BRB No. 96-1241

LAWRENCE E. CRAWFORD Claimant-Petitioner v. STEVEDORING SERVICES OF AMERICA and EAGLE PACIFIC INSURANCE COMPANY Employer/Carrier-Respondents	)	DATE ISSUED: _____ DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson & Stark, P.C.), Portland, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-3285) of Administrative Law Judge Daniel L. Stewart 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 the 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).

On January 4, 1991, claimant suffered a work-related injury to his left knee, when

he fell through the walkway of a ship while working for employer as a button pusher operating a wood chip blower. Claimant sought permanent total disability compensation under the Act. The parties stipulated that if claimant was not found to be permanently totally disabled, employer's liability would be limited to scheduled permanent partial disability compensation under Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), for a 35 percent impairment of claimant's left leg based on an average weekly wage of $1,001.68, and medical expenses.

Crediting claimant's hearing testimony that he probably could still perform the job of chip sampler, a longshoring job he had performed prior to the work-related injury, the administrative law judge found that claimant failed to establish his *prima facie* case of total disability by establishing that he was unable to return to longshore work. Accordingly, consistent with the parties' stipulations, he awarded claimant scheduled permanent partial disability benefits for a 35 percent impairment of his left leg pursuant to Section 8(c)(2), and medical benefits. In addition, inasmuch as claimant was awarded partial disability compensation under the schedule for a period of less than 104 weeks, the administrative law judge found that employer's request for Section 8(f), 33 U.S.C. §908(f), relief was moot.

Claimant appeals, arguing that the administrative law judge erred in finding that he was able to perform his usual longshore work based solely on his statement that he probably could perform the job of a chip sampler, as that job, which claimant performed infrequently, was only one of several longshoring jobs constituting claimant's usual work at the time of his injury. Claimant asserts that in addition to working as a chip pusher, he regularly worked as a button pusher, linesman, dockman, walking boss and holdman at the time of his injury and urges that the administrative law judge's finding that claimant failed to establish his *prima facie* case be reversed as "legally incorrect." Employer responds, urging affirmance, and claimant replies, reiterating the arguments made in his Petition for Review.

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 and Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988). Claimant's usual work is that which he was performing at the time of his injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Once claimant has established a *prima facie* case of total disability, the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that the burden shifts to employer to demonstrate that specific job opportunities which claimant could perform, were realistically and regularly available to claimant in his community. *See Edwards v. Director, OWCP,* 999 F2d 1374, 27 BRBS 81 (CRT) (9th Cir. 1991)*; Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

We agree with claimant that the administrative law judge's finding that claimant failed to establish his *prima facie* case of total disability cannot be affirmed. Initially, we note that in making this determination the administrative law judge employed an erroneous legal standard; he found that claimant failed to establish a *prima facie* case of total disability because he failed to establish that he was unable to return to "longshore" work. The relevant inquiry, however, is whether claimant is unable to perform his "usual work" duties as a longshoreman. Moreover, while the administrative law judge relied upon claimant's concession that he probably is able to work as a chip sampler to find that claimant failed to establish a *prima facie* case of total disability, the record reflects, and employer does not dispute, that in addition to working as a chip sampler on a very infrequent basis,[1] claimant also performed work as a button pusher, linesman, dockman, walking boss and holdman as part of his usual job duties. *See generally Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982); *see also Caudill v. Sea Tac Alaska Shipbuilding, Inc.*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). These jobs must also be considered in addressing claimant's ability to perform his former job as a longshoreman.

[1] Claimant's earning statements reveal that he worked as a chip sampler for only 29 of over 4,000 hours of longshore work he performed between 1988 and 1994. CX-9.

Employer argues in its response brief, however, that although the administrative law judge did not consider all of the relevant evidence regarding claimant's usual work duties, the Board should nonetheless affirm his finding that claimant failed to establish a *prima facie* case of total disability based on its own review of the evidence. Employer avers that claimant's admitted ability to perform work a chip sampler, when taken in conjunction with other evidence of record concerning claimant's ability to perform the jobs of walking boss and dockman, Dr. Whitney's inconsistent opinions regarding claimant's ability to perform longshore work, and claimant's ambivalence about returning to work, constitutes substantial evidence sufficient for affirmance of the administrative law judge's decision. The Board, however, has no *de novo* review authority. *Miijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986). Moreover, the evidence cited by employer was not considered, discussed, or weighed by the administrative law judge as is required under the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(a)(APA). *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990). Accordingly, as the administrative law judge erred in not analyzing claimant's full work activities in addressing his ability to perform his usual work and the fact that the record contains conflicting evidence regarding this issue[2] which was not considered by the administrative law judge previously, we vacate his finding that claimant failed to establish a *prima facie* case of total disability and remand for him to reconsider this issue based on all of the relevant evidence under the appropriate legal standard consistent with the requirements of the APA. *See generally Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73, 79-80 (1994), *modified on other grounds on recon,* 29 BRBS 103 (1995). If, on remand, the administrative law judge determines that claimant established a *prima facie* case of total disability, he should then consider whether employer established the availability of suitable alternative employment consistent with the controlling Ninth Circuit case precedent. *See Edwards*, 999 F.2d at 1374, 27 BRBS at 81 (CRT).

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

SO ORDERED.

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BETTY JEAN HALL

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[2]For instance, Dr. Whitney, claimant's treating physician, stated at one point that there are some longshore jobs that claimant could do, *see* EX-26, CX-16, but in March 1995 found claimant "totally disabled from his longshoring job." CX-18. Employer's vocational expert, Mr. Cardinal, found that claimant could return to lighter longshore work. EX-28. Claimant testified in his 1993 deposition that there were certain longshore jobs he could do, and others he could not, EX-29 at 65-66, but later testified at the hearing that he was told by his doctor that he could not do his regular work, and that he felt himself that he was physically unable to do so. Tr. at 57.

Chief Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. MCGRANERY
Administrative Appeals Judge