BRB No. 00-0461

ANGELO TORNABENE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOWLAND HOOK CONTAINER TERMINAL	)	DATE ISSUED: Jan. 26, 2001
	)	
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 Awarding Benefits and Supplemental Decision and Order Upon Motion for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Francis M. Womack III (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

Andrew D. Auerbach (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and McATEER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Upon Motion for Reconsideration (98-LHC-2372) of Administrative Law Judge Robert D. Kaplan 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 injured his chest, neck and back during the course of his employment for employer as a holdman on July 30, 1997, when he was struck on the chest by a piece of lumber. Claimant was hospitalized for chest pain and he subsequently developed neck and back pain. A spinal MRI disclosed, *inter alia*, pre-existing herniations of four cervical discs, three lumbar discs, and two thoracic discs. Claimant has not returned to work since the date of injury.

In his Decision and Order, the administrative law judge found that claimant's pre-existing cervical and lumber spinal pathology was aggravated by the July 30, 1997, work injury. The administrative law judge next found that claimant's back condition reached maximum medical improvement on October 21, 1998. The administrative law judge determined that claimant is unable to return to his usual employment as a holdman and that employer did not establish the availability of suitable alternate employment. The administrative law judge found that claimant has an average weekly wage of $1,178.30. Finally, the administrative law judge found that employer is not entitled to Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f). Accordingly, claimant was awarded benefits for temporary total disability, 33 U.S.C. §908(b), from July 31, 1997, to October 20, 1998, and thereafter for continuing permanent total disability, 33 U.S.C. §908(a), payable by employer. In his Supplemental Decision and Order, the administrative law judge rejected employer's contention that the evidence established that claimant's permanent total disability was not caused solely by the July 30, 1997, work accident; consequently, the administrative law judge denied employer's motion for reconsideration and affirmed his denial of Section 8(f) relief.

On appeal, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment and the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of Section 8(f) relief. Claimant has not responded to this appeal.

Employer initially contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment . Specifically, employer avers that the administrative law judge erred by rejecting as evidence of suitable alternate employment positions as a sales representative, converter box recovery person, and airplane cleaner and ramp employee, on the basis that employer did not afford claimant an opportunity to obtain these jobs.

---

[1]Employer does not challenge the administrative law judge's discrediting as evidence of suitable alternate employment the other positions identified in a labor

Where, as in the instant case, claimant has established his inability to perform his usual employment due to his work-related 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 compete and reasonably secure. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988).

While we agree with employer that the administrative law judge erred by discrediting employer's evidence of suitable alternate employment on the basis that claimant was not afforded an opportunity to obtain specific jobs identified in employer's labor market survey, we further hold that this error is harmless in this case. Employer is under no obligation to inform claimant of positions it identifies as evidence of suitable alternate employment, *see Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), nor is employer required to act as an employment agency, *Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165, or to place claimant in a specific job. *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). In the instant case, however, the medical evidence credited by the administrative law judge precludes these positions from being physically suitable for claimant. Specifically, the administrative law judge credited the opinions of Drs. Zaretsky and Brisson, that claimant is unable to work at all, and the opinion of Dr. Pearl, that claimant is limited to office work involving no more physical activity than sitting, in finding that claimant's back condition precludes employment as an automobile painter. *See* Decision and Order at 11; CX 12 at 19. Employer does not challenge the administrative law judge's decision to credit this evidence. The positions identified by employer as a sales representative stocking telephone credit card applications at retail establishments, a converter box recovery person, and an airplane cleaner and ramp employee are not within Dr. Pearl's restrictions. Specifically, the sales representative and converter box recovery jobs require driving, walking, and repetitive exiting and entering a car. EX 19. The airplane cleaner and ramp employee position is also not within Dr. Pearl's work restriction, as it requires more activity than sitting. *Id.* Accordingly, based on the medical evidence credited by the administrative law judge, which establishes that claimant is physically incapable of performing the positions identified by employer, we affirm on other grounds the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, and the consequent award of permanent total disability benefits.

We next address employer's contention that the administrative law judge

---

market survey conducted for employer on November 9, 1998, by Sharon Levine. *See* EX 19.

erred in denying its request for Section 8(f) relief. Specifically, employer contends that the weight of the uncontroverted evidence establishes that claimant's pre-existing back condition contributes to claimant's permanent total disability and that claimant's July 30, 1997, work injury, by itself, did not render claimant totally disabled. Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not due solely to the subsequent work-related injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. General Dynamics Corp.[Bergeron],* 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). The administrative law judge found that claimant had manifest, pre-existing, long-lasting degenerative lumbosacral and cervical spinal conditions. He found, however, that employer did not establish that claimant's total disability is not due solely to the 1997 work injury.

We affirm the administrative law judge's denial of Section 8(f) relief. The administrative law judge rationally determined that the opinions of Drs. Pearl and Smith, while supportive of a finding that claimant's present condition is due to a combination of his two work-related injuries, do not establish that claimant's total disability is not solely the result of his last injury. Specifically, the administrative law judge rationally discredited the opinion of Dr. Smith that the work injury alone was insufficient to render claimant disabled because Dr. Smith failed to provide any basis for his opinion. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.[Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Moreover, the administrative law judge acted within his discretion in finding that the testimony of Dr. Pearl fails to clearly and unequivocally address whether claimant was rendered totally disabled solely by the July 27, 1997, work injury. *See generally Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993). Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is rational and supported by the record, that finding is affirmed. *See Bergeron,* 982 F.2d 790, 26 BRBS 139(CRT).

---

[2]Employer's assertion that the administrative law judge required employer to establish by more than a preponderance of the evidence that claimant's pre-existing back pathology contributed to claimant's permanent total disability is without merit. On reconsideration, the administrative law judge explicitly stated that employer's burden of proof is by a preponderance of the evidence. *See* Supplemental Decision and Order Upon Motion for Reconsideration at 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Supplemental Decision and Order Upon Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge