment in an area which required him to kneel or crouch. Tr. at 139-142. Claimant also testified that when he returned to work in December 1998, he had to bend and stoop and was required to climb ramps and stairs repeatedly. Tr. at 103, 163-165. In June 1999, claimant complained that he needed additional help on a crane test. Tr. at 176-177, 206-214.

[3]The FCE completed on June 30, 1998, restricted claimant to sedentary work, occasionally lifting and carrying 10-18 pounds, and sitting, standing, walking, and

Ex. 16 at 13, 48. The administrative law judge further discussed the August 25, 1998, modified job offer by employer's workers' compensation adjuster, Ms. Hebert, and rationally credited her testimony that the job offer, whether it was termed "sedentary" or "light" duty, was for a job within claimant's restrictions.[4] *See Donovan*, 300 F.2d 741; Decision and Order at 16, 25-26; Tr. at 33-35, 41-42.

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reaching on a frequent basis. The FCE further restricted claimant to occasional squatting, kneeling, and climbing stairs. Claimant was not to bend and crawl repetitively. Cl. Ex. 7; Emp. Ex. 6.

[4]Ms. Hebert's letter dated August 25, 1998, to claimant states, "We received notice from your department that they have a light duty job available. This job is within your restrictions to return to work. Please report to our First Aid Department as soon as possible." Cl. Ex. 9.

We cannot, however, affirm the administrative law judge's finding that the job at employer's facility constitutes suitable alternate employment, as the administrative law judge did not discuss and weigh other relevant evidence. As claimant asserts, the administrative law judge did not discuss and weigh the conflicting opinions of Dr. Butler, claimant's treating physician. *See* Tr. at 79-80. Dr. Butler testified by deposition that the modified job is not within claimant's restrictions, although he approved the written description of the modified job as within the FCE restrictions.[5] Cl. Ex. 2 at 31-32, 38, 63; Emp. Exs. 14 at 31-32, 38, 63, 15.

The administrative law judge also did not compare the job's duties as described in the written description, *see* n.1, *supra,* to those identified at the hearing by claimant's former supervisor, Mr. McCann, and co-worker, Mr. Doucet, Mr. Doucet indicated that a typical work day for claimant would include activities such as getting into awkward positions, kneeling, bending over, occasionally crawling, working in confined spaces at times, and sitting on a five gallon bucket. Tr. at 300-304. Mr. McCann, on the other hand, described the job as a supervisory job with no lifting, crawling, climbing, or crouching, but requiring claimant to maneuver a 60 step gangway in order to get to his work station. Tr. at 316, 319, 323, 327.

Additionally, the administrative law judge did not discuss Ms. Favaloro's letter to claimant dated November 23, 1998, which states, "I am still working with Avondale to determine if your previous position can be modified within the work restrictions outlined in the [FCE]." Cl. Ex. 8 at 9. Ms. Favaloro stated in her deposition that as of November 23, 1998, it was still uncertain whether claimant's job could be modified within his restrictions only because she had not finished talking with employer yet. Emp. Ex. 16 at 23. Ms. Hebert explained at the hearing that she had contacted Ms. Favaloro because there was a conflict between claimant and his supervisors as to whether the job was within his restrictions and Ms. Hebert wanted Ms. Favaloro to draft a written job description to resolve the conflict. Tr. at 44. Lastly, the administrative law judge did not discuss and weigh the hearing testimony of the Department of Labor's vocational expert, Ms. Knight. Ms. Knight testified that

[5]On December 22, 1998, Dr. Butler signed a statement following the written description of claimant's modified job that, "I am in agreement that [claimant] is capable of performing these job tasks." Emp. Ex. 15. In contrast to the restrictions identified in the FCE, Dr. Butler restricted claimant from lifting or carrying heavy objects, bending into unusual positions, or being in cramped positions, and thought that claimant should alternate sitting and standing. Emp. Ex. 4 (p. 18 of 27). In addition, Dr. Butler thought that a person limited to sedentary activities, such as claimant, should not climb ladders, and stated that he placed no specific restrictions on claimant other than those outlined in the FCE. Emp. Ex. 14 at 29, 42; Cl. Ex. 2 at 29.

claimant's job exceeded Dr. Butler's restrictions but was within the framework of the FCE. Tr. at 59, 61, 65-68.

Because the administrative law judge did not address and resolve the inconsistencies presented by the statements of Drs. Butler, Messrs. McCann and Doucet, Ms. Favaloro, and Ms. Knight, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility as of August 1997. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc)*. In ascertaining the suitability of the job at employer's facility, the administrative law judge must determine what duties the job actually entailed, and what are claimant's restrictions; then he must compare the credited duties of the position with the credited medical restrictions. *See Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). If the administrative law judge finds the job at employer's facility is suitable, he must determine when it became available. *See, e.g., Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90(CRT)(5th Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). In this regard, if the administrative law judge finds the job as described in the December 1998 writing is suitable, he must consider whether the duties were modified as of this date; if so, a finding of suitable alternate employment dated back to 1997 would not be appropriate. Finally, if the administrative law judge finds on remand that the modified job at employer's facility is not within claimant's restrictions, he must determine whether employer established the availability of suitable alternate employment on the open market through Ms. Favaloro's labor market survey.[6] *See Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); Emp. Ex. 5.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[6]Ms. Favaloro identified the jobs of real estate appraiser, claims representative trainee, dispatcher, motor vehicle compliance officer, tour desk agent, courtesy desk officer, and registration operator, as suitable for claimant. These positions were available as of February 28, 2000. Cl. Ex. 8; Emp. Exs. 5, 5a.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge