BRB No. 98-1105

ANTHONY CARIA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: May 10, 1999
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Hugh O'Boyle (Foley, Smit, O'Boyle & Weisman), New York, NewYork, for self-insured employer.

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

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PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2271) of Administrative Law Judge Edward J. Murty, Jr., 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 if they 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 was injured during the course of his employment with employer as a freight handler on August 9, 1993. Employer voluntarily paid claimant temporary total disability compensation, 33 U.S.C. §908(b), from September 28, 1993, to May 24, 1994, and permanent partial disability benefits for an impairment of the left leg, 33 U.S.C. §908(c)(2).

Claimant looked for employment on November 21-22, 1996, but he never returned to work. He sought benefits under the Act for permanent total disability based on the combination of his left knee injury and an alleged work-related psychological disability. Employer controverted the claim.

In his Decision and Order, the administrative law judge initially determined the work restrictions imposed by claimant's left knee impairment, crediting the medical opinions of Drs. Magliato and Lerman, whose findings support the conclusion that claimant is unable to return to his usual longshore employment. The administrative law judge next credited the medical opinion of Dr. Aldin over that of Dr. Feretti to find that claimant is not disabled from a psychological standpoint. Based on jobs identified by employer's expert and his personal observations of the work of a security guard in his office building, the administrative judge further found that claimant could obtain employment as a security guard and that employer therefore established the availability of suitable alternate employment as of June 11, 1996. Based on the impairment rating of Dr. Magliato, the administrative law judge found that claimant is entitled to permanent partial disability benefits for a 20 percent disability to his left leg. Accordingly, claimant was awarded temporary total disability benefits from September 28, 1993, to June 11, 1996, and permanent partial disability benefits thereafter for a 20 percent impairment to his left leg.

On appeal, claimant challenges the administrative law judge's finding regarding the extent of his disability. Specifically, claimant contends the administrative law judge erred by failing to apply the Section 20(a), 33 U.S.C. §920(a), presumption when addressing this issue, and by failing to adequately explain why he credited Dr. Aldin rather than Dr. Feretti and claimant's testimony. Finally, claimant argues that employer's vocational consultant, Dr. Stein, failed to ascertain all of claimant's physical limitations or define the precise nature and terms of the job opportunities he identified as establishing the availability of suitable alternate employment. Employer responds, urging affirmance.[1]

Initially, we reject claimant's argument that the administrative law judge erred by failing to apply the Section 20(a) presumption to the issue of the nature and extent of claimant's disability, as it is well-established that the Section 20(a) presumption does not apply to this issue. *See Jones v. Genco, Inc.*, 21 BRBS 12, 15 (1988). Rather, claimant has 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); s*ee also*

[1]On appeal, no party has challenged the administrative law judge failure to specifically address the cause of claimant's alleged psychological disability.

Trask v. Lockheed Shipbuilding & Const. Co., 17 BRBS 56 (1985). Once claimant establishes that he is unable to perform his usual employment duties as a result of his work-related injury, the burden shifts to employer to establish the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions is capable of performing. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). In order to meet this burden, employer must demonstrate that there are jobs reasonably available in the geographic area where claimant resides that he is capable of performing and which he could realistically secure if he diligently tried. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). In addressing this issue, the administrative law judge must compare claimant's physical restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden under the standard set forth in *Palombo*. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

In addressing the nature and extent of claimant's disability, the administrative law judge discussed the medical opinion of Dr. Magliato, an independent examiner for the Department of Labor, who opined that, while claimant is unable to perform longshore duties due to his knee impairment, claimant could perform sedentary employment. CX 3. The administrative law judge also summarized the opinion of Dr. Lerman, a board-certified orthopedic surgeon, who evaluated claimant at employer's request and found that his knee condition would not prevent his performing work of more than a sedentary nature so long as he can minimize continuous trauma to the knee. EX 1-4. The administrative law judge next addressed the psychological evidence, specifically, the opinions of two psychiatrists. Dr. Feretti found claimant totally disabled due to a work-related psychological disorder. CX 1. Dr. Aldin concluded that claimant is not psychologically disturbed and that there is nothing of a psychiatric nature that would prevent claimant from working. Aldin depo.at 7. The administrative law judge found both Aldin and Feretti to be well-credentialed and that there is little basis to choose between their opposite conclusions "except as I relate their opinions to the experiences of every day life." Decision and Order at 3. Thereafter, the administrative law judge noted that claimant had not received treatment for his psychiatric complaints and was not examined by Dr. Feretti until shortly before the formal hearing. The administrative law judge then relied on his personal experiences and that of others in their sixties to find that claimant's complaints sound like those of a "grumpy old man" that are common to the age and do not result in a psychiatric disorder. *Id.* Based on his own experience, the administrative law judge credited Dr. Aldin. With regard to claimant's knee, the administrative law judge stated that employer's expert identified a "number of positions" in the general area which he felt were suitable and which were available. Without specifically discussing the effect of claimant's restrictions on the specific jobs identified, the administrative law judge found claimant was best suited for a position as a security guard. The administrative law judge found this job suitable based on his observations of such a position in his office building.

On appeal, claimant argues that the administrative judge failed to provide adequate reasons for crediting the opinion of Dr. Aldin over the opinion of Dr. Feretti. We agree. Hearings of claims under the Act are subject to the Administrative Procedure Act (APA), which requires that decisions be based on evidence formally admitted into the record. 5 U.S.C. §556(e). Thus, a decision issued based on evidence not formally admitted into the record violates the APA. *See Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984). In the instant case, the administrative law judge violated the APA and thus erred in crediting the opinion of Dr. Aldin over the opinion of Dr. Feretti based on his own life experience and that of others in their sixties, rather than weighing the evidence before him. *See Ross*, 16 BRBS at 225. It is clear in this case that the administrative law judge's conclusion to give greater weight to Dr. Aldin was based on his own experiences rather than on an analysis of the medical findings.[2] The administrative law judge may not substitute his opinion for that of the psychiatric experts. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). In any event, claimant saw both Drs. Ferretti and Aldin for evaluation for trial, and thus, their opinions cannot be distinguished on this basis.[3] Thus, as the administrative law judge failed to provide a rational explanation for his conclusions in weighing the evidence, we vacate his decision to credit Dr. Aldin and remand the case for the administrative law judge to reconsider all the medical evidence relevant to the issue of claimant's alleged work-related psychological disability, make appropriate findings based on the law and evidence, and give a written explanation for the reasons and bases for that determination.

Finally, claimant contends that Dr. Stein, a vocational consultant, failed to ascertain claimant's physical limitations and to specify the precise nature and terms of the job openings which he identified as being within claimant's physical limitations. We disagree. While Dr. Stein's assessment of claimant's limitations did not incorporate the psychological assessment of Dr. Feretti, he relied on the physical limitations diagnosed by Drs. Magliato and Lerman. *See* Stein depo. at 10, 14. *See also Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Moreover, his labor market survey contains the precise nature and terms of the

[2]The administrative law judge concluded his discussion of the psychiatric evidence stating: "My own experience as I become older and grumpler cause [sic] me to lean in the direction of Dr. Aldin's way of thinking." Decision and Order at 3.

[3]Dr. Ferretti did recommend that claimant receive treatment for his condition.

available jobs that he opined are within the work restrictions of Drs. Magliato and Lerman. *See* Stein depo. at 50-67; CX 7. *See also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1998). The administrative law judge, however, did not base his suitable alternate employment finding on the job descriptions provided by Dr. Stein but rather on his personal observations of a security guard. He also did not compare claimant's physical restrictions with the job requirements. Thus, on remand the administrative law judge must reconsider the evidence of suitable alternate employment in light of his findings regarding the physical restrictions placed on claimant as a result of his work-related injury. *See Palombo*, 937 F.2d 70, 25 BRBS 1 (CRT); *Ballesteros*, 20 BRBS 184. His analysis should also address any restrictions due to claimant's psychiatric condition, consistent with his findings on that issue on remand.

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge