BRB No. 97-1755

STANLEY GACKI	)	
	)	
Claimant-Respondent	)	DATE ISSUED: 8/27/98
	)	
v.	)	
	)	
SEA-LAND SERVICE, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Thomas W. Polaski (Law Offices of Gary P. Sarlo), Morganville, New Jersey, for claimant.

Keith L. Flicker and Robert N. Dengler (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-2701) of Administrative Law Judge Ralph A. Romano 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 worked as mechanic for employer. On September 2, 1994, he was

seriously injured when he was changing a tire on a chassis and the tire exploded. Claimant sustained multiple severe injuries, including a fractured right clavicle, a strained right rotator cuff, a strained right shoulder, a ruptured thigh muscle, a fractured right ankle, a sprained right ankle ligament, and aggravation of his pre-existing degenerative joint disease. Stipulations; Tr. at 23. Thereafter, employer voluntarily paid claimant temporary total disability and medical benefits. Claimant filed a claim for permanent total disability benefits and continuing medical benefits, and employer disputed those additional claims.

In his Decision and Order, the administrative law judge found that claimant established a *prima facie* case of total disability based on the medical evidence of record. Additionally, he found that employer failed to rebut claimant's contention because it offered no evidence of suitable alternate employment and because he credited claimant's physician, Dr. Rosa, over employer's medical experts. Decision and Order at 5. Therefore, he awarded claimant permanent total disability and medical benefits. *Id.* at 5, 7. Employer appeals the award, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in awarding permanent total disability benefits, alleging that claimant has no disability and can return to his usual work without restrictions. Employer also argues that the administrative law judge's reason for discrediting its witnesses is irrational and that Dr. Rosa's opinion is not entitled to the weight he gives it. Claimant responds, arguing that the administrative law judge's decision is supported by substantial evidence.

Under the Act, a claimant has the burden of establishing the nature and extent of his disability. *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To do so, he must establish a *prima facie* case of total disability by establishing his inability to perform his usual work due to the injury. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). If the claimant meets his burden, then the employer has the burden of coming forth with evidence of the availability of suitable alternate employment, thereby establishing that the claimant's disability is, at most, partial. *Id.*

In this case, Dr. Rosa stated that claimant cannot return to his usual work based on the injuries he sustained. Cl. Ex. A; Tr. at 73, 95. The remaining medical experts, who were aware of how seriously claimant was injured, concluded that claimant can return to his usual work and that he does not have any residual disability. For example, Dr. Burke, Board-certified in internal medicine, stated on April 18, 1995, and November 14, 1996, that there is no evidence of internal

disability, that claimant needs no further treatment, and that claimant can return to his usual work. Emp. Exs. F, J, DD. Dr. Koval, an impartial orthopedic surgeon selected by the Department of Labor, concluded on May 22, 1995, that claimant had no continuing orthopedic disability due to the September 1994 injury. He also stated that claimant can return to work without restrictions, that claimant needs no additional medical treatment, and that none of claimant's few objective findings would cause a disability.[1] Emp. Exs. H, CC. Dr. Gallick expressed a similar opinion as early as January 1995. Emp. Exs. A, FF. In 1996, Dr. Nehmer, an orthopedic surgeon, also stated that claimant can return to work without further medical treatment. He concluded that claimant's subjective complaints outweighed the objective findings and that claimant displayed symptom magnification. Emp. Exs. I, K, EE.

In determining that employer failed to overcome claimant's *prima facie* case of total disability, the administrative law judge rejected the opinions of the physicians other than Dr. Rosa, concluding they did not know, and could not define, claimant's usual job duties. Because of this lack of awareness, the administrative law judge discredited those doctors, concluding that their medical opinions were "without value." The administrative law judge, however, found that Dr. Rosa's opinion is more probative of the issue involved because Dr. Rosa demonstrated a "thorough knowledge" of claimant's usual job duties.[2] Decision and Order at 5-6.

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[1]For example, the dent in claimant's thigh muscle did not produce a disability. Emp. Ex. CC at 44-45. Other objective findings were normal, *i.e.,*claimant's neurological tests revealed normal results. Emp. Exs. C-E, G.

[2]The administrative law judge stated that the issue in this case is not "whether claimant's injuries are clinically verifiable," but rather whether any restricted abilities prevent claimant's return to work. Therefore, he stated that any opinion which lacks knowledge of claimant's job duties, as compared with his residual abilities, is valueless. Decision and Order at 6.

We agree with employer that it was not rational for the administrative law judge to reject the medical opinions of employer's experts as well as that of the impartial examiner on this basis. Because those physicians determined that claimant has no disability and no work restrictions, it is irrelevant whether they were aware of claimant's job duties as a mechanic. Contrary to the administrative law judge's statement, these experts believed claimant to be fully recovered with no loss of ability. Thus, if he is determined to be restriction-free, he can do anything he could do before the injury, and any comparison between his work requirements and his residual abilities is immaterial. Consequently, it was irrational for the administrative law judge to consider this evidence less credible than Dr. Rosa's opinion merely because it appeared to lack an awareness of claimant's duties as a mechanic. *See Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). For this reason, we vacate the administrative law judge's award of benefits and his determination that claimant established a *prima facie* case of total disability, and we remand the case for further consideration.[3] If, on remand, the administrative law judge determines that claimant cannot return to his usual work, then claimant is entitled to total disability benefits because employer has not presented evidence of suitable alternate employment. If, however, he determines that claimant can return to his usual work, then claimant is not entitled to further disability benefits.

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

SO ORDERED.

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[3]We note that the administrative law judge phrased this analysis as if it involved a "bursting bubble" presumption (employer "failed to overcome Claimant's *prima facie* showing"). *See, e.g.,* 33 U.S.C. §920(a). This analysis is incorrect. Rather, in this case which concerns the extent of claimant's disability, the statutory presumption does not apply and claimant bears the burden of proving he is disabled. In resolving this issue, the administrative law judge must first weigh all the relevant medical evidence to determine whether claimant can return to his usual work, and thus whether he has established a *prima facie* case of total disability. Once claimant establishes a *prima facie* case, then employer bears the burden of establishing the availability of suitable alternate employment to show that claimant's disability is, at most, partial. It is undisputed that employer did not present any evidence of suitable alternate employment in this case.

ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge