BRB No. 96-0205

WILLIE L. DAVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEACO	)	DATE ISSUED:
	)	
and	)	
	)	
SIGNAL ADMINISTRATION, INCORPORATED	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Eugene C. Brooks, IV, Savannah, Georgia, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-2585) of Administrative Law Judge Edward J. Murty, Jr., 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 findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On August 15, 1990, while operating a forklift for employer, claimant hit his head on an overhead guard and sustained injury to his cervical spine. A cervical discectomy at C6-7 was performed on October 29, 1990. Claimant testified that, following his recovery and participation in a work hardening program, he attempted to return to work on three occasions in June and July 1991, but was unable to perform his assigned duties which required heavy exertion. Thereafter, he was

granted a disability retirement through his union on August 13, 1991. Employer voluntarily paid temporary total disability compensation to claimant from August 29, 1990, through July 1, 1991, and from July 19, 1991, through February 6, 1992, at the rate of $561.42 per week and permanent partial disability compensation from February 7, 1992 through July 29, 1993, at the rate of $283.07 per week. Claimant sought permanent total disability compensation under the Act, as well as penalties and interest on past due compensation, arguing that employer had not made its voluntary payments of compensation at the correct rates.

The administrative law judge denied the claim for permanent disability benefits, finding that claimant was capable of performing his usual work as of the time he reached maximum medical improvement on June 28, 1991, and that he had been voluntarily paid the benefits due from the date of his injury until that date consistent with the district director's determination that claimant had an average weekly wage of $991.63 and a loss of wage-earning capacity of $824.14.

Claimant appeals the denial of benefits, contending that the administrative law judge committed reversible error in excluding relevant evidence regarding the extent of his disability from admission into the record. Claimant also asserts that the medical evidence and his failed attempts to return to work establish a *prima facie* case of total disability, and that the evidence is insufficient to establish suitable alternate employment realistically available to claimant at the time he reached maximum medical improvement. Additionally, claimant maintains that the administrative law judge failed to provide any explanation as to the basis for his finding that claimant had an average weekly wage of $991.63 except to refer to the computations made by the district director, and asserts that he should have been awarded temporary total disability compensation based on 66 and 2/3 percent of an average weekly wage of $1,094.43. Claimant alternatively asserts that even if the administrative law judge properly determined that his average weekly wage was $991.63, he nonetheless has been substantially underpaid because of employer's unauthorized practice of taking credits for the container royalty, vacation and holiday pay claimant received during his period of temporary total disability and treating these payments as if they established a post-injury wage-earning capacity. Employer responds, urging affirmance.

We initially address claimant's assertion that administrative law judge erred in excluding from the record the Job Description for Physician/Pension Disability prepared by claimant's union, Local 1414, as well as claimant's testimony relating to his understanding of this document and Dr. Novack's report of July 19, 1992, submitted in support of claimant's disability pension. The administrative law judge has great discretion concerning the admission of evidence, *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988), and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *Champion v. S & M Traylor Brothers*, 14 BRBS 251 (1981), *rev'd on other grounds*, 690 F.2d 285, 15 BRBS 33 (CRT)(D.C. Cir. 1982). We conclude that on the facts presented the administrative law judge did not abuse his discretion in excluding this evidence. Rather, he reasonably determined that claimant's and the union's understanding of the Collective Bargaining Agreement (CBA) and interpretation of the terms was irrelevant, given that the record contained the contract itself. Moreover, the administrative law judge rationally found that introduction of Dr. Novack's report was

unnecessary as the record contained his deposition. Tr. at 29-31, 48. Claimant's argument that this evidence was wrongfully excluded is therefore rejected.

Claimant also contends that in finding that claimant was able to perform his usual work, the administrative law judge erroneously relied on the job descriptions authored by Ms. Favaloro, employer's vocational expert, which do not exist as separate and distinct positions, but rather are part and parcel of the much larger description for a general longshoreman which has much broader physical demands. In addition, claimant avers that the administrative law judge erred in failing to explain why he discounted the broader and more inclusive definition of a longshoreman contained in the Department of Labor's Dictionary of Occupational Titles, CX-88, which lists physical demands such as climbing which both Drs. Novack and Baker indicated that claimant should not perform. Moreover, claimant contends that the administrative law judge erred in failing to address claimant's arguments that Ms. Favaloro's opinion was deficient because she failed to account for the contract provisions of the CBA which forbids workers, such as claimant, who are using prescription medications which could interfere with the safety of their jobs from working, EX-24 at 27, and failed to inform Dr. Novack of this prohibition when she sought his approval of the positions she identified as suitable for claimant. Claimant also asserts the administrative law judge ignored relevant portions of Dr. Novack's deposition testimony and medical reports which support his position that he is not capable of performing the heavier aspects of longshore work, as he is limited to medium level work with limitations on overhead lifting and climbing, CX-102 at 98-99, 119-120; CX-8, as well as Dr. Baker's opinion to the same effect, CX-6, 7. Finally, claimant argues that the administrative law judge failed to consider the deposition testimony of Dr. Swenson, the psychologist who worked with Dr. Novack's work recovery program, which indicated that claimant was highly motivated, not seeking secondary gain, and truly experiencing pain which prevented his return to longshoring, CX-103, contrary to the finding made by the administrative law judge.

After review of the administrative law judge's Decision and Order in light of the record evidence and the arguments raised by claimant on appeal, we hold that the administrative law judge's denial of permanent disability benefits cannot be affirmed because he neglected to fully consider and weigh all of the relevant evidence consistent with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Notably, the administrative law judge did not address evidence relevant to several of claimant's arguments raised below and on appeal. In finding that claimant was able to perform his usual longshore work as of the date of maximum medical improvement, the administrative law judge noted that on June 5, 1991, claimant had been cleared for a return to work by Dr. Baker, the neurologist who performed claimant's discectomy on October 29, 1990, subject to final approval from Dr. Novack, which he gave effective June 28, 1991. The administrative law judge further noted that Dr. H. Clark Deriso, who examined claimant on September 17, 1991, could find no reason why claimant could not do longshore work. Based on Dr. Novack's November 11, 1993, affirmation in writing that the exertional requirements for a hook-on man, tie-on man, lock man, water boy, flagman, hustler driver and forklift driver, as described by employer's vocational expert, Nancy Favaloro, were suitable for claimant, and Ms. Favaloro's representation that such jobs were regularly available to workers with an "M" card or lower from the time he reached maximum medical improvement, the administrative law judge found that there has been work available in

claimant's usual job as a longshoreman which he has been able to perform since the time that he reached maximum medical improvement. Decision and Order at 2; Tr. at 172-174, 181, 185; EX-1, 7.

In finding that claimant could perform his "usual work," however, the administrative law judge never explicitly identified claimant's "usual" job duties within the range of longshoring jobs performed on the waterfront. A conclusion that claimant is able to return to his usual work requires a determination as to the job duties performed prior to his injury and a finding that these duties are within claimant's medical restrictions. *See, e.g., Mangault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). In this case, the administrative law judge did not specifically discuss the fact that when claimant was released to return to work in July 1991, he was limited to medium level work with lifting and climbing restrictions, CX-7, 8, and the effect of these restrictions on the jobs claimant was previously able to perform. Although his decision appears to recognize that claimant could not perform all possible longshore jobs, the administrative law judge's denial of benefits rests on the conclusion that longshore jobs within claimant's restrictions were available which claimant had the seniority to obtain. The administrative law judge did not, however, address evidence regarding claimant's realistic ability to "pick and choose" longshore jobs. Specifically, although claimant argued below that Ms. Favaloro's opinion was insufficient to establish claimant's ability to perform his usual work because it failed to account for the CBA's contract provisions regarding the use of prescription drugs and the loss of seniority where assigned work is refused, EX-24, the administrative law judge did not address this argument. Moreover, he did not address claimant's post-hearing affidavit of December 17, 1993, which had been submitted to show that Ms. Favaloro's job descriptions and video, allegedly depicting the available waterfront jobs which fell within claimant's limitations, did not accurately portray the exertional requirements of claimant's usual duties.[1]

In addition, he did not consider Dr. Novack's deposition testimony that claimant was not capable of performing his usual job as a longshoreman because some of the requisite duties were not within his restrictions, CX-102 at 98, 114, 119, 120, or reconcile Dr. Novack's deposition testimony that claimant should not drive forklifts due to their excessive vibration, CX-102 at 98, 99, with his subsequent approval of the forklift driving position described by Ms. Favaloro on November 11,

[1]Claimant also reiterates the argument made below that Ms. Favaloro's opinion is deficient because she wrongfully assumed that claimant had an "L" card, when in actuality he had relinquished his "L" card after his retirement; under the terms of the Collective Bargaining Agreement, claimant's seniority status could be reinstated at any time he was on workers' compensation. EX-24. We reject claimant's assertion that Ms. Favaloro's opinion is deficient because she failed to advise potential employers of claimant's use of pain medication or all of his restrictions. The Act does not require that such information be communicated to prospective employers. *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990). Finally, we reject claimant's assertion that because Ms. Favaloro is a professional vocational expert witness, her testimony is inherently unreliable. The decision to credit a witness is within the purview of the administrative law judge. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990).

1993, EX-1. The administrative law judge also did not address the opinion of claimant's vocational expert, William Sabo, who found that claimant was unemployable, Tr. at 117, 125, CX-86. In light of the administrative law judge's failure to consider and weigh the conflicting evidence in the record and to address the specific arguments which claimant raised, we vacate his finding that claimant was capable of performing his usual work as of the date of maximum medical improvement. The case is remanded for reconsideration of this issue consistent with the requirements of the APA. *See McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). If on remand the administrative law judge finds that claimant has established a *prima facie* case of total disability because he is unable to perform his usual work, he must then determine whether employer established suitable alternate employment within claimant's restrictions.[2]

We further conclude that the administrative law judge's finding that claimant was properly paid the amount of temporary total disability compensation due from the time of his injury until June 28, 1991, cannot be affirmed. Initially, the administrative law judge stated that he was accepting the district director's average weekly wage determination, EX-14,[3] because he did not have sufficient proof of claimant's earnings in the 52-week period prior to his injury to enable him to make this determination. The record, however, contains W-2 forms and income tax returns which document claimant's earnings during the relevant period from which this determination could be made. CX-47, 48. Accordingly, we vacate the administrative law judge's average weekly wage finding and remand for reconsideration of this issue in light of this evidence.

In addition, the administrative law judge stated that he was accepting the district director's computation of the benefits due and that the proper compensation had been paid. The district director's calculation, EX-14 at 2, however, does not comport with applicable law. The district director concluded that while the parties agreed that claimant's total earnings for the 52-week period prior to his injury was $51,564.76 yielding an average weekly wage of $991.62, compensation based on that rate was only due for the period between the date of injury and December 15, 1990, at which time claimant received a total of $7,773.50 for his annual container royalty, holiday, and vacation pay. Dividing the $7,773.50 which claimant received by 52 weeks, the district director determined

[2]If claimant is not able to perform all of the longshoring jobs he held pre-injury, his ability to perform some jobs may be relevant to suitable alternate employment if the jobs were realistically available to claimant.

[3]This exhibit is the Memorandum of Informal Conference prepared by the district director's office and submitted into evidence by employer. This document is not evidence of claimant's average weekly wage. It is not clear, moreover, that this document should be part of the record, since the regulations explicitly prohibit the district director from transmitting it to Office of Administrative Law Judges, 20 C.F.R. §702.317(c), and while a party may retrieve materials from the administrative file for submission to the administrative law judge, the work product of the district director is excluded, 20 C.F.R. §702.319. In any event, the administrative law judge cannot abdicate his duty under the Act and APA to independently evaluate the evidence and render findings supported by the record.

that claimant had a wage-earning capacity of $149.49 per week. Subtracting the $149.49 figure from claimant's average weekly wage of $991.62, he then determined that claimant had a wage-earning capacity of $842.14 entitling him to compensation based on two-thirds of that amount or $561.43 per week from December 15, 1990 until December 15, 1991, at which time the figure would again be adjusted based on claimant's receipt of his annual vacation, holiday and container pay. This calculation of the benefits due is contrary to law, as it is premised on the theory that the container royalty, holiday and vacation pay which claimant received while he was totally disabled are the equivalent of wages which can be credited and used to reduce claimant's average weekly wage, a theory which has been rejected by the Board and courts. *See Sproull v. Director, OWCP*, 86 F.3d 895 (9th Cir. 1996); *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, No. 95-1902 (4th Cir. Sept. 10, 1996). Accordingly, we vacate the administrative law judge's determination that claimant was correctly paid the temporary total disability due. Claimant is entitled to temporary total disability compensation based on 66 and 2/3 percent of the average weekly wage which the administrative law judge determines is applicable on remand.[4]

[4]We reject claimant's suggestion that this case be reassigned to another administrative law judge on remand, as claimant failed to demonstrate that the administrative law judge was biased. *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98, 100 (1988).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge