BRB No. 99-0198

ROGER LEON JOHNS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL CONTAINER REPAIR	)	DATE ISSUED: Nov. 2, 1999
	)	
and	)	
	)	
ITT HARTFORD	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Lori A. Carter (Bignault & Carter), Savannah, Georgia, for claimant.

Tracie Grove Smith (Karsman, Brooks & Callaway, P.C.), Savannah, Georgia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1209) of Administrative Law Judge Vivian Schreter-Murray 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).

Claimant, who worked for employer as a container mechanic, suffered a work-related injury to his hands on April 21, 1993, while pulling the tires and brake drums off a chassis. After being diagnosed with bilateral carpal tunnel syndrome, greater on the right hand, claimant underwent a right carpal tunnel release in July 1993. Claimant returned to work without restrictions in April 1994, but complaints of pain in both hands, his shoulders and his neck forced him to stop working on May 12, 1995. Thereafter, claimant filed a claim for benefits under the Act.

In her Decision and Order, the administrative law judge accepted the parties' stipulation, *inter alia*, that claimant reached maximum medical improvement on September 11, 1997. Thereafter, the administrative law judge discredited Dr. Novack's opinion that claimant suffers from an impairment to his cervical region as being unsupported by the objective evidence of record. Next, the administrative law judge rejected Dr. Novack's imposition of work restrictions as receiving no support from the medical evidence, and found that even if claimant established that he were unable to return to his usual employment, employer had established the availability of suitable alternate employment by virtue of its vocational evidence. Thus, having accepted employer's concession that claimant suffers from a 5 percent impairment to each upper extremity, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(1) of the Act, 33 U.S.C. §908(c)(1), for a 5 percent impairment to each upper extremity.

On appeal, claimant contends that the administrative law judge erred by finding that he does not have a residual impairment to his neck as a result of his work injury. Consequently, claimant asserts that the administrative law judge's denial of permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for a loss in wage-earning capacity, in addition to his permanent partial disability compensation under the schedule, was in error. Alternatively, claimant contends that the administrative law judge erred in failing to award claimant permanent total disability compensation for his work-related hand injury. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially contends that the administrative law judge erred in rejecting the opinion of Dr. Novack that claimant suffers from a residual impairment to his neck; relying on Dr. Novack's opinion, claimant thus asserts that he is entitled to continuing permanent partial disability benefits pursuant to Section 8(c)(21) of the Act for a loss in wage-earning capacity. We disagree. 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 & Const. Co.,* 17 BRBS

56 (1985). In the instant case, in finding that claimant does not have a residual impairment to his neck, the administrative law judge accorded little weight to a 1993 MRI which demonstrated equivocal changes at the C5-6 level, as it was discredited by Dr. Greenberg, a board-certified neurologist, in light of subsequent negative tests and evaluations. *See* Cl. Ex. 2. Specifically, the administrative law judge credited a 1997 MRI and a 1996 myelogram of claimant's cervical region, both of which were normal. *See* Cl. Exs. 2, 7. Thus, the administrative law judge rejected Dr. Novack's assessment of a 4 percent impairment to claimant's neck as being contrary to the objective evidence. Moreover, as there was no evidence in the record indicating that claimant suffers from any specific cervical disorder, the administrative law judge found that Dr. Novack's assessment, based solely on subjective complaints, was contrary to the American Medical Association *Guides to the Evaluation of Permanent Impairment*.

As these conclusions are rational and supported by the evidence, the administrative law judge committed no error by declining to credit the opinion of Dr. Novack. The administrative law judge's determinations are within her authority as a factfinder, and the negative objective test results of record constitute substantial evidence supporting the administrative law judge's finding that claimant has no impairment to his neck. *See, e.g., Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990), *aff'd*, 948 F.2d 774, 25 BRBS 51 (CRT)(D.C. Cir. 1991). Accordingly, we reject claimant's contentions of error in this regard and affirm the administrative law judge's findings on this issue.

Claimant next contends that the administrative law judge erred in not awarding claimant permanent total disability compensation. Specifically, claimant asserts that the administrative law judge erred in failing to address the totality of the evidence regarding claimant's capacity to perform suitable alternate employment. Claimant alternatively argues that if suitable alternate employment was established, claimant met his burden of showing that he diligently yet unsuccessfully searched for employment, and therefore, he should be entitled to permanent total disability under the Act. *See* 33 U.S.C. §908(a). For the reasons that follow, we vacate the administrative law judge's denial of permanent total disability compensation, and remand the case for reconsideration.

In the event of an injury to a scheduled member, a claimant's permanent partial disability under Section 8(c) is confined to the schedule, and wage-earning capacity is irrelevant. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). If claimant establishes that he is permanently or temporarily totally disabled, however, he may receive benefits under either Section 8(a) or (b) of the Act, 33 U.S.C. §908(a), (b) . Where claimant establishes that he is

unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to demonstrate the availability of jobs within the geographic area in which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing and for which he can compete and reasonably secure. *New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see P&M Crane Co. v. Hayes,* 930 F.2d 424, 24 BRBS 166 (CRT), *reh'g denied,* 935 F.2d 1293 (5th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). If employer establishes the availability of suitable alternate employment, claimant nevertheless can prevail in his quest to establish total disability if he demonstrates that he diligently tried and was unable to secure such employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). Claimant does not have to seek the exact jobs identified by employer to establish due diligence. *See Palombo,* 937 F.2d at 74, 25 BRBS at 8 (CRT).

In determining that claimant's recovery was limited to the schedule provisions of Section 8(c)(1), the administrative law judge did not specifically state that claimant is able to return to his former employment. Dr. Novack, in his September 11, 1997 report, opined that claimant should be able to perform a medium level job, which would be limited to lifting, carrying, pushing and pulling in the 25-50 pound range, cautioning that due to claimant's bilateral carpal tunnel syndrome, repetitive fine motor coordination type movements with his hands could only be performed as tolerated. *See* Cl. Ex. 9; Emp. Ex. 1 at 21. These activities are below the physical capacity required of a container mechanic, claimant's former employment with employer.[1] In her decision, the administrative law judge declined to credit this opinion, finding that there was no credible basis for Dr. Novack's imposition of these physical limitations, as the most recent medical evidence suggested that claimant's arm condition was better in September 1997 than it was in May 1994 when claimant returned to work without restrictions. The administrative law judge further found that even if claimant were unable to return to his former employment, employer's vocational evidence, which identified four jobs within Dr. Novack's restrictions, established the availability of suitable alternate employment, and that a one time application for these jobs by claimant was insufficient to establish a diligent

[1]Employer's vocational counselor, William Hagen, testified that the work of a container mechanic involves heavy lifting of up to 150 pounds and pushing of up to 300 pounds. *See* Tr. at 89.

employment search. Thus, by discrediting these physical limitations, the administrative law judge essentially found that claimant had not established that he was unable to return to his former employment duties with employer, but that in any event, suitable alternate employment was available to him.[2]

In reaching this conclusion, however, the administrative law judge did not fully discuss the contrary evidence of record. The reports of Drs. Greenberg, Baker and Holland all note claimant's symptoms of bilateral carpal tunnel syndrome subsequent to 1995. In his June 17, 1997 report, Dr. Kamaleson opined that the right carpal tunnel release had failed, and suggested that claimant consider releases on both sides. Cl. Ex. 4. In her discrediting of Dr. Novack's limitations, the administrative law judge specifically cited Dr. Baker's assessment that claimant had excellent upper extremity strength. In his July 17, 1997 report, however, Dr. Baker acknowledged that claimant's carpal tunnel syndrome had gotten worse, that his hands were extremely stiff, and that he was barely able to move them. *See* Cl. Ex. 7. The administrative law judge, in her decision, relied on the physical evaluation performed in February 1997 which noted that claimant was able to lift and push up to 96 pounds. This report indicates, however, that claimant complained of pain throughout these endeavors, and after performing a reaching activity he collapsed on the floor, crying in pain, and was unable to complete the evaluation. Cl. Ex. 6. Moreover, while claimant returned to his former employment from April 1994 until May 1995, the administrative law judge did not consider claimant's testimony that he experienced excruciating pain in his hands throughout this period. Tr. at 22-23.

We hold that the administrative law judge's decision on this issue cannot be affirmed since it fails to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §554. Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind her decision and specify the evidence upon which she relied. *See*

[2]On appeal, claimant contends that the parties stipulated that claimant cannot return to his usual employment, *see* Claimant's brief at 9, but refers to no citation to support this assertion, and the transcript indicates no such stipulation. *See* Tr. at 4-6. The administrative law judge mentioned no such stipulation in her decision.

Ballesteros v. Willamette W. Corp., 20 BRBS 184 (1988); *see also Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981). Failure to do so will violate the APA's requirement for a reasoned analysis. *Ballesteros*, 20 BRBS at 187; *see Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, the administrative law judge failed to consider all of the evidence of record relevant to the issue of whether claimant is capable of resuming his usual employment duties with employer. Accordingly, we vacate the administrative law judge's decision regarding the ability of claimant to return to his usual employment, and remand the case for a reasoned analysis of all the medical evidence on this issue.

Claimant next challenges the administrative law judge's finding that, assuming he was not able to return to his usual employment, employer met its burden of demonstrating suitable alternate employment opportunities based on the labor market survey submitted into evidence. Employer's job market survey listed four available jobs, specifically those of an auto-body repair helper, maintenance utility technician, molder operator, and machine operator, all of which were alleged to involve either light or medium level work. Cl. Ex. 14. Mr. Hagen, employer's vocational expert, testified that in identifying these jobs as suitable, he considered the physical limitations placed on claimant by Dr. Novack. *See* Tr. at 90. However, the administrative law judge did not address claimant's testimony that he was not allowed to apply for two of the jobs listed in the survey, the molder operator and the machine operator, because he was told that the jobs were outside his physical limitations. *See* Tr. at 45-47. Moreover, the administrative law judge did not consider the effect claimant's limited education and psychological problems had on his employability, which, if credited, could support a finding that employer failed to establish the availability of suitable alternate employment. Mr. Hagen testified that in preparing the labor market survey, he did not take into consideration claimant's educational level or his ability to read, write and comprehend. Tr. at 99. Claimant testified that he never finished high school, has roughly a seventh grade education, does not have a GED, and does not read, in part, because of his lack of education. Tr. at 15, 34-35. In his February 24, 1997 psychological report, Dr. Swenson indicated that tests had to be administered to claimant orally due to his limited education. *See* Cl. Ex. 8. One of the jobs listed in employer's job survey, a machine operator for Fort James Corporation, required a high school diploma or a GED. Cl. Ex. 14. In addition to claimant's limited education, Dr. Swenson reported that based on the results of claimant's Behavioral Assessment and Pain Inventory, claimant's psychological disability was severe, noting that claimant suffers from deep depression and hysteria as a result of his work-related injury. Dr. Swenson recommended an intense, highly structured psychological rehabilitation program, which would initially include hospitalization. *Id.* As the administrative law judge

failed to consider the effect of claimant's limited education and psychological problems on his employability in making her suitable alternate employment determination, we vacate the administrative law judge's finding in this regard, and remand the case for the administrative law judge to reconsider whether suitable alternate employment has been established taking into account both claimant's physical and mental limitations. *See, e.g., White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 13 (1995).

Lastly, in finding that claimant was not entitled to permanent total disability compensation, the administrative law judge summarily found that a one time application for the jobs listed on employer's job survey did not constitute a diligent search for employment by claimant. *See* Decision and Order at 9. In rendering her decision, however, the administrative law judge did not consider claimant's contention that he sought employment but was refused work due to his physical restrictions and his limited education. Claimant testified that upon receiving employer's job survey, he tried to obtain employment at each of the four jobs listed. He stated that when he went to apply for the auto-body repair job at Dan Vaden companies, he was told that no job was available, although he was allowed to fill out an application. Claimant further testified that the contact person noted on the job survey told him that she knew nothing about the job survey. Tr. at 43. When claimant applied for the maintenance utility technician job at Carson Products, he was told that no jobs were available and they weren't taking applications. Tr. at 43-44. Claimant applied for the molder operator at Xylo Moldings, but when he informed them of his carpal tunnel syndrome, he was told that there was no suitable job for him from a physical standpoint. Tr. at 45-46. Claimant also attempted to apply for the machine operator position with Fort James Corporation, but was not given an application because he did not have a high school diploma and was told that the job demanded heavy lifting outside his physical restrictions. Tr. at 46-47. As the administrative law judge failed to address all the evidence on this issue, we vacate the administrative law judge's finding that claimant failed to establish that he diligently sought employment. If, on remand, the administrative law judge finds that employer established the availability of suitable alternate employment, she must make specific findings regarding the nature and sufficiency of claimant's efforts to seek employment. *See Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

Accordingly, the administrative law judge's determination that claimant did not establish entitlement to permanent total disability compensation is vacated, and the case is remanded for further findings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge