

MIGUEL A. NEVAREZ)
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 Claimant-Respondent)
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 v.)
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 McDERMOTT, INCORPORATED) DATE ISSUED: 12/28/04
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 and)
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 CRAWFORD & COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

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

Billy Wright Hilleren, Mandeville, Louisiana, for claimant.

J. Louis Gibbens (Gibbens & Stevens), New Iberia, Louisiana, for employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (03-LHC-0712) of Administrative Law Judge Lee J. Romero, 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 if they 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 testified that he came to the United States from Puerto Rico in 1979 or 1980. Claimant experienced low back pain on February 9, 1989, while working for employer as a welder. He continued to work for less than two weeks and then stopped working due to ongoing pain; he has not worked since February 20, 1989. Dr. Jackson, a neurosurgeon, performed back surgeries on claimant on April 7, 1989, and March 1, 1991. CXs 6, 7; EX 23(a), (b). Claimant's back condition improved somewhat, but his pain persisted and he developed pain in other parts of his body. On August 18, 1994, Dr. Jackson stated that claimant was totally disabled due to his back condition.

Claimant also alleged that his hip began hurting a few days after the accident. Dr. Brent diagnosed avascular necrosis of the hip. In 1994, claimant had a right hip replacement and then a left hip replacement. Dr. Jackson referred claimant to Dr. Hernandez, a specialist in the field of anesthesiology and pain management, for treatment of his pain. Claimant has treated with Dr. Hernandez on an ongoing basis since April 2002. Claimant stated that Spanish is his primary language, that he cannot read or write English, and that people sometimes have trouble understanding his spoken English. Tr. at 62-64.

In his Decision and Order, the administrative law judge found that the parties stipulated to a compensable injury to claimant's back, but he concluded that claimant's avascular necrosis of his hip is not work-related. With regard to the extent of disability, he determined that claimant is unable to return to his usual employment duties and that employer failed to establish the availability of suitable alternate employment. The administrative law judge thus awarded claimant temporary total disability compensation from February 21, 1989, to May 17, 2000, and continuing permanent total disability compensation from May 18, 2000.¹ 33 U.S.C. §908(a), (b). The administrative law judge also awarded claimant payment for all reasonable and necessary medical expenses arising from claimant's February 9, 1989, work injury, including ongoing pain

¹ The administrative law judge also found claimant had a work-related knee injury which would be compensable under the schedule; however, he concluded no separate benefits are presently due since claimant is permanently totally disabled. Decision and Order at 36. These findings are not at issue on appeal.

management treatment. Lastly, the administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in determining that it failed to establish the availability of suitable alternate employment. Additionally, employer challenges the administrative law judge's award of pain management treatment to claimant. Lastly, employer avers that it is entitled to relief pursuant to Section 8(f) of the Act. Claimant responds, urging affirmance of the administrative law judge's decision. The Director has filed a response brief urging that the administrative law judge's finding that employer did not establish entitlement to Section 8(f) relief be affirmed.

Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer as a result of his work-injury, the burden shifts to employer to establish the availability of realistically available jobs within the geographic area where the claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *see also P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116(CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT)(5th Cir. 1986); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRS 294 (1992).

Employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. We reject this contention. In addressing this issue, the administrative law judge found that claimant credibly testified that, owing to his pain, he could not perform any work, including the eight potential positions identified in 1993 by Ms. Harris, a licensed rehabilitation counselor.² The administrative law judge determined that even though Drs. Jackson and Steiner both agreed that claimant might attempt to perform three of the jobs employer identified,³ two of these positions, at Wal-Mart and Gemoco, were actually unavailable. Decision and Order at 41. The administrative law judge further determined that Wal-Mart's

² Ms. Harris identified positions as front door greeter for Wal-Mart, punch press operator, newspaper advertisement inserter, pizza delivery driver, prescriptions and supplies delivery driver, security guard, seafood processor and bridge tender. *See* EXs 5, 14.

³ The approved jobs were as a greeter for Wal-Mart, EX 5 at 1; EX 14 at 1-2, 9, a punch press operator for Gemoco, EX 14 at 1, 4, 10, and a newspaper inserter for the *Houma Daily Courier*, EX 5 at 3; EX 14 at 1, 4, 11.

supplemental job description indicating that claimant must pass employment tests and communicate well, which claimant could not do, and that Gemoco's description of its position as "medium" and requiring driving and operating machinery, both exceed Dr. Steiner's sedentary restrictions and contravene Dr. Jackson's admonition that claimant should not operate machinery while using medications which increase drowsiness or decrease coordination. EX 23(a) at 33-34. The administrative law judge concluded that the remaining approved job with the *Courier* also exceeded claimant's restrictions based on the newspaper's job description, which the administrative law judge considered would be more accurate than the synopsis provided by Ms. Harris. Reviewing the remaining jobs identified, the administrative law judge concluded they were not suitable for claimant. Finally, he found that rehabilitation for claimant's communication deficiencies would be difficult, frustrating and ultimately futile in light of his age and background. Decision and Order at 41-42.

Contrary to employer's contentions, in determining whether the identified employment positions constituted suitable alternate employment, the administrative law judge properly compared the job's requirements with claimant's medical restrictions and other relevant factors. See *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). Moreover, it is well-established that the administrative law judge is entitled to weigh the evidence and draw his own inferences from it. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT)(5th Cir. 1995). In the instant case, the administrative law judge's decision to rely upon the testimony of claimant regarding his ongoing complaints of pain, the restrictions imposed on claimant by Dr. Jackson, and the supplemental job descriptions of the potential employers in concluding that the positions employer proffered did not establish the availability of suitable alternate employment that claimant was capable of performing is rational, and his findings are supported by the record.⁴ Moreover, contrary to employer's argument that claimant did not make an effort to undergo rehabilitation, the administrative law judge properly based his determination on claimant's existing capabilities.⁵ Accordingly, we affirm the administrative law judge's finding that employer did not establish the availability of suitable alternate employment, and his consequent award of total disability compensation to claimant. See *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT)(5th Cir. 2000); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

⁴ Angela Harold, a vocational rehabilitation counselor, also testified that claimant is unemployable. Tr. at 114-116.

⁵ Contrary to employer's contention, claimant does not have to establish diligence in seeking employment until after employer establishes suitable alternate employment. See *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990); *Mendez v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 22 (1988).

Employer next challenges the administrative law judge's award of medical benefits to claimant, specifically the cost of the pain management treatment provided to claimant by Dr. Hernandez. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." See *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary and must be related to the injury at hand. See *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve. See *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988).

In the instant case, Dr. Jackson, claimant's treating neurosurgeon, recommended pain management for claimant's back, see CX 8 at 36-37, 107-108, and Dr. Brent concurred with this recommendation. CX 12 at 1. Dr. Hernandez provided claimant with such treatment for his continuing complaints of pain. CX 9 at 1-5, 30-31, 48-51. He also prescribed various medications for pain and related depression. *Id.* at 19-22; CX 10 at 1-22. Claimant averred that the treatment is helpful, and he wished to continue it. Tr. at 51-52. The administrative law judge determined that the course of pain management recommended by Dr. Hernandez is both reasonable and necessary, and, thus, is covered under Section 7(a) of the Act. It is well-established that the administrative law judge is entitled to evaluate the credibility of the medical evidence and to draw his own inferences from the evidence. See *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). It was, therefore, within the administrative law judge's discretionary authority as factfinder to credit the consistent opinions of Drs Jackson and Brent in favor of pain management, as supported by the opinions of Drs. Ortenberg and Steiner that claimant needs pain medication and may need it indefinitely. Decision and Order at 43; *McGrath*, 289 F.2d 403; *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). We therefore affirm the administrative law judge's determination that employer is liable for the medical treatment provided by Dr. Hernandez, as that finding is rational and supported by substantial evidence, and in accordance with law. See generally *Wheeler*, 21 BRBS at 35.

Lastly, employer contends that the administrative law judge erred in denying it relief from continued liability for claimant's benefits pursuant to Section 8(f) of the Act. Specifically, employer argues that it established a pre-existing permanent partial disability based on claimant's avascular necrosis of the hip. For the reasons that follow, we affirm the administrative law judge's denial of Section 8(f) relief to employer. Section 8(f) of the Act shifts the liability to pay compensation for permanent disability and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. To obtain the benefit of Section 8(f) relief in a case where claimant is permanently totally disabled, employer must show (1) that the

employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent injury, and (3) that the subsequent injury alone would not have caused claimant's permanent total disability. *See Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT)(5th Cir. 1990); 33 U.S.C. §908(f).

Employer alleges that Dr. Brent, the orthopedic surgeon who performed claimant's bilateral hip replacements, opined that claimant's aseptic necrosis of the hips was present prior to claimant's work injury. Employer's brief on appeal at 6; Decision and Order at 10 n.5. The administrative law judge found that the record contained no objective medical evidence predating claimant's work-injury and establishing that claimant suffered from hip necrosis prior to that injury; the administrative law judge found that claimant's hip complaints did not begin until approximately one year after claimant's February 1989 employment injury. Decision and Order at 31, 49. The administrative law judge found that any reference to Dr. Brent's alleged opinion that claimant's hip necrosis preexisted claimant's work-injury was outweighed by Dr. Jackson's uncontroverted testimony to the contrary, and that even if Dr. Brent offered such an opinion at a vocational meeting, his report and any supporting pre-injury studies or films are not in the record. Decision and Order at 49. Dr. Jackson reported that claimant first complained of hip pain to him on July 26, 1990, and that claimant first had an aseptic necrosis one year and five months after his original injury. CX 8 at 77. Thereafter, an MRI performed on August 1, 1990, produced normal findings. CX 13 at 25-27. A second MRI performed on July 21, 1993, revealed bilateral avascular necrosis of the hips. CX 2 at 1-2. Claimant then underwent hip replacement surgery on his right hip in 1994, and on his left hip in 1995. CX 2 at 5, 15. As substantial evidence supports the administrative law judge's finding that claimant's hip problems did not pre-exist his February 1989 work injury, we affirm the administrative law judge's finding that employer did not establish a pre-existing permanent partial disability on the basis of his hip problems. *See Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), *aff'd on recon.* 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994).

We also affirm the administrative law judge's finding that employer did not establish a pre-existing disability on the basis of claimant's illiteracy and language problems. While the establishment of a mental impairment may qualify as a permanent partial disability for purposes of satisfying the first prong necessary for Section 8(f) relief, *see Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT)(9th Cir. 1990); *Watts v. Marcel S. Garrigues Co.*, 19 BRBS 40 (1986), *aff'd sub nom. State Compensation Ins. Fund v. Director, OWCP*, 818 F.2d 1424, 20 BRBS 11(CRT)(9th Cir. 1987), social and economic factors such as illiteracy stemming from a limited education and language difficulties are not previous disabilities sufficient to trigger Section 8(f) applicability. *Id.*; *see also Cononetz v. Pacific Fisherman, Inc.*, 11

BRBS 175, 178 (1979); *Collins v. Todd Shipyards Corp.*, 9 BRBS 1015, 1023 (1979). The administrative law judge found that in this case there is no credible evidence that claimant's functional illiteracy is due to mental retardation or a learning disorder, and that Ms. Harris's testimony that it may take a long time to ameliorate claimant's condition does not establish that claimant suffers from a permanent irrevocable reduction of individual capacity. Decision and Order at 48-49. Moreover, the administrative law judge determined that claimant's testimony that he is limited from successfully attending English classes due to ongoing concentration difficulties from job-related pain and medications fails to establish that his functional illiteracy is due to a pre-existing mental impairment. *Id.* As illiteracy and language difficulties alone are insufficient to establish a pre-existing permanent partial disability for purposes of Section 8(f), the administrative law judge's determination that claimant does not have a pre-existing permanent partial disability is rational and accords with law. Accordingly, we affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge