BRB No. 05-0212

ROBERT CAPOFARRI	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL, INCORPORATED	)	DATE ISSUED: 11/18/2005
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Jorden N. Pedersen, Jr. (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey, for claimant.

John F. Karpousis (Freehill, Hogan & Mahar, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2002-LHC-2227) 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 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).

This case is before the Board for the second time. Claimant, a maintenance mechanic, injured his head and neck at work on July 9, 2001. Employer voluntarily paid claimant temporary total disability benefits from July 10, 2001, through April 21, 2002. Claimant did not return to work. Claimant was offered a light-duty job at employer's facility as a trailer inspection report (TIR) writer on April 16, 2002, at his pre-injury wages. Claimant asserted that he could not perform this job and sought continuing temporary total disability benefits from April 22, 2002. Initially, the administrative law judge denied the disability benefits sought, finding that employer established the availability of suitable alternate employment through the TIR writer job at its facility. The administrative law judge found that the medical evidence was in equipoise but that claimant could perform the duties of the TIR writer job based on the lay opinions of Messrs. Lopez, Fallon, and Davis.

Upon claimant's appeal, the Board vacated the administrative law judge's finding that employer established the availability of suitable alternate employment at its facility through the TIR writer job. *Capofarri v. Howland Hook Container Terminal, Inc.*, BRB No. 03-0683 (Jul. 13, 2004)(unpub.). The Board held that the administrative law judge improperly concluded that the medical evidence was in equipoise, and erred in not determining which medical restrictions claimant has as a result of his work injuries. The Board further held that the administrative law judge erred in relying on the lay opinions of Messrs. Lopez, Fallon, and Davis, that claimant could perform the TIR writer job, without crediting a particular medical opinion concerning claimant's ability to work post-injury. Thus, the Board remanded the case to the administrative law judge to reconsider whether the TIR writer job at employer's facility was suitable, and if not, to determine whether employer established the availability of suitable alternate employment on the open market.

On remand, the administrative law judge again denied claimant disability benefits, finding that employer established the availability of suitable alternate employment at its facility since claimant was able to perform the TIR writer job at the same wages as his pre-injury job. The administrative law judge found that each medical expert is credible in some ways, though not in others, and noted that their opinions conflict in many instances. The administrative law judge relied on the opinions of Drs. Zhou, Benatar, and Klingon to find the TIR writer job suitable. Claimant appeals the administrative law judge's Decision and Order on Remand.

In the current appeal, claimant argues that the administrative law judge erred in relying on the opinions of Drs. Zhou, Benatar, and Klingon to support his finding that the TIR writer job is suitable for claimant. Claimant also argues that the administrative law judge erred by again failing to delineate claimant's restrictions in order to evaluate whether he can perform alternate work. Employer responds in support of the administrative law judge's decision.

Once, as here, claimant establishes that he is unable to return to his pre-injury employment because of his work injury, the burden shifts to employer to demonstrate 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 and for which he can realistically compete. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer can meet its burden by offering claimant a suitable job in its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Initially, the administrative law judge found that the duties of the TIR writer job required inspecting 50-60 tractor trailers each day by writing certain information on a form attached to a clipboard. Decision and Order on Remand at 17-18. Each inspection took three minutes and required a 120-foot walk around a trailer. The working hours were from 6 a.m. to 3 p.m. with one hour and 20-25 minutes for lunch and two 20 minute breaks. The remainder of the time would be spent sitting in a booth. Employer would accommodate claimant's need for a heating pad but not his need to leave early to attend physical therapy, as claimant could receive this treatment after work. Inspecting 50-60 tractor trailers per day at three minutes per trailer equated to a total work day of between 150-180 minutes (or two and one-half to three hours), according to the administrative law judge. Decision and Order at 18.

We cannot affirm the administrative law judge's finding that the TIR writer job is suitable for claimant. The opinions of Drs. Zhou, Benatar, and Klingon taken together do not support his finding. Dr. Zhou limited claimant to working part-time and walking one hour per day. Thus, Dr. Zhou's opinion does not support the administrative law judge's finding that claimant could perform the TIR writer job on a full-time basis, as the administrative law judge found the job required walking two and one-half to three hours per day. Decision and Order on Remand at 18; Cl. Exs. 14; 19 at 61-62; Emp. Ex. B at 61-62. Dr. Benatar imposed a five to ten minute break each hour, but the administrative law judge found that the job provided only two breaks a day, each typically 20 minutes long, plus a one hour and 20-25 minute lunch break. Decision and Order on Remand at 18; Emp. Ex. C; Tr. at 106. Moreover, Dr. Klingon's opinion does not support the administrative law judge's finding that claimant can drive to and from work and work in

inclement weather.[1] Decision and Order on Remand at 18; Cl. Exs. 19 at 60; 26 at 29; Emp. Ex. B at 60; Tr. at 179, 202-204.

The essential problem with the administrative law judge's finding that the TIR writer job is suitable for claimant is that the administrative law judge did not determine claimant's restrictions and compare them to the duties of the TIR writer job. Where the medical evidence is in conflict, the administrative law judge did not credit any particular set of restrictions on remand or any particular doctor's opinion. Instead, he found each medical expert credible in some ways and not in others. The administrative law judge credited the opinion of Dr. Zhou with less weight because she is a Board-certified internist with no specialty in orthopedics or neurology, but more weight because she is claimant's treating doctor upon employer's referral. Decision and Order on Remand at 12-13; Cl. Exs. 14; 19 at 61; Emp. Ex. B at 61. The administrative law judge found Dr. Benatar's opinion entitled to less weight because he is employer's expert and not a treating doctor, but considerable weight because it is well-reasoned, well-documented, and sufficiently specific. Decision and Order on Remand at 14-15; Emp. Ex. C; Tr. at 173. The administrative law judge found Dr. Klingon's testimony presented a challenge because while it is based on objective findings which would ordinarily entitle it to more weight, many of the other medical experts disagreed with these findings, and the limitations he testified to were not documented in his report. Decision and Order on Remand at 15-16; Cl. Exs. 17; 26 at 28-29, 59.

With respect to Dr. Zimmerman's opinion that claimant was unable to work in any capacity, the administrative law judge credited this opinion with great weight because he is claimant's treating Board-certified orthopedist but less weight because his findings lacked specificity, especially as to claimant's physical restrictions. Decision and Order on Remand at 13; Cl. Ex. 28 at 15-16. The administrative law judge gave great weight to the initial report of Dr. Head, but less weight to his subsequent reports because he only examined claimant at the time of the initial report. Decision and Order on Remand at 14; Emp. Exs. D; M at 37. The administrative law judge found Dr. Jeret's opinion entitled to significant

[1] Dr. Klingon, in response to why he thought claimant probably could not perform the TIR writer job, stated, "Well, the first problem would be travel to and from work. Say if he was taking public transportation or driving, that would enhance the pain." Cl. Ex. 26 at 29. He also stated, "Being on his feet for much of the day, if the weather were inclement, that would, downward spiraling of atmospheric pressure, that would tend to increase the pain, cold weather would tend to increase the pain by virtue of more muscle tightening, and basically it would be unpredictable weather." *Id.* On the other hand, Dr. Benatar stated that claimant could drive as long as he was not taking medications that would affect his driving abilities, was stiff, in pain, or had limited motion. Tr. at 179, 202-204. Dr. Zhou opined that claimant could drive one-half hour to one hour with 10-15 minute breaks before resuming driving if he were not taking narcotic medications. Cl. Ex. 19 at 60; Emp. Ex. B at 60.

weight because it is well-reasoned and logical, yet he did not rely on this opinion at all. Decision and Order on Remand at 16; Emp. Ex. N at 22-24; Cl. Ex. 22. The administrative law judge accurately found that Dr. Freeman did not offer an opinion on claimant's ability to return to work. Decision and Order on Remand at 13-14; Cl. Ex. 27.

We must vacate the administrative law judge's Decision and Order on Remand, and remand this case to the administrative law judge for reconsideration of whether the TIR writer job at employer's facility is suitable for claimant. On remand, the administrative law judge must re-evaluate the medical evidence and the suitability of the TIR writer job in light of the medical evidence he credits, as well as other relevant evidence of record. The administrative law judge must determine what restrictions claimant has as a result of his work injuries, and compare the duties of the TIR writer job to these restrictions. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT)(5th Cir. 2001); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). The administrative law judge may credit all or part of an opinion; he need not credit one particular set of doctor's restrictions over any other, but he must resolve conflicts in the evidence making the necessary findings as to claimant's specific restrictions and explaining the basis for his decision. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). If the administrative law judge finds that the TIR writer job is not suitable for claimant, he must determine whether employer established the availability of suitable alternate employment on the open market by way of its labor market survey and whether claimant has established a loss in his wage-earning capacity.[2] *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997); *see also* 33 U.S.C. §908(c)(21), (e), (h).

[2] The labor market survey, performed by Mr. Lopez, employer's vocational expert, identifies two part-time, as well as four full-time, sedentary inside jobs. Emp. Ex. E. Mr. Lopez explained in his deposition how he arrived at the suitability of these jobs. Emp. Ex. O at 5-8, 21-30.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge