BRB No. 90-1165

VETUS C. BROWN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Mary W. Adelman (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (87-LHC-53) of Administrative Law Judge Michael P. Lesniak denying benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In the course of his employment as a rigger for employer, claimant injured his head, left arm and right knee on March 10, 1986. He claims he was tightening a nut on a metal brace when the wrench slipped and he fell and suffered contusions and lacerations. Unable to return to his regular job, claimant was assigned to light duty in the MRA shop the next day on March 11, 1986. He worked there until March 25 when he stopped working because of his injuries. On April 7, 1986, Dr. Snider, claimant's treating neurologist, diagnosed post-traumatic headaches and prescribed medication. Claimant returned to work in the MRA shop on April 7, 1986, and on April 24, 1986, he returned to his regular department for a job assignment. Emp. Exs. 2, 4, 52, 56; Tr. at 24, 26-28.

Because claimant continued to complain of severe headaches caused by loud noise and

bright lights, he was off work from May 5 to May 28, 1986 and again beginning June 2, 1986. Emp. Exs. 52, 56. He returned for a few days in October 1986 but could not continue, and additions and changes to his medication proved ineffective. Emp. Ex. 56; Tr. at 33. On November 14, 1986, claimant was laid off work in a general reduction in force.

In late April or early May 1987, claimant obtained a supervisory job at the Fort Eustis filling station. On July 7, 1987, employer recalled claimant to the shipyard. On July 21, when claimant reported to work, he informed his supervisor, Mr. Burke, that his doctor had imposed work restrictions. Once informed of claimant's restrictions, Mr. Tabb, the supervisor of employee relations, approved claimant's assigned work. Therefore, on July 21 and 22, claimant worked at the shipyard. Although he did not complain to his supervisor of noise-induced headaches or any other physical problems on either day, he did complain to Dr. Snider, and he did not report to the shipyard on July 23.[1] The next day, claimant reported to the shipyard only for purposes of visiting the clinic and giving his new restrictions to the shipyard physician, Dr. Lenthall. He was informed there was work available within his restrictions and was warned about unauthorized leave. Based on his failure to report to work after July 24, claimant was released from the union rolls on August 3, 1987 (effective July 24, 1987) for being absent without leave for five or more consecutive work days. Emp. Ex. 47 at 16-18.

From the date of the injury, excluding days claimant actually worked, employer paid claimant temporary total disability benefits. It later controverted the claim several times for various reasons. Emp. Exs. 7-9, 11-12. As the result of an agreement reached in February 1987, employer paid claimant temporary total disability benefits from March 25, 1986 through May 3, 1987, excluding days claimant actually worked, and temporary partial disability benefits from May 4, 1987 through July 20, 1987.[2] Emp. Ex. 1. Claimant's compensation was terminated when he was released from duty.

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[1]Claimant worked at Fort Eustis that day. Tr. at 114.

[2]The record contains a memorandum of the verbal agreement between claimant and employer. It calls for a compromise of benefits for the period between June 2 and August 5, 1986. Further, it states:

> Compensation will be paid from October 1, 1986 and continuing contingent upon job placement within ninety (90) days from the date [claimant] completed the [rehabilitation] program (2-6-87). If no job is found at the end of ninety (90) days the payment would then become temporary partial based on an earning capacity of $146.75 per week. . . . This payment will continue for six (6) months, terminating at the conclusion of the period.

Emp. Ex. 77. The memorandum also provides that compensation will be terminated if claimant becomes employed at a comparable average weekly wage or if his restrictions are removed and he is able to perform his usual work. *Id.*

A hearing was held on January 24, 1989 and continued on May 30, 1989, wherein the parties stipulated, *inter alia*, that claimant sustained a work-related injury on March 10, 1986, that his average weekly wage is $277.83, and that there is no objective medical evidence establishing that claimant has an increased sensitivity to noise or light.[3] Decision and Order at 2-3. The parties disputed whether claimant is entitled to reinstatement of temporary partial disability benefits due to his loss of wage-earning capacity from July 23, 1987 and continuing, and whether employer is liable for Dr. Su's medical bill. The administrative law judge found that claimant deliberately chose his Fort Eustis job over his job at the shipyard and that claimant's claim reflects an attempt to supplement his income from the gas station with workers' compensation. Decision and Order at 21. Consequently, he denied reinstatement of benefits. Further, he ordered employer to pay all reasonable costs incident to Dr. Su's treatment. Decision and Order at 22. Claimant appeals the denial of benefits. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in failing to reinstate partial disability benefits. He argues that the administrative law judge improperly rejected Dr. Snider's medical opinion and substituted his own, which is not supported by the evidence. Further, claimant contends employer violated the February 1987 agreement between the parties by recalling claimant to shipyard duty. Finally, claimant avers the administrative law judge violated the Administrative Procedure Act (APA) by failing to explain his analysis of the medical evidence and the rationale for his decision. In response, employer argues that the administrative law judge acted within his discretion in crediting the testimony of employer's witnesses and discrediting claimant's testimony. Moreover, it argues, while the issue of claimant's credibility is relevant, the material issue of the case is claimant's violation of the five-day rule and his subsequent termination. Employer contends the administrative law judge's finding that claimant's termination was justified is supported by substantial evidence, and his decision meets the requirements of the APA.

The APA requires an administrative law judge to adequately detail the rationale behind his decision, analyze and discuss the medical evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); 5 U.S.C. §557(c)(3)(A). In this case, it is evident from reading the Decision and Order that, although the administrative law judge summarized the testimony and a selection of the exhibits of record, he did not analyze and discuss the medical evidence in reaching his conclusions. Decision and Order at 19-21. In his findings of fact and conclusions of law, the administrative law judge does not discuss the medical evidence relating to claimant's work restrictions or his ability to perform his job. Based on the administrative law judge's failure to discuss the relevant medical and vocational evidence and the applicable law, we vacate the denial of benefits and remand the case to him for further consideration.

Despite the specific contentions of the parties, the issue in this case is whether claimant can

[3]Although claimant complained of continuing headaches as of the date of the hearing, he felt they were less severe as a result of his acupuncture treatments with Dr. Su. Tr. at 36.

return to his regular shipyard work. Claimant has the burden of establishing the nature and extent of his disability, and to establish a *prima facie* case of total disability he must show he is unable to return to his usual work. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *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. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). If claimant establishes his inability to return to his regular work, the burden shifts to employer to establish the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer may meet its burden of establishing the availability of suitable alternate employment by offering claimant a job at its facility specially tailored for injured employees, provided the job is necessary work. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where a claimant is discharged from a suitable post-injury job for reasons unrelated to his disability, his employer has succeeded in establishing the availability of suitable alternate employment. *See Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1, 5 (1992); *Walker v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 133 (1980) (Miller, J., dissenting), *vacated and remanded mem. on other grounds*, 642 F.2d 445 (3d Cir. 1981), *decision after remand*, 19 BRBS 171 (1986).

The record contains evidence concerning claimant's ability to return to his usual work which the administrative law judge did not analyze in terms of the relevant law.[4] *See* Emp. Exs. 56, 68, 70-71. For example, Drs. Mounaimne and Snider imposed work restrictions on claimant whereas Dr. Williamson did not. Cl. Ex. 6 at 46-48; Emp. Exs. 56, 70-71. On remand, the administrative law judge must compare claimant's work restrictions to the job requirements to determine whether claimant can perform his usual work. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). He also must determine whether the work to which claimant was assigned upon his return in July 1987 constituted his "usual job."[5] *Manigault*, 22 BRBS at 333-334. If the administrative law judge determines claimant is unable to perform his usual job, then he next must determine whether employer had light duty work at its facility which claimant could perform given his work restrictions.[6] *Darden*, 18 BRBS at 224. If employer shows alternate work is available at the

[4]Claimant contends employer violated the February 1987 agreement and that the agreement is proof of his undisputed inability to return to work at the shipyard. Contrary to claimant's assertion, there is no evidence showing that employer agreed to such a claim. *See* Emp. Ex. 77. Moreover, the informal agreement between the parties is not binding as it does not constitute an approved settlement in accordance with Section 8(i) of the Act. *See, e.g., Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988); 33 U.S.C. §908(i) (1988). In recalling claimant to work at the shipyard, employer did not violate the agreement, and even assuming, *arguendo*, that it did, claimant has no recourse as there are no legal consequences for such an action under the Act.

[5]Claimant testified that on his first day back, after he visited the clinic, he was sent to dry dock to work on some staging. The next day, he was assigned to work with a crew dragging scrap metal from beneath the hull of a ship. Tr. at 48-49.

[6]Although the administrative law judge found there was work at the shipyard available to claimant within his restrictions, the evidence he cited does not support this finding. Decision and Order at 20.

shipyard, then employer has satisfied its burden of establishing the availability of suitable employment, as claimant was terminated for violation of a work rule. *Brooks*, 26 BRBS at 5. Moreover, if claimant was to receive his pre-injury rate for performing the light work at the shipyard,[7] with no loss in hours, then employer also may have established that claimant has no loss in wage-earning capacity and that claimant is not entitled to further compensation. *Swain v. Bath Iron Works*, 17 BRBS 145 (1985); 33 U.S.C. §908(e), (h). If claimant cannot perform his usual job and employer did not have available suitable alternate work at the shipyard, then claimant's termination is irrelevant and, as his job at the Fort Eustis filling station constitutes suitable alternate employment, he may be entitled to reinstatement of his partial disability benefits based on his loss of wage-earning capacity. *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); 33 U.S.C. §908(e), (h).

Although it is within the administrative law judge's discretion to disbelieve claimant's complaints of pain and his version of the facts and to find employer justified in its decision to terminate claimant's employment, the administrative law judge failed to adequately analyze and discuss whether claimant actually could perform his usual work or the work employer offered him.[8] *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *Cotton*, 23 BRBS at 380. Therefore, we remand the case for the administrative law judge to consider claimant's ability to perform his usual job or suitable alternate work at the shipyard, and thus to determine whether claimant suffered any loss in wage-earning capacity after July 23, 1987.

Accordingly, the Decision and Order of the administrative law judge denying benefits is vacated, and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

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BETTY J. STAGE, Chief
Administrative Appeals Judge

Dr. Lenthall's report of July 28, 1987 merely indicates claimant's work restrictions, and statements made by Mr. Burke and Mr. Tabb allege the availability of suitable work without defining it. *See* Emp. Ex. 52 at 137; Tr. at 165-166, 186.

[7]Claimant testified that he was paid approximately $9.00 per hour at the time of his injury and $10.00 per hour when he returned to the shipyard in 1987. Tr. at 61.

[8]Instead, the administrative law judge noted claimant's previous minor injuries and stated they were "so numerous to cause me to doubt his honesty and credibility." Decision and Order at 20. These injuries are not related to the present claim. As such, claimant correctly avers that the administrative law judge's rejection of claimant's present claim based on the number and the lack of severity of past injuries is irrational.

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge