BRB No. 91-1967

JAMES M. ANDERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING AND CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order After Remand of James J. Butler, Administrative Law Judge, United States Department of Labor.

William C. Decker, Enumclaw, Washington, for claimant.

Russell A. Metz (Metz, Frol & Jorgensen), Seattle, Washington, for self-insured employer.

Samuel Oshinsky, Counsel for Longshore, and Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Employer appeals the Decision and Order After Remand (83-LHC-1350) of Administrative Law Judge James J. Butler 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). Oral argument was heard in this case on August 2, 1994, in Seattle, Washington.

This is the second time this case has been before the Board. To briefly recapitulate, claimant was injured on May 4, 1979, while moving a machine during the course of his employment as a pipefitter for employer. Claimant did not work from May 5, 1979, until November 1, 1981, during which time employer paid temporary total disability benefits. On November 2, 1981, claimant began work for a second employer which lasted three and one-half months. Thereafter, employer paid temporary total disability benefits from February 18 to May 13, 1982, when claimant began work with a third employer, and temporary partial disability compensation from June 15, 1982, until November 29, 1982. Claimant underwent a laminectomy and discectomy at L4-5, L5-S1 on February 3, 1983, and a second laminectomy at L4-5 and L5-S1 on August 2, 1983. Claimant has not returned to work since the August 1983 surgery.

In his first Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on August 10, 1979, that claimant could not perform his usual job, and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability compensation. Employer appealed to the Board. *Anderson v. Lockheed Shipbuilding & Construction Co.*, BRB No. 85-909 (April 30, 1990)(unpublished). The Board held that the administrative law judge's failure to analyze and discuss the relevant vocational evidence regarding the availability of suitable alternate employment violated the Administrative Procedure Act's requirement for a reasoned analysis. The Board, therefore, remanded the case to the administrative law judge to consider and discuss all of the evidence relevant to the issue of suitable alternate employment and to set forth the reasons for the acceptance or rejection of such evidence.

On remand, the administrative law judge determined that claimant was not qualified for the four employment positions set forth by employer's vocational expert. The administrative law judge also accepted the testimony of claimant's vocational expert regarding claimant's ongoing vocational training and progress, finding that his rehabilitation efforts and other factors made two of the jobs "inappropriate." Accordingly, the administrative law judge found that employer failed to establish the availability of suitable alternate employment, and reinstated his award of permanent total disability benefits to claimant.

On appeal, employer challenges the administrative law judge's determination that it failed to establish the availability of suitable alternate employment. The Director, Office of Worker Compensation Programs (the Director), has filed a brief in response to employer's appeal, urging affirmance of the administrative law judge's decision. Claimant has not filed a response brief.[1]

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 and Construction Co.*, 17 BRBS 56 (1985). Where, as in the instant case, a claimant establishes that he is unable to perform his usual employment, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). Employer must establish realistic, not theoretical, job opportunities; for the job opportunities to be considered realistic, employer must establish their precise nature, terms and availability. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). In considering whether employer has established the availability of suitable alternate employment, the administrative law judge must determine whether claimant is physically capable of performing the positions identified by employer. *See Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); *Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 (1984).

In the instant case, employer initially contends that the administrative law judge erred in rejecting the testimony of Ms. Meeks, its vocational consultant, which, employer avers, was sufficient to establish the availability of suitable alternate employment which claimant is capable of performing. Specifically, employer asserts that Ms. Meeks, after taking into consideration the results of a variety of aptitude tests, claimant's prior work and educational history, and the physical restrictions placed on claimant by Dr. Mayon,[2] identified three specific positions, *i.e.*, alcohol abuse counselor, benefits assistant and clerk,[3] which she determined were appropriate for claimant.

[1]We note that claimant's counsel, at the oral argument, yielded to the Director. *See* oral argument transcript at 6-7.

[2]Dr. Mayon opined that claimant, although capable of working an eight-hour day, is limited to lifting not greater than 25 pounds and cannot engage in an occupation which involves extensive walking, stooping, or driving.

[3]Ms. Meeks described these positions as follows:

The alcohol abuse counselor position required only a high school degree; although

Employer asserts that the administrative law judge's subsequent rejection of this testimony is both irrational and unsupported by the record. We agree that the administrative law judge's rejection of these jobs cannot be affirmed, as the administrative law judge's reasoning is not supported by the record. The administrative law judge considered each of the specific positions identified by Ms. Meeks, but found them unsuitable for claimant. Specifically, the administrative law judge found that the alcohol abuse counselor position was not suitable for claimant because claimant did not have the necessary certification, that the clerk positions may have been beyond claimant's physical capabilities, and that the veteran's benefits assistant's position may have required veteran's status, which claimant does not have.

The administrative law judge's findings in this case regarding the suitable alternate employment positions identified by employer's consultant are not supported by the record as a whole. The administrative law judge rejected the alcohol abuse counselor position because he believed that claimant lacked the necessary credentials, *i.e.*, state certification, to obtain the position. Ms. Meeks specifically testified, however, that this position did not require certification; rather, the job specifications required only a high school diploma plus the intent to acquire certification within two years. Transcript at 58. Although the administrative law judge noted Ms. Meeks' acknowledgement that applicants for this position who were certified may have a "competitive edge" in obtaining the position, the administrative law judge failed to address Ms. Meeks' subsequent statement that claimant's previous experience in the field may outweigh such certification.[4] *Id.* at 66. Additionally, the administrative law judge, in rejecting this position, relied in part on Mr. Mola's independent assessment that claimant was not qualified for this position. However, Mr. Mola, claimant's vocational expert, did not offer testimony regarding the specific employment positions

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certification was preferred, it was waived upon agreement to obtain such credentials within two years. *See* transcript at 58. Ms. Meeks believed that claimant was a serious contender for such a position based upon his academic course work and his two and a half years working as an alcohol counselor in California. *Id.* at 64.

The two clerk positions with the State of Washington were entry level positions. The first position required filing, tabulating, cross-checking, sorting, and using standard office equipment. The second position was responsible for assigned clerical duties. Ms. Meeks opined that claimant was qualified for these positions based upon prior employment as a clerk at Fort Lewis and his course work completed at Green River College. *Id.* at 59.

Lastly, the position of veteran's benefits assistant involved the advising, counseling and assisting of veterans and their dependents and beneficiaries in obtaining state and federal benefits. Ms. Meeks found that claimant could perform this position based upon his prior work experience and educational background. *Id.* at 60.

[4]Claimant's employment history includes four years in the counseling field, specifically 2 1/2 years for Santa Clara County as an alcohol abuse counselor and 1 1/2 years as a public service aide. Transcript at 64.

identified by employer; rather, Mr. Mola discussed general goals for claimant.[5]

Next, the administrative law judge determined that the veteran's benefits assistant position was unavailable for claimant because there was no indication as to whether a non-veteran, such as claimant, could qualify for the job. Ms. Meeks, however, when questioned by the administrative law judge regarding the possibility that veterans would be given preference for this position, specifically replied that the position description did not indicate that such a preference existed. *Id.* at 67. Lastly, in rejecting the clerking positions set forth by Ms. Meeks, the administrative law judge stated that he was not sure whether the activities required by these positions would fall within claimant's physical restrictions. In rendering this finding, the administrative law judge failed to take into consideration Ms. Meeks' testimony that she thoroughly considered the physical restrictions imposed by Dr. Mayon and limited her search to sedentary positions. *Id.* at 54-55. Due to this incomplete evaluation, we cannot affirm the administrative law judge's decision to reject the testimony of Ms. Meeks. Our review of the record indicates that the evidence does not support the inferences drawn by the administrative law judge. *See generally Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Accordingly, we conclude that remand of this case to the administrative law judge is necessary for further consideration of the evidence.

In finding claimant unable to perform suitable alternate employment, the administrative law judge further determined that, taking into consideration claimant's ongoing vocational rehabilitation efforts in the form of college classes, the clerk and benefits assistant positions would have been inappropriate for claimant. Specifically, the administrative law judge stated that "[i]t would have been foolish to abandon the ongoing efforts towards the goals encouraged and sponsored by the State of Washington in order to seek some immediate other work for which [claimant] was over-qualified." *See* Decision and Order After Remand at 3. The administrative law judge found that Ms. Meeks was attempting to show some residual earning capacity in order for employer to meet its burden of proof, while Mr. Mola was truly seeking to vocationally rehabilitate claimant. The

[5]Mr. Mola noted in his file reports on this claimant:

> This man has attempted for the past nine years to work at jobs that have entailed a good deal of physical work. In going over his background it is seen that he has taken some college courses a number of years ago; however, he never actually completed any of these programs. A number of years ago he was employed as a counseling aid [sic] with some of the social service programs that were operating in California at that time. However, he was never fully qualified for any of these jobs because of his lack of education...However, the test results do show [he has the abilities] to be successful in the counseling area. However, he does not have the required academic credentials to qualify for these kinds of jobs at this time. Therefore it was felt that by completing approximately two years of schooling that he would be able to receive a bachelor's degree in counseling and thereby be qualified for this kind of work.

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administrative law judge thus rejected Ms. Meeks' opinions because they were inconsistent with the goals of the Act, finding that Mr. Mola's efforts were "most consistent with the intent of Congress to restore the injured worker to the best possible productive position at the earliest time." *Id.*[6]

On appeal, employer asserts that the administrative law judge erred in finding that the jobs were not suitable on the basis that Mr. Mola had a better vocational plan for claimant. Employer asserts that its burden is a limited evidentiary one and that it did not have to present a superior vocational plan. Employer asserts it was required only to show specific suitable available jobs. The Director asserts that the administrative law judge's rationale is consistent with law and the purposes of the Act. She asserts that the Board has recently accepted the administrative law judge's precise rationale.

[6]Section 39(c)(1) and (2) of the Act, 33 U.S.C. §939(c)(1), (2), to which the administrative law judge cites, states that the Secretary of Labor shall provide assistance to permanently disabled employees who desire vocational rehabilitation. *See Morgan v. Asphalt Construction Co.*, 6 BRBS 540 (1977).

Sections 702.501 through 702.508, 20 C.F.R. §§702.501-702.508, of the implementing regulations address vocational rehabilitation. Section 702.501 states that the "objective of vocational rehabilitation is the return to the permanently disabled persons to gainful employment commensurate with their physical or mental impairments, or both... ." Section 702.504 states that the Director's vocational rehabilitation advisors will refer employees to state employment services for the purpose of securing employment counseling, job classification, and selective placement assistance. Regarding actual training, Section 702.506 states, in part, that "[v]ocational rehabilitation training shall be planned in anticipation of a short, realistic, attainable vocational objective terminating in remunerable employment, and in restoring wage-earning capacity or increasing it materially."

The Director is correct that the Board has recently affirmed an administrative law judge's decision to award a claimant continuing total disability compensation where employer established the availability of suitable alternate employment at a minimum wage level, but claimant was precluded from working because he was enrolled in a vocational rehabilitation program. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993). In *Abbott*, claimant, following his medical release, sought vocational counseling through the United States Department of Labor and thereafter enrolled in a four-year full-time medical technology degree program. The Department of Labor paid claimant's tuition and required him to attend school full-time, year-round and maintain a minimum grade point average. Claimant subsequently completed his four-year program, plus a one year internship, and commenced work as a medical technician with earnings well above a minimum wage level. After acknowledging that claimant was physically capable of performing the entry level minimum wage work of a sedentary nature identified by employer as of the time he reached maximum medical improvement, the Board held that the administrative law judge could properly find that this employment was not realistically available to claimant because his participation in the Department of Labor-sponsored program precluded him from working. 27 BRBS at 203. The Board noted that the administrative law judge's decision best served the Act's goal of promoting rehabilitation and the interests of both parties. While employer would pay more in the short term in benefits, it would recoup this payment because claimant's successful rehabilitation resulted in an increased earning capacity. Thus, on the facts presented, the Board affirmed the administrative law judge's award of total disability compensation while claimant was undergoing vocational rehabilitation.

The instant case, however, is factually distinguishable from the situation presented in *Abbott.* Claimant in *Abbott* was enrolled in a specific job rehabilitation program sponsored by the Department of Labor which he had successfully completed at the time of hearing. Claimant herein was enrolled at Evergreen State College on a Pell Grant at the time of the hearing.[7] Transcript at 46-47. Furthermore, the record does not support the administrative law judge's conclusion that claimant's continued education will result in his being able to obtain a position in counseling; claimant testified that Evergreen State College does not offer the necessary certification nor coursework in drug and alcohol counseling.[8] *Id.* at 42-43. Additionally, unlike the minimum wage positions identified by employer in *Abbott*, employer herein set forth positions paying between $849 and $1,400 per month. *Id.* at 58-59. Most importantly, while the administrative law judge in *Abbott* found the jobs

were not realistically available because claimant's government-sponsored rehabilitation program required his full-time participation, no similar finding was made in this case.

[7]Claimant described Evergreen State as offering "a very well balanced program. It also is helping me pick up on my math and writing skills." Transcript at 42.

[8]Claimant further stated that he sees his present educational goal as possibly leading to a position with a group home or with an insurance company, but that he had no intention of working in the drug abuse field again. *See* transcript at 28, 43.

Based upon the foregoing, we vacate the administrative law judge's determination that employer failed to establish the availability of suitable alternate employment and we remand the case to the administrative law judge. On remand, the administrative law judge must resolve the inconsistencies between the testimony of Ms. Meeks regarding the description of the positions identified as being suitable for claimant and the administrative law judge's interpretation of those positions. Thereafter, the administrative law judge must make appropriate findings regarding the issue of whether employer has established the availability of suitable alternate employment, consistent with the Ninth Circuit's decisions in *Hairston*, 849 F.2d at 1194, 21 BRBS at 122 (CRT), and *Bumble Bee*, 629 F.2d at 1327, 12 BRBS at 660.[9]

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[9]The administrative law judge may reopen the record for additional evidence in view of the lengthy period which has elapsed since the record on claimant's employability was closed.