

BRB No. 05-0506

WILLIAM TAPPA)	
)	
Claimant-Respondent)	
)	
v.)	
)	
MARINETTE MARINE CORPORATION)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: 03/10/2006
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Michael B. Kulkoski, Green Bay, Wisconsin, for claimant.

Gregory Sujack (Garafolo, Schreiber, Hart & Storm), Chicago, Illinois, for
employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H.
Feldman, 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, SMITH and
BOGGS, Administrative Appeals Judges.
PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-2085) of Administrative Law Judge Alice M. Craft 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, a pipe welder, sustained an injury to his back on October 21, 2001, while lifting a valve weighing between 100 and 150 pounds. HT at 34. Although claimant attempted to return to light-duty work, his pain and physical limitations increased. Claimant underwent a discectomy in January 2002. Employer conceded that claimant could not return to his usual job and that it had no position available within claimant's permanent physical restrictions.

In her Decision and Order, the administrative law judge found that employer did not establish the availability of suitable alternate employment and that therefore claimant is entitled to permanent total disability benefits. Additionally, she found that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer appeals, contending that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment and in denying it Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's award of total disability benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of Section 8(f) relief.

Once, as here, claimant establishes his inability to perform his usual work because of his work injury, the burden shifts to employer to establish that jobs exist that are reasonably available and that the disabled employee could realistically secure and perform given his age, education and restrictions. *Bunge Corp. v. Carlisle*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000). In this case, claimant's physical restrictions limit him to sedentary work with no lifting over 10 pounds, no climbing and no driving. In addition, claimant has limitations on walking and sitting, and may only occasionally bend, squat and lift. CX 3. Claimant was released to work for only four to five hours per day. CX 4.

The administrative law judge found that employer did not establish the availability of suitable alternate employment. She reviewed the testimony of two vocational rehabilitation consultants, Sarah Holmes and Linda Goss. Based upon the restrictions placed on claimant by his physician, Dr. Merritt, Ms. Holmes prepared a labor market

survey, dated September 24, 2002, in which she identified jobs in electrical assembly, home sales, telephone sales and customer service.¹ EX 6. The administrative law judge rejected the position in mobile home sales as it required claimant to drive clients to home sites and to be able to crawl under the units to demonstrate various qualities to potential buyers, contrary to claimant's physical restrictions which prohibited squatting, climbing and kneeling. CX 3.

Although Dr. Merritt approved the positions as being within claimant's physical restrictions, Ms. Goss opined that claimant was unlikely to be successful in securing and performing the sales and customer service jobs given his restrictions and vocational background. The administrative law judge specifically credited Ms. Goss's opinion that claimant's lack of computer and interpersonal skills would prohibit his performing the identified positions over Ms. Holmes's opinion that computer skills were not necessarily required in any of the positions and that his lack of sales experience would not be a detriment in these entry level positions. The administrative law judge is entitled to weigh the evidence, *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and we affirm her rejection of the sales and customer service positions as it is rational and supported by substantial evidence. *See, e.g., Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

The administrative law judge found that the single remaining job, that of an assembler, which both consultants found suitable for claimant, was not sufficient to meet employer's burden. The administrative law judge found that this job was suitable for claimant but that employer failed to show that there was a reasonable likelihood under the circumstances of this case that claimant could obtain the single identified position. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). Indeed, both consultants testified as to the difficulty claimant would encounter in the current tight job market given his physical restrictions, which limited him to five-hour work days, and his vocational background. HT 96, 126. As employer identified only one job opportunity and did not proffer evidence of a significant likelihood of claimant's obtaining the identified position, the administrative law judge rationally found that employer failed to meet its burden of establishing the availability of suitable alternate employment. *Holland v. Holt Cargo Systems, Inc.*, 32 BRBS 179 (1998). As employer did not establish the availability of suitable alternate employment, we reject employer's contention that claimant was required to establish he diligently

¹ Ms. Holmes also identified a position at New Curative Rehabilitation, a non-profit rehabilitation center with non-competitive wages. HT at 27. The administrative law judge found that this position is sheltered employment and thus does not satisfy employer's burden. This finding has not been appealed.

sought alternate employment. *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Accordingly, the administrative law judge's finding that claimant is permanently totally disabled is affirmed.

Employer also argues that the administrative law judge erred in denying it relief pursuant to Section 8(f). Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his 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) (2^d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

In the present case, employer sought Section 8(f) relief based upon claimant's prior injuries to his back,² which, it contends, combined with claimant's subsequent 2001 work-related injury to result in his current permanent total disability. The administrative law judge found that the contribution element is not satisfied as employer presented no evidence that the 2001 injury, in and of itself, was not the source of claimant's totally disabling impairment.³

In challenging the administrative law judge's finding on appeal, employer avers that claimant's present disability is due to both the work injury and the pre-existing condition which materially contributed to claimant's ultimate total disability. Employer contends that the medical evidence is "logically in compliance with the requirements for proof" under Section 8(f). Emp. Brief at 16. Employer, however, misapprehends the standard for establishing contribution in a total disability case. Contrary to employer's

² The record reflects that claimant suffered several prior injuries. In seeking Section 8(f) relief, employer relied primarily upon claimant's injuries to his back: an L-3 compression fracture in a car accident in the early 1980s; a lumbosacral sprain and second L-3 compression fracture suffered when claimant fell down steps; and significant back pain requiring treatment and physical therapy resulting from three falls on a single day in April 1989. EXs 1, 3; CX 2; HT at 15-25.

³ Because he found that employer failed to establish the contribution element, the administrative law judge did not specifically address the other two elements necessary for Section 8(f) relief except to state that the Director did not contest that claimant had suffered previous injuries which were manifest to employer. Decision and Order at 30.

assertion, it need not merely establish that claimant's prior conditions combined with the work-related injury to cause a greater disability than would have occurred from the work accident alone. Employer must establish, as the administrative law judge properly stated, that the work accident alone did not result in claimant's present total disability. *See Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT). The administrative law judge found that employer introduced no evidence that would carry its burden in this respect, and employer fails on appeal to raise any error in this finding.⁴ As the administrative law judge's finding that the contribution element is not satisfied is rational, supported by substantial evidence and in accordance with applicable legal standards, we affirm the finding that the contribution requirement is not satisfied and the consequent denial of Section 8(f) relief.

⁴ Specifically, Dr. Merritt opined that the subject accident was the probable cause of claimant's current disability, EX 4; Dr. Sellers stated that the pre-existing condition and last accident resulted in a greater disability than the last accident alone, EX 5; and Dr. Weinshel related that it was probable that the 2001 accident caused claimant's present disability, CX 3. In addition to finding the opinions legally insufficient to establish the contribution element, the administrative law judge also found that the opinions lack supporting explanation in the medical record. Decision and Order at 30; *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge