BRB Nos. 97-0394
and 97-0394A

GERALD R. REEVES	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
GLOBAL ASSOCIATES	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Joel F. Gardiner, Administrative Law Judge, United States Department of Labor.

Malcolm M. Crosland, Jr. (Steinberg Law Firm), Mt. Pleasant, South Carolina, for claimant.

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for employer/carrier.

Laura Stomski (J. Davitt McActeer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH and

McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Awarding Benefits (96-LHC-42) of Administrative Law Judge Joel F. Gardiner 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 was employed as a lead man machinist when he injured his back on July 24, 1991, while attempting to lift an engine room hatch. Claimant sought immediate medical treatment and was diagnosed with a low back strain. As claimant continued to experience pain and difficulty walking, he was referred to Dr. Johnson, a surgeon, on January 9, 1992. Dr. Johnson noted that an MRI of claimant's spine indicated "a disc herniation, central, paracentral at L3-L4 with a disc bulge and degeneration at 4-5." Ex. 5. Claimant continued treatment for his back and resulting psychological pain disorder through the date of the hearing, and sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant sustained a serious back injury on July 24, 1991, and that claimant's psychological problems constitute a work-related injury as a consequence of his work-related back injury. In addition, the administrative law judge found that claimant reached maximum medical improvement on February 3, 1995, and that he cannot return to work as a lead machinist. The administrative law judge also found that employer submitted credible and persuasive evidence as to the availability of suitable alternate employment and concluded that claimant has the residual wage-earning capacity to work 40 hours per week at minimum wage. Thus, he awarded permanent partial disability benefits beginning on April 12, 1996, the date of the labor market survey. The administrative law judge also found that the evidence does not establish that claimant suffered from a pre-existing permanent partial disability, and thus denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, claimant contends that the administrative law judge erred in finding that he is not totally disabled, asserting that employer did not establish suitable alternate employment available in claimant's community within claimant's work restrictions. Employer responds, urging affirmance of the administrative law judge's finding on this issue. However, on cross-appeal, employer contends that the administrative law judge erred in finding that claimant has a wage-earning capacity of only $134 per week. Employer also contends that the administrative law judge erred in not retroactively applying the labor market survey to the date of maximum medical improvement, and in failing to award Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the

Director), responds, urging affirmance of the administrative law judge's refusal to retroactively apply the labor market survey and denial of Section 8(f) relief. Claimant responds, contending that the administrative law judge erred in finding that employer established that claimant had any residual wage-earning capacity.

Claimant contends on appeal that the administrative law judge erred in finding that claimant is not totally disabled, alleging that employer did not establish suitable alternate employment available in claimant's community within claimant's work restrictions, including claimant's psychological condition. Specifically, claimant alleges the administrative law judge erred by not discussing Dr. Brilliant's opinion and in discrediting Ms. Hutchinson's opinion that claimant is unable to work. Claimant also contends that the administrative law judge erred in relying solely on the restrictions assigned by Dr. Warmouth as they do not take into consideration his psychological condition or the medications he is taking. Once the claimant establishes that he is unable to perform his usual work, the burden shifts to the employer to demonstrate the availability of a range of realistic job opportunities within the geographic area where claimant resides, which the claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). In the present case, the administrative law judge found that claimant has established that he cannot return to work as a lead man machinist, and employer does not dispute this finding. Thus, the burden shifted to employer to establish suitable alternate employment.

The administrative law judge found that only one of the physicians of record, Dr. Snover, opined that claimant could not return to work of any kind, and the administrative law judge instead credited Dr. Warmouth's opinion that claimant could return to work with restrictions. The administrative law judge rejected the opinion of claimant's vocational counselor, Ms. Hutchinson, that claimant was unable to perform any substantial gainful work activity as he found that the opinion was unfounded. The administrative law judge then compared claimant's physical limitations as stated by Dr. Warmouth, *see* Cl. Ex. 10, with the physical requirements of the positions identified by Ms. Scherr, employer's vocational counselor, and concluded that her survey identified a range of jobs within the physical limitations prescribed by Dr. Warmouth; specifically, the administrative law judge found that claimant has the residual work capacity to work 40 hours per week at entry level positions as a key cutter and as a trophy assembler.

We conclude this case must be remanded for reconsideration of whether claimant is able to perform suitable alternate employment. In addition to Dr. Snover's opinion that claimant cannot perform any work, as claimant correctly contends, the administrative law judge failed to note that Dr. Brilliant also opined that he does not "see [claimant] returning to work in his present state...[and] without treatment at a pain clinic, he has to be considered totally disabled." Emp. Ex. 6. If a claimant is unable to perform any work, employer has not established the availability of suitable alternate employment. *Lostanau v. Campbell Industries, Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.,* 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

We also agree with claimant that the administrative law judge improperly rejected the opinion of claimant's vocational counselor as lacking a foundation. Ms. Hutchinson testified that she based her opinion on personal meetings with claimant, his prior job history, his age, educational background, physical limitations, as well as his medical history in total. Tr. at 65, 67. Ms. Hutchinson concluded that "[claimant's] physical limitations and pain component which includes the emotional aspects is so significant that ...he is not able to compete on the job market and unable to work at this time." Tr. at 69. The administrative law judge stated that Ms. Hutchinson did not investigate the job market and did not attempt to find employment for claimant. Thus, the administrative law judge found that "[r]emarkably and without foundation, she concluded that claimant was unemployable." Decision and Order at 19. We hold that the administrative law judge provided an improper ground for rejecting Ms. Hutchinson's opinion, as it is not without foundation. She testified as to its basis, and therefore provided a reason for not attempting to perform a labor market survey. On remand, the administrative law judge must reconsider the weight to be given Ms. Hutchinson's report. We note that in so doing, if the administrative law judge on remand does not accept her opinion that claimant is unemployable, he must nonetheless evaluate her testimony as to the suitability of the specific jobs employer identified.

With regard to the specific jobs at issue here, we agree that the administrative law judge inadequately considered the suitability of the jobs identified given claimant's psychological condition and the medications he is taking. Dr. Warmouth, on whom the administrative law judge relied, noted that claimant was taking Mexitill, Darvon, Percodan, Sarzone for depression, and Tagamet, but there is no evidence that Dr. Warmouth considered claimant's psychological condition in determining his impairment rating; rather, his rating and restrictions are based solely on claimant's unoperated back and associated pain.[1] *See* Cl. Ex. 10. Employer's vocational expert, Ms. Scherr, relied on Dr. Warmouth's restrictions in identifying alternate job opportunities,[2] and Ms. Hutchinson specifically stated that the key cutter position was not, in her opinion, suitable for claimant given his physical restrictions as well as his emotional injury and the medications he is taking. Tr. at 76-77. Therefore, in view of the administrative law judge's failure to discuss Dr. Brilliant's opinion and the possible effects of the psychological condition and/or

[1]Dr. Warmouth stated that claimant has a 16 percent impairment of the whole man based on his stable unoperated back with medically documented pain, and he restricted claimant to "lifting, carrying, pushing and pulling no more than twenty (20) pounds. [Claimant] is limited in stair climbing and should not have to sit, stand or walk for any continuous time exceeding one (1) hour. Claimant should never perform overhead activity above shoulder height." Cl. Ex. 10.

[2]Contrary to claimant's contention, the vocational expert need not personally interview claimant, as long as she is aware of all relevant factors, *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), or tell potential employers about claimant's restrictions. *Universal Maritime Corp. v. Moore*, 126 F.3d 256 (4th Cir. 1997).

medications claimant is taking, and his invalid reason for rejecting Ms. Hutchinson's opinion, we vacate the administrative law judge's finding that employer established the availability of suitable alternate employment and remand the case to the administrative law judge for reconsideration of this issue. *See White v. Peterson Boatbuilding* Co., 29 BRBS 1 (1995)(Board remanded case to administrative law judge as his suitable alternate employment finding only took into account claimant's physical, and not psychological condition); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992)(case remanded to administrative law judge to consider effect claimant's medication would have on the alternate jobs identified).

Claimant also contends that the administrative law judge erred in finding that employer established a "range" of suitable alternate employment as only one of the positions identified had an actual opening in April 1996, when Ms. Scherr's survey was done. Employer must present evidence that a range of jobs exists which is reasonably available and which the disabled employee is realistically able to secure and perform. *Lentz,* 852 F.2d at 137, 21 BRBS at 113 (CRT). Employer's burden to establish suitable alternate employment requires evidence of specific job openings available at any time during the critical periods which claimant is medically able to seek work. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990). In the present case, the administrative law judge found that claimant could perform the job as a key cutter which had a current opening at the time of the labor market survey, and as a trophy assembler, for which there was an expected opening in one month at one employer and "frequent openings" at another employer. Emp. Ex. 8. On remand, the administrative law judge must consider whether employer has established evidence of a "range of jobs" which claimant would be realistically able to secure and perform and which is reasonably available in the community to claimant. *Lentz*, 952 F.2d at 131, 21 BRBS at 113 (CRT).

On cross-appeal, employer contends that the administrative law judge erred in finding that claimant has a residual wage-earning capacity of no more than $134 per week, and in not commencing the award of partial disability on the date claimant reached maximum medical improvement. The administrative law judge based his finding of claimant's wage-earning capacity on the salaries paid for the alternate employment he found employer established, specifically the key cutter ($4.65) and trophy assembler jobs ($4.25 and $4.65). Therefore, as the administrative law judge may again find suitable alternate employment established on remand, we will address employer's specific contentions regarding wage-earning capacity. Employer contends that its labor market survey establishes the availability of jobs which pay more than those found suitable by the administrative law judge. The administrative law judge found that claimant does not have the necessary transferrable skills to work as a service writer or as a quality control/purchaser, and employer does not directly challenge this finding. Therefore, we affirm the administrative law judge's finding that these positions do not satisfy employer's burden of establishing suitable alternate employment, or a higher post-injury wage-earning capacity. In addition, as the administrative law judge found that Ms. Scherr did not identify the wages paid in the key cutter and trophy assembler positions at the time of injury, the administrative law judge used the minimum wage in effect in 1991 ($3.35 per hour) to weed

out the effect of inflation on claimant's post-injury wage-earning capacity. We affirm the administrative law judge's use of the minimum wage at the time of injury of the jobs identified as alternate employment in determining claimant's post-injury wage-earning capacity, as employer has raised no reversible error in this regard. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988).

Moreover, the Board has held based on circuit law that claimant's entitlement to total disability benefits continues until the date suitable alternate employment is found to be first available to claimant, not the date of maximum medical improvement, contrary to employer's contention, and such a showing may not be applied retroactively so as to commence a partial disability award before suitable alternate employment is shown to exist. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991)(decision on recon.); *see also Director, OWCP v. Bethlehem Steel Corp. [Dollins]*, 949 F.2d 185, 25 BRBS 90 (CRT) (5th Cir. 1991)*; Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991)*; Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). Therefore, we affirm the administrative law judge's finding that claimant's disability does not become partial until the effective date of the labor market survey, if suitable alternate employment is established on remand.

Employer also contends on cross-appeal that the administrative law judge erred in failing to award Section 8(f) relief as claimant has a history of medical treatment for chronic low back pain dating back to February 1988. Section 8(f) relief is available if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury; 2) the disability was manifest prior to the employment injury; and 3) the current disability is not due solely to the most recent injury. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992). In a case where claimant is partially disabled, employer must also establish that the resulting disability is materially and substantially greater as a result of the pre-existing disability. *Director, OWCP v. Bath Iron Works Corp.*, ___ F.3d ___, 1997 WL 679661 (1st Cir. Nov. 6, 1997). A pre-existing permanent partial disability has been defined as a serious, lasting physical condition. *See Lockheed Shipbuilding v. Director, OWCP [Sekin]*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In the instant case the administrative law judge found that while claimant did suffer back pain beginning on February 29, 1988, with periodic flareups thereafter, they were minor incidents which resulted in a few days out of work and each time he returned to his regular unrestricted duties. Decision and Order at 26. The medical records indicate that claimant was treated for a back strain in 1988, but was discharged from treatment by Dr. Williams on March 4, 1988, and one week later, an x-ray revealed a "normal back." Emp. Ex. 7. Dr. Williams released claimant to return to his regular duties without restriction by March 22, 1988. Claimant also suffered a back strain on April 9, 1991, but was released to his regular duties by Dr. Williams on April 22, 1991. Employer does not raise any specific allegations of error in the administrative law judge's finding that claimant did not suffer a

pre-existing permanent partial disability. Moreover, as the existing medical records fail to establish that the injuries cited by employer resulted in a "serious lasting physical condition,"[3] we hold that the administrative law judge rationally determined that employer failed to establish the pre-existing permanent partial disability element of Section 8(f) entitlement.[4] *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

[3]Dr. Aymond, for example, reviewed the previous medical records and concluded that no permanent impairment incurred from the previous back strains, given claimant's quick return to work. *See* Emp. Ex. 3.

[4]As we affirm the administrative law judge's finding that employer failed to establish a pre-existing permanent partial disability, and thus affirm the denial of Section 8(f) relief, we decline to address employer's and the Director's contentions regarding the manifest and contribution elements.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. The administrative law judge's denial of Section 8(f) relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge