BRB No. 93-990

GLORIA SELDON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: ________________
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Modification of Robert M. Glennon, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Modification of Administrative Law Judge Robert M. Glennon 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 the 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, a former structural engineer, who was awarded temporary total disability compensation for a 1984 back and wrist injury in an earlier proceeding, sought to modify her award of benefits to one for permanent total disability compensation. *See* 33 U.S.C. §922. In his Decision and Order on modification, the administrative law judge determined that, although it was undisputed that claimant was unable to perform her usual work for employer as a structural engineer, claimant was limited to permanent partial disability compensation because, as of August 3, 1992, employer had met its burden of establishing available suitable alternate employment by offering claimant an

office cleaning job in Department 260 of its facility, which was established to work with restricted duty employees.[1] Claimant appeals, contending that the administrative law judge's determination that the job offered to her at employer's facility was physically suitable is not supported by substantial evidence, and that the administrative law judge's discussion of this issue fails to comport with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (APA). Employer responds urging affirmance.

Initially, we reject claimant's APA argument. Inasmuch as the administrative law judge summarized the relevant evidence in pages 5 through 9 of his Decision and Order and identified the evidence on which he was relying on page 15, we hold that the administrative law judge's suitable alternate employment analysis substantially complies with the requirements of the APA. Nonetheless, we agree with claimant that the administrative law judge's finding that employer established the availability of suitable alternate employment based on the offer of a maintenance job at its facility on August 3, 1992 cannot be affirmed because it is irrational and not supported by substantial evidence. The record reflects that in January 1992, the custodial job ultimately held to constitute suitable alternate employment by the administrative law judge was available but determined to be outside of claimant's restrictions both by the shipyard and claimant's treating physician, Dr. Kelly. Rx. 14a at 19; Rx. 9 at 11. According to Mr. Witt, employer's restricted duty coordinator, in August 1992 that same job was offered to claimant, allegedly because statements Mr. Witt read in two paragraphs of Dr. Kelly's deposition, Rx. 9 at 20, led him to believe that claimant could perform repetitive bending 4 hours per day. *See* Rx. 14a at 20, 30; Rx. 14b at 8, 10. Mr. Witt indicated that the two paragraphs in question were the sole basis for his belief that claimant could perform the job and that he had otherwise disregarded Dr. Kelly's restrictions. Rx. 14a. at 21, 30.

Contrary to Mr. Witt's interpretation of Dr. Kelly's deposition, however, Dr. Kelly stated that claimant could perform repetitive twisting, not repetitive bending, throughout the course of the day for 4 hours. Moreover, Dr. Kelly specifically testified that claimant was restricted from bending for more than 1 hour a day, and that she cannot bend repetitively at any one time or bend excessively forward to pick up something close to the floor. Rx. 9 at 13. In addition, after reviewing the relevant position description, Dr. Kelly specifically opined that claimant would not be able to handle the job because "it requires quite a bit of

[1]The administrative law judge also found that employer did not establish suitable alternate employment based on a vocational survey conducted by Conservco, a medical cost management consulting firm, and that employer is not entitled to 33 U.S.C. §908(f) relief. These findings are unchallenged on appeal.

bending and lifting, cleaning out trash cans, and cleaning under things." Rx. 9 at 11.[2] Although Dr. Kelly did state, in response to a hypothetical question posed by employer's counsel, that if the job afforded claimant the flexibility not to do excessive twisting or excessive bending, she probably would be able to handle this position, Rx. 9 at 17, Mr. Witt's description of the required job duties belies a finding that the job offered to claimant offered this flexibility. Mr. Witt indicated that claimant and at least one other person would be assigned to an engineering floor where as many as 150 desks and up to 3 restrooms were located and where she would be required to empty all the trash cans into black plastic bags and then take those plastic bags to the elevators. Rx. 14a at 24. In addition, claimant would be required to pick up anything that was on the floor, to vacuum two or three times per week, to clean the rest rooms, including mopping the restroom floor, to sweep, and to dust the desks once per week. Rx. 14b at 5, 8. Although Mr. Witt testified that claimant would have the opportunity to rest, that she could take perhaps 5 minute intervals between emptying the trash liners, Rx. 14b at 12, and that employer would be somewhat tolerant of absenteeism, *id.* at 15, he also conceded that emptying trash cans and replacing the liners involves repetitive bending, as would cleaning the toilet bowls to some extent. *Id.*, at 8, 14. Moreover, Mr. Witt deposed that if something such as a pencil were on the floor she would have to pick it up contrary to Dr. Kelly's restrictions. *Id.* at 13.

In finding that employer met its burden of establishing the availability of suitable alternate employment, the administrative law judge relied upon Mr. Witt's testimony to conclude that the job offered to claimant on August 3, 1992 would not require physical activities beyond the specific medical limitations imposed by Dr. Kelly. Decision and Order at 8, 15. We conclude, however, that the administrative law judge's reliance on this testimony was misplaced, given Mr. Witt's apparent confusion regarding Dr. Kelly's bending restrictions. Inasmuch as Dr. Kelly indicated that claimant could bend no more than 1 hour per day and could not bend repetitively at any one time or bend excessively forward to pick up something close to the floor, which the maintenance job would require claimant to do, and in addition specifically opined that claimant would not be able to perform the tendered job based on his review of the job description, it was irrational for the administrative law judge to find that the maintenance job as described by Mr. Witt was physically suitable for claimant. Accordingly, we reverse the administrative law judge's suitable alternate finding and modify his Decision and Order on modification to reflect claimant's entitlement to permanent total disability compensation. Inasmuch, however, as the administrative law judge commenced the award of permanent disability compensation as of August 3, 1992, based on his finding of suitable alternate employment, without making a specific finding as to when claimant's condition reached permanency, we remand the case to allow him to determine the date on which the award of permanent total disability compensation is to commence.

Accordingly, the administrative law judge's finding that employer established the availability of suitable alternate employment is reversed, and his Decision and Order on modification is modified to reflect claimant's entitlement to permanent total disability compensation. The case is remanded for further consideration of the date claimant's condition reached permanency consistent with this opinion.

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[2]Dr. Kelly also indicated that claimant could do no climbing, working in tight places, or lifting over 20 pounds with the right hand. The tendered job does not conflict with these restrictions.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge