BRB Nos. 99-0762
and 00-0138

TRACIE A. REYNOLDS-WEBSTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Order Granting Employer's Motion for Summary Decision of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Kristin Dadey (Henry L. Solano, Solicitor of Labor; Carol 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Order Granting Employer's Motion for Summary Decision (98-LHC-0904, 0905) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 in employer's insulation department, suffered work-related injuries to her wrists on July 21, 1994 and August 30, 1994, and underwent carpal tunnel releases in October 1994 and February 1996. She stopped working on October 21, 1997 after being placed on permanent physical restrictions, and it is uncontested that claimant is unable to return to her usual employment. Employer voluntarily paid permanent partial disability compensation under the schedule based on a 10 percent impairment to each of claimant's arms. 33 U.S.C. §908(c)(1). After applying for state unemployment benefits, claimant was referred to the Greater Peninsula Council Worker Training and Support Program in early 1998, which provided funding for claimant to enroll in a business computerized applications program at Kee Business College. Claimant began this 10-month course on April 20, 1998, and as of the date of the hearing, attended classes from 9:00 a.m. to 1:00 p.m. five days per week. Claimant sought permanent total disability benefits under the Act from October 21, 1997, including the time she was participating in the Kee Business College program.

In his Decision and Order, the administrative law judge rejected the labor market survey of employer's vocational counselor, David Karmolinski, as Mr. Karmolinski did not take into consideration the time claimant needed to care for her daughter, who suffers from psychological disorders, and thus found that employer failed to establish suitable alternate employment. In so finding, the administrative law judge took judicial notice of the definitions of claimant's daughter's disorders as contained in *The Merck Manual of Diagnosis & Therapy*, and the fact that the medication taken by claimant's daughter requires regular monitoring, based on the *Physician's Desk Reference*. The administrative law judge further found that pursuant to *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994), *aff'g* 27 BRBS 192 (1993), claimant was entitled to permanent total disability compensation while participating in the Kee Business College program. Assuming, *arguendo*, employer did establish the availability of suitable alternate employment, the administrative law judge determined that claimant was reasonably diligent in her attempts to secure a job, and therefore found that claimant established entitlement to permanent total disability compensation under the Act. 33 U.S.C. §908(a). Next, the administrative law judge gave greater weight to Dr. McCarthy's 10 percent impairment rating, and thus determined that employer is not entitled to a credit for the amount of permanent partial disability benefits it paid in excess of an impairment rating of 5 percent to

each of claimant's upper extremities. Lastly, the administrative law judge denied employer entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), finding that claimant's prior shoulder and hand conditions were not serious or lasting, and thus, employer failed to demonstrate the presence of a pre-existing permanent partial disability.

Subsequent to the issuance of the administrative law judge's Decision and Order, employer filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, requesting that claimant's benefits be terminated as of May 10, 1999, as claimant had secured full-time employment at Kwik Kopy Printing on this date. On September 23, 1999, the administrative law judge issued an Order Granting Employer's Motion for Summary Judgment, wherein he found that employer established a change in condition with regard to claimant's employability, and terminated benefits as of August 27, 1999, finding that employer agreed to alter its modification request during a conference call on this matter to reflect this termination date.

On appeal, employer challenges the administrative law judge's Decision and Order, BRB No. 99-0762, and Order Granting Employer's Motion for Summary Decision, BRB No. 00-0138.[1] In its appeal of the administrative law judge's Decision and Order, employer contends that the administrative law judge abused his discretion by taking judicial notice of facts regarding claimant's daughter's psychological disorders, and in admitting post-hearing evidence from claimant but not employer. Additionally, employer challenges the administrative law judge's finding that suitable alternate employment was not established, advancing several arguments. Employer asserts that claimant's child care needs should not have been taken into consideration in analyzing this issue, that the administrative law judge failed to consider claimant's craft business as a means of establishing suitable alternate employment, and that the administrative law judge erred in applying *Abbott* to the instant case. Employer further contends that the administrative law judge erred in finding that claimant diligently sought employment subsequent to April 20, 1998, and that the administrative law judge's analysis of the extent of claimant's disability does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). Next, employer contends that the administrative law judge erred in not finding that it was entitled to a credit for its payments of permanent partial disability under the schedule. Lastly, employer argues that the administrative law judge erred in denying it entitlement to Section

[1]By Order dated July 16, 1999, the Board dismissed employer's appeal in BRB No. 99-0762, and remanded the case for modification proceedings. After the Board received employer's appeal of the administrative law judge's Order Granting Employer's Motion for Summary Decision, BRB No. 00-0138, the Board, by Order dated October 19, 1999, granted employer's request to reinstate its previous appeal, BRB No. 99-0762, and consolidated the two appeals for decision.

8(f) relief. In its appeal of the Order Granting Employer's Motion for Summary Judgment, employer maintains that permanent total disability benefits should have been terminated as of May 10, 1999, not August 27, 1999. Claimant responds, urging affirmance of the administrative law judge's decisions. In a reply brief, employer reiterates its contentions raised on appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in the instant matter, maintaining that upon further examination, claimant's previous right shoulder injury resulted in a pre-existing permanent partial disability within the meaning of Section 8(f), and requesting that the Board remand the case for consideration of the contribution element under Section 8(f).

We first consider employer's contention, raised in its appeal of the administrative law judge's Decision and Order, BRB No. 99-0762, that the administrative law judge erred in awarding claimant permanent total disability compensation. Claimant has the burden of establishing the nature and extent of her disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1980). 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 any loss in wage-earning capacity is irrelevant. *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). If claimant establishes that she is permanently or temporarily totally disabled, however, she may receive benefits under either Section 8(a) or (b) of the Act, 33 U.S.C. §908(a), (b). Where, as in the instant case, claimant is incapable of resuming her usual employment duties with her employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant, by virtue of her age, background and physical restrictions, is capable of performing. *See Lentz v. The Cottman Co*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). If employer makes such a showing, claimant nevertheless can prevail in her quest to establish total disability if she demonstrates that she diligently tried and was unable to secure such employment. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

The instant case involves two distinct periods of alleged total disability. The first period concerns claimant's alleged total disability from October 21, 1997 until April 20, 1998, the period prior to claimant's enrollment in the Kee Business College vocational program. With regard to this time frame, the administrative law judge found that employer bore the burden of showing the availability of suitable alternate employment in light of claimant's "background," which included the unique family needs that claimant possesses. In this regard, the administrative law judge credited claimant's testimony that her daughter suffers from bipolar disorder, attention deficit disorder, and attention deficit hyperactivity disorder, *see* Tr. at 39, which requires regular supervision of the daughter's medicine intake, and that this impacted claimant's ability to work full-time. The administrative law judge then concluded that the failure of employer's vocational counselor David Karmolinski to conduct

its labor market survey in light of the time claimant needed to care for her daughter vitiated his entire labor market survey and rendered his opinion inadequate. Consequently, the administrative law judge found that employer failed to establish the availability of suitable alternate employment. On appeal, employer contends that the administrative law judge erred in finding that it was required to take claimant's child care needs into account in establishing the availability of suitable alternate employment, and erred in rejecting its labor market survey.

We hold that any error the administrative law judge may have committed in considering claimant's child care situation in his analysis of the issue of suitable alternate employment is harmless in light of his finding that claimant established that she diligently attempted to secure employment from October 21, 1997 to April 17, 1998, but was unable to obtain work. The administrative law judge credited claimant's testimony that during this period she complied with the requirements of the Virginia Employment Commission by applying for three jobs per week, using word-of-mouth sources and job search listings at the Virginia Employment Commission. Tr. at 22-24. This testimony is supported by the records of the Virginia Employment Commission. *See* Cl. Ex. 4(a)-(ii). The administrative law judge rejected employer's rebuttal evidence, which showed that four of the 29 prospective employers contacted by claimant did not have an application on file from claimant, inferring that those employers had lost or misplaced the applications.[2] Finding that the jobs claimant inquired about were within the purview of the employment opportunities identified by employer, the administrative law judge concluded that claimant demonstrated that she had been diligent in her attempt to secure available employment during the period at issue, her attempts were unsuccessful, and that claimant was therefore entitled to permanent total disability commencing on October 21, 1997. As substantial evidence supports the administrative law judge's finding that claimant diligently sought alternate employment during the period at issue, we affirm the administrative law judge's award of permanent total disability benefits from October 21, 1997 through April 20, 1998. *See generally DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188 (CRT)(8th Cir. 1998); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(1st Cir. 1991).

Employer next challenges the administrative law judge's finding that claimant is entitled to permanent total disability compensation during her enrollment in the Kee Business College rehabilitation program, which she began on April 20, 1998. Claimant can establish total disability if suitable alternate employment is not reasonably available due to her

[2]Several employers noted that their files concerning the relevant time frame had been purged. Emp. Ex. 42.

participation in a Department of Labor (DOL)-sponsored rehabilitation program. *See Abbott*, 40 F.3d at 122, 29 BRBS at 22 (CRT). In *Abbott*, the Board and the United States Court of Appeals for the Fifth Circuit held that despite the employer's showing of suitable alternate employment which the claimant was physically capable of performing, the administrative law judge's award of total disability benefits was nonetheless appropriate on the facts presented. In so concluding, both bodies noted that in *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit recognized that the degree of disability is not assessed solely on the basis of physical condition; it is also based on factors such as age, education, employment history, rehabilitative potential and the availability of work that claimant can perform. *Abbott*, 27 BRBS at 204; 40 F.3d at 127, 29 BRBS at 26 (CRT). Moreover, the court agreed with the Board that the administrative law judge's award of total disability benefits to Abbott was appropriate because the jobs identified by employer were unavailable and could not reasonably be secured while he was enrolled full-time in the DOL-sponsored rehabilitation program. *Abbott*, 40 F.3d at 127-128, 29 BRBS at 26 (CRT).

The Board discussed *Abbott* in three subsequent cases. In *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998), the claimant had a college degree prior to his injury, and the employer established that the claimant had the capacity post-injury to earn greater than the minimum wage. Nevertheless, the Board held the rationale of *Abbott* applicable as the alternate jobs were not realistically available to the claimant during the period of his participation in a full-time DOL-sponsored nursing program. The Board held that an award of total disability during this period promoted the goal of rehabilitating the claimant to the fullest extent possible and in the long term would lower the employer's liability. In *Gregory v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 264 (1998), however, *Abbott* was held to be inapplicable as the claimant stipulated that she had obtained part-time employment while enrolled in a DOL-sponsored rehabilitation program. As alternate employment was realistically available during the rehabilitation period, the claimant was limited to a recovery under the schedule for her arm impairment. *Gregory*, 32 BRBS at 267. In *Kee v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 221 (2000), the Board held that pursuant to *Abbott*, the claimant bears the burden of proving that he is unable to perform suitable alternate employment due to his participation in a vocational training program.[3] As there was no evidence that the claimant diligently sought but was unable to obtain suitable alternate employment while receiving vocational assistance before his training, during his training

[3]The Board reasoned that this result is consistent with well-established case law placing the burden of proof on a claimant to show he was unable to obtain alternate employment despite a diligent effort in order to be entitled to total disability benefits, notwithstanding a showing by employer of suitable alternate employment. *See, e.g., Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT).

program, and during job placement services after his training, or that the rehabilitation program prohibited working, the Board affirmed the administrative law judge's denial of total disability benefits during these periods.

In the instant case, claimant received funding from the Greater Peninsula Council Worker Training and Support Program in early 1998 to enroll in a business computerized applications program at Kee Business College. Claimant began this 10-month course on April 20, 1998, and, as of the date of the hearing, attended classes from 9:00 a.m. to 1:00 p.m. five days per week. Claimant testified that the program required one to two hours a day of homework. Tr. at 28. She further testified that her daughter was diagnosed with several psychological disorders in October 1997, and that although she made some attempts to look for part-time employment during the program, she stopped because she had to care for her daughter. Tr. at 39, 41-42. The program was monitored by a DOL vocational counselor; in addition, the DOL approved claimant for some financial assistance, approximately $25 per week, agreed to provide job placement counseling, and required that claimant maintain average progress and complete the program. *See* Tr. 29-31; Cl. Exs. 1-3.

After finding that claimant was diligent in attempting to complete the vocational program, that employer had knowledge of it, *see* Cl. Ex. 3, and that it would likely increase her wage-earning capacity, the administrative law judge found that the *Abbott* rule entitled claimant to permanent total disability benefits from the time she began the program on April 20, 1998, and continuing. Employer first argues that the *Abbott* rule should not apply in the instant case because the Kee Business College program was not a DOL-sponsored program. We reject this contention. The regulations clearly indicate that DOL-sponsored vocational programs include other public or private vocational programs a claimant is referred to by the DOL. *See* 20 C.F.R. §§702.502-505. In the instant case, while claimant's vocational program was being funded by the Greater Peninsula Council Worker Training and Support Program, the evidence reflects that the DOL was monitoring the program and providing some financial assistance. *See* Cl. Exs. 1-3. Thus, we hold that claimant's enrollment in the Kee Business College vocational program, which in light of the hours claimant attended, 9:00 a.m. to 1:00 p.m., and the hours she needed to complete her homework, constitutes a full-time DOL-sponsored program.

Employer further argues that claimant was capable of part-time employment during the vocational program, and that Mr. Karmolinski testified that four of the jobs in his labor market survey were part-time jobs. Tr. at 84-85. Referencing claimant's activities in furtherance of her craft business while enrolled at Kee Business College, employer ultimately argues that claimant failed to establish that the identified suitable alternate jobs were realistically unavailable to her while she was in the vocational program. We disagree that the administrative law judge erred in this regard. The administrative law judge credited claimant's testimony that she made attempts to look for part-time employment during her

enrollment at Kee Business College, but had to stop due to the demands placed on her by caring for her daughter, who returned home every day at 4:45 p.m. Given his findings regarding the hours of class room attendance and homework, the administrative law judge rationally found claimant's enrollment precluded her obtaining employment. The administrative law judge also found claimant's 3.78 grade point average demonstrates her diligence in completing the program and that it would substantially increase her wage-earning capacity. These findings are supported by the record. Regarding claimant's home craft business, the administrative law judge credited claimant's testimony that while she owns the business, her husband does most of the work, her role is limited to performing accounting tasks and attending craft shows with her husband, and lastly, that this business does not make a profit. *See* Tr. at 36-37; Decision and Order at 11 n.14. As the administrative law judge rationally credited claimant's testimony, we affirm his finding that claimant met her burden of establishing that suitable alternate jobs during the program were not realistically available.[4] Accordingly, we affirm the administrative law judge's application of the *Abbott* doctrine to claimant's enrollment at the Kee Business College vocational program, and affirm his determination that claimant is entitled to permanent total disability compensation during her enrollment at Kee Business College.

With regard to the above holdings, we reject employer's contention that the administrative law judge committed reversible error by taking judicial notice of facts regarding claimant's daughter's psychological disorders without providing employer an opportunity to submit rebuttal evidence in accordance with Rule 201 of the Federal Rules of Evidence, FED. R. EVID. 201. Under Section 23(a) of the Act, 33 U.S.C. §923(a), and Section 702.339 of the implementing regulations governing the administration of the Act, administrative law judges are not bound by statutory rules of evidence, "but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a); 20 C.F.R. §702.339. Accordingly, we hold that the

[4]We reject employer's contention that the *Abbott* doctrine finds no support in the Act, as it is consistent with case precedent regarding suitable alternate employment. Moreover, the Fifth Circuit in *Abbott* affirmed the Board's decision, reasoning that courts should not frustrate the DOL's rehabilitative efforts when they are reasonable and result in lower total compensation liability for the employer in the long run. *Abbott*, 40 F.3d at 128, 29 BRBS at 26-27 (CRT).

administrative law judge committed no error in relying on medical manuals in describing the nature of the psychological disorders suffered by claimant's daughter, Decision and Order at 7 n.9, particularly as the record contained no evidence describing these conditions.

We further reject employer's contention that the administrative law judge erred in excluding employer's post-hearing evidence. An administrative law judge has great discretion concerning the admission of evidence and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See, e.g., Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). At the hearing, the administrative law judge granted claimant permission to submit records from the Virginia Employment Commission regarding claimant's search for employment. The administrative law judge allowed employer the opportunity to submit a rebuttal report from Mr. Karmolinski for the specific purpose of rebutting claimant's evidence regarding her job search in accordance with the requirements of the state employment commission. *See* Tr. 116-118. In his Decision and Order, the administrative law judge excluded those portions of Mr. Karmolinski's report describing his inquiries with prospective employers about part-time work for claimant as being outside the scope of his permission. *See* Decision and Order at 2 n.2. Thus, as the exclusion of portions of Mr. Karmolinski's reports is not arbitrary, capricious or an abuse of discretion, employer has not met its burden in this regard.[5] *See Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Ion v. Duluth, Missabe & Iron Range Ry. Co.*, 32 BRBS 268 (1998). Lastly, employer's argument that the administrative law judge's analysis does not comport with the APA is without merit.[6] Having set forth the evidence, the administrative law judge

[5]As the administrative law judge found, employer's reliance on *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992), is misplaced. In *Ramirez*, the administrative law judge held the record open for the claimant to depose his treating physician, who imposed new physical restrictions, but denied employer the right to depose its vocational counselor post-hearing with regard to the availability of suitable alternate employment based on the new physical restrictions. The Board ruled that the administrative law judge abused his discretion in this regard. By contrast, in the instant case, the administrative law judge allowed employer the opportunity to rebut claimant's post-hearing evidence, but excluded portions of this evidence that went beyond the scope of his permission.

[6]The Administrative Procedure Act 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 must independently analyze and discuss the evidence, and must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985).

weighed the evidence with regard to each of his findings and provided reasons for his findings based on the evidence. As employer has not established reversible error in the administrative law judge's weighing of the conflicting evidence, we reject employer's contention that the administrative law judge's decision does not comport with the APA.

We next consider employer's contention that the administrative law judge erred in failing to award it a credit for an alleged overpayment of permanent partial disability compensation. In the instant case, employer voluntarily paid claimant permanent partial disability compensation under the schedule for a 10 percent impairment rating for each of claimant's arms, 33 U.S.C. §908(c)(1), based on the June 26, 1996, opinion of Dr. McCarthy. Emp. Ex. 14. At the hearing, employer requested a credit for an overpayment of permanent partial disability benefits, *see* 33 U.S.C. §914(j), relying on the September 5, 1997, report of Dr. Gwathmey, in which the physician opined that claimant suffered from a five percent impairment to each upper extremity. Emp. Ex. 18. In his Decision and Order, the administrative law judge denied employer's request, finding that Dr. McCarthy's opinion was better reasoned than Dr. Gwathmey's.[7] In so finding, the administrative law judge gave no weight to Dr. McCarthy's subsequent deference to Dr. Gwathmey's impairment rating, *see* Emp. Ex. 29, as no basis for Dr. McCarthy's change of opinion was provided; the administrative law judge concluded that Dr. McCarthy's deference, which consisted of a signature on a form prepared by employer, was merely an expression of professional courtesy.[8] Decision and Order at 13. On appeal, employer contends that the administrative

[7]Dr. Gwathmey stated that as a general rule, for symptomatic carpal tunnel syndrome patients following surgery, he rates the impairment to the upper extremity as five percent. Emp. Ex. 18. The administrative law judge found that since Dr. Gwathmey's impairment rating was based on a general rule and not claimant's specific circumstances, his opinion was entitled to less weight. Decision and Order at 13.

[8]The administrative law judge noted that the text of employer's letter required Dr. McCarthy to provide a full explanation if he disagreed with Dr. Gwathmey's assessment, but asked only for a signature if he agreed. *See* Decision and Order at 13 n.16; Emp. Ex. 29.

law judge erred in giving greater weight to Dr. McCarthy's 1996 opinion, arguing that as Dr. Gwathmey was an independent examiner and subsequently became claimant's treating physician, his opinion was entitled to greater weight.

Employer, on appeal, essentially asks that the Board reverse the administrative law judge's weighing of the evidence with regard to the impairment rating to claimant's upper extremity. We decline to do so. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge's decision to credit the opinion of Dr. McCarthy over that of Dr. Gwathmey is within his authority as fact finder, we affirm the administrative law judge's determination that employer is not entitled to a credit pursuant to Section 14(j) of the Act.

Employer also argues that the administrative law judge erred in failing to award it Section 8(f) relief. Section 8(f) of the Act shifts the liability to pay compensation for a permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if employer establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992). In finding that employer failed to establish the existence of a serious and lasting pre-existing permanent partial disability, the administrative law judge relied on the January 1993 report of Dr. McCarthy, which stated that claimant had no neurological problems, mild subdeltoid bursitis and triceps muscle soreness, noting that no objective diagnosis could be made with regard to intermittent numbness and pain in claimant's right shoulder. Emp. Ex. 12. The administrative law judge rejected Dr. Reid's 1997 opinion that claimant suffered from a permanent pre-existing chronic bilateral arm disability as being unreasoned. As the administrative law judge found that employer failed to establish a pre-existing permanent partial disability, he did not consider the other elements for Section 8(f) relief.

On appeal, employer contends that the administrative law judge's finding is irrational in this regard. The Director has filed a response brief agreeing with employer's position. The Director concedes that employer has established a pre-existing permanent partial disability based on claimant's pre-existing shoulder condition, and requests that the Board remand the case for the administrative law judge to determine whether employer has established the contribution element for Section 8(f) relief. We hold that remand of the case

is not necessary. Pursuant to the administrative law judge's Decision and Order, permanent total disability benefits commenced on October 21, 1997. In his Order Granting Employer's Motion for Summary Relief, the administrative law judge terminated benefits as of August 27, 1999. *See infra*. As employer's liability for claimant's permanent total disability benefits is for fewer than 104 weeks, Section 8(f) does not apply to the instant case. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

Lastly, we consider employer's appeal of the administrative law judge's Order Granting Employer's Motion for Summary Decision, BRB No. 00-0138. Subsequent to the initial Decision and Order, employer filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in condition based on the fact that claimant had obtained full-time employment. Employer thereafter filed a motion for summary judgment in support of its modification request, arguing that claimant's permanent total disability benefits should cease as of May 10, 1999. In his Order Granting Employer's Motion for Summary Decision, the administrative law judge indicated that claimant conceded that since May 10, 1999, she has been working at Kwik Copy Printing and that this position is medically and vocationally appropriate for her. The administrative law judge further stated that in a conference call over which he presided, employer amended its modification petition, requesting that permanent total disability benefits should cease as of August 27, 1999. Based on the pleadings and representations of the parties, the administrative law judge granted employer's motions for modification and summary judgment, and terminated benefits as of August 27, 1999.

On appeal, employer contends that the administrative law judge erred in not terminating benefits as of May 10, 1999. At the outset, it is noted that employer, in its motion for modification, requested that claimant's permanent total disability benefits be terminated as of May 10, 1999, or in the alternative, as of June 4, 1999 or August 27, 1999. These dates correspond to the DOL's agreement to stagger its reimbursement to Kwik Kopy for the wages paid to claimant; 100 percent for the first four weeks, 75 percent for the next four weeks, 50 percent for the next four weeks, and 25 percent for the last four weeks. The reimbursement period ended as of August 27, 1999. On appeal, employer asserts that to allow claimant to receive permanent total disability compensation while earning wages amounts to a double recovery, and therefore, benefits should have been terminated as of May 10, 1999.[9] Employer, however, makes no assertion which contradicts the administrative law

[9]Claimant responds, arguing that her position with Kwik Kopy Printing was part of the DOL-sponsored rehabilitation training program, which falls within the parameters of the *Abbott* doctrine until August 27, 1999, when the position became permanent and the DOL no longer reimbursed Kwik Kopy for claimant's wages. Claimant did not address the question of whether employer had agreed at the conference call that August 27, 1999 should be the date benefits terminated.

judge's statement that it amended its modification request to reflect that August 27, 1999 should be the date on which benefits should terminate. We therefore hold that the administrative law judge acted within his discretion in holding employer bound to its agreement, and affirm the administrative law judge's Order Granting Employer's Motion for Summary Decision. *See, e.g.*, *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994).

Accordingly, the Decision and Order and Order Granting Employer's Motion for Summary Decision of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge