BRB No. 96-1095
and 96-1095A

THOMAS J. WHITE Claimant Cross-Petitioner v. PETERSON BOATBUILDING COMPANY and INSURANCE COMPANY OF NORTH AMERICA Employer/Carrier-Respondents Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: DECISION and ORDER

Appeals of the Decision and Order on Remand of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Terri L. Herring-Puz (Welch & Condon), Tacoma, Washington, for claimant.

James E. Hutchins (Faulkner, Banfield, Doogan & Holmes), Anchorage, Alaska, for employer/carrier.

Mark Reinhalter (J. Davitt McAteer, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), appeal the Decision and Order on Remand (88-LHC-1232) of Administrative Law Judge Edward C. Burch awarding benefits 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case, involving a claim for a work-related low-back injury sustained on October 17, 1978, is on appeal before the Board for a second time. In the prior appeal, after hearing oral argument, the Board affirmed the administrative law judge's findings that claimant's right to compensation under the Act was not barred under Section 33(g) of the Act, 33 U.S.C.§933(g), and that employer was not entitled to a credit for the net amount of a third-party settlement under Section 33(f), 33 U.S.C.§933(f), because the settlement involved a different injury than that for which claimant was seeking compensation under the Act. The administrative law judge further determined that a subsequent accident sustained by claimant in May 1979 was not an intervening cause sufficient to relieve employer of liability. Relevant to the current appeal, the Board also vacated the administrative law judge's finding that employer met its burden of establishing the availability of suitable alternate employment based on telephone answering and telephone representative jobs identified by Ms. Prosser, employer's vocational expert, due to the administrative law judge's failure to consider the effect of claimant's low intelligence and psychological problems on his employability. The Board directed the administrative law judge on remand to reconsider whether suitable alternate employment was established, taking into account both claimant's physical and mental limitations; to consider the testimony of Dr. Severtson, a licensed psychologist, that claimant was not vocationally retrainable; to address the evidence regarding claimant's pre-existing psychological problems; and to reconsider the opinion of Mr. Peterson, claimant's vocational expert, that claimant was unemployable in light of the evidence as a whole. The Board also vacated the administrative law judge's finding that employer was not entitled to Section 8(f) relief based on claimant's pre-existing psychological problems and low intelligence. In so doing, the Board noted that the administrative law judge's determination that employer failed to establish that claimant suffered any psychological disorder other than a low intellectual level was not consistent with the record and that his finding that claimant's low intellectual functioning was insufficient to establish a pre-existing permanent partial disability was inconsistent with recent controlling case precedent, *e.g.*, *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990). The Board instructed the administrative law judge on remand to consider all relevant evidence on this issue and also to address whether a back injury suffered by claimant in 1970 constituted a pre-existing permanent partial disability.

On remand, the administrative law judge found that employer established the

availability of suitable alternate employment for claimant as a service station attendant at the minimum wage of $2.65 per hour at the time of claimant's injury. Accordingly, he reinstated his prior award of permanent partial disability compensation commencing April 2, 1984, the date claimant reached maximum medical improvement, based on the difference between claimant's stipulated average weekly wage of $192.56 and his post-injury wage earning capacity of $106 per week. The administrative law judge also found that employer was entitled to Section 8(f) relief based on claimant's pre-existing psychological disorder and low intelligence. In an Order dated April 30, 1996, the administrative law judge summarily denied claimant's Motion for Reconsideration.

The Director now appeals the administrative law judge's award of Section 8(f) relief to employer, challenging his determination that claimant' pre-existing psychological/ intellectual problems were pre-existing permanent partial disabilities. Employer responds, urging affirmance. Claimant appeals the administrative law judge's finding that employer established the availability of suitable alternate employment based on the service station attendant position identified by Ms. Prosser. Employer has not responded to claimant's appeal.

Suitable Alternate Employment

As it is undisputed that claimant is incapable of performing his usual employment as a mechanic, he established a *prima facie* case of total disability. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986). Accordingly, the burden shifted to employer to demonstrate the availability of suitable alternate employment within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing and could secure if he diligently tried. *See Edwards v. Director, OWCP,* 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Hairston v. Todd Shipyards Corp.,* 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). The Act requires that employer establish realistic job opportunities for claimant; for the job opportunities to be considered realistic, employer must establish the precise nature, terms, and availability of the alternate positions identified. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989).

In evaluating the evidence on this issue on remand, the administrative law judge accepted the opinion of Dr. Severtson that claimant was not capable of learning any new vocational task through formal vocational rehabilitation or on-the-job training. Accordingly, he found that the telephone answering service operator and telephone representative jobs upon which he relied initially did not constitute suitable alternate employment because they required on-the-job training of new skills. The administrative law judge, however, rejected the testimony of Mr. Peterson, claimant's vocational expert, that claimant was unable to return to any work, reasoning that not all types of jobs within claimant's capabilities would require retraining. In so concluding, he noted that Ms. Prosser had identified four occupational categories of jobs which she believed were consistent with claimant's abilities

including: (1) auto service station attendant; (2) auto self-service station attendant; (3) parking lot attendant; and (4) auto parts, order and stock clerk. Based on an opening for a service station attendant identified by Ms. Prosser in a report dated May 4, 1983, the administrative law judge determined that employer met its burden of establishing the availability of suitable alternate employment paying the minimum wage at the time of claimant's injury and accordingly awarded him permanent partial disability compensation commencing April 2, 1984. Decision and Order on Remand at 3; EX 27 at 321.

Claimant initially argues on appeal that the administrative law judge erred in finding that the service station position constitutes suitable alternate employment because he does not have the transferable skills and education necessary to perform this work. We reject this contention. Inasmuch as claimant was previously employed as an automobile mechanic and gas station service attendant, and ran his own Mobil Car Care Service station for one year, see Tr. at 31, 111-112; CX 2 at 19-21; EX 28 at 495-499, the administrative law judge rationally determined that claimant had the transferable skills necessary to perform this work. Decision and Order on Remand at 3.

Similarly, we reject claimant's assertion that the administrative law judge failed to account for his emotional difficulties, depression, and learning disabilities in assessing his ability to work as a service station attendant. Inasmuch as Ms. Prosser testified that both Dr. Severtson, claimant's treating psychologist, and Dr. Heath, claimant's treating physician, reviewed the descriptions and requirements in the Dictionary of Occupational Titles labor codes for the four occupational categories identified, and approved them as being within claimant's abilities, and the administrative law judge credited this testimony, he properly accounted for claimant's psychological and mental problems in determining that claimant was capable of performing work as a service station attendant. Decision and Order on Remand at 3; Tr. at 167-168; EX 27 at 333.

We nonetheless agree with claimant, however, that the administrative law judge erred in finding that employer established the availability of suitable alternate employment based on the service station attendant position identified in Ms. Prosser's May 4, 1983, letter. The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that employer must "prove that suitable alternate work was *'realistically* and *regularly'* available to [claimant] on the open market." *Edwards,* 999 F.2d at 1375, 27 BRBS at 83 (CRT) (emphasis in original).[1] Employer must point to specific jobs claimant can perform in order to meet its suitable alternate employment burden and thereby establish claimant's post-injury wage-earning capacity. *Hairston,* 849 F.2d at 1196, 21 BRBS at 123 (CRT), *citing Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980).

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[1]In *Edwards*, the court noted that the Fourth Circuit adopted a similar standard in *Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988), quoting the statement that employer must show the "injured employee retains the capacity to earn wages in *regular, continuous* employment ...." (emphasis in *Edwards*). In *Lentz*, the court held that an employer's showing of only one specific available job is insufficient.

In the present case, employer failed to introduce any evidence of the precise nature and terms of the station attendant job, which was a blind listing posted on March 23, 1983, at Employment Security in Lakewood, Washington. There is no record of the identity of the employer, the location of the service station, or any description of the job duties, necessary skills, or physical requirements.[2] Moreover, there is no evidence that this job, which Ms. Prosser identified in her progress report dated May 20, 1983, was ever realistically available to claimant. Ms. Prosser indicated that when the job leads were given to claimant on May 4, 1983, "it was emphasized by the specialist that no openings existed currently." EX 27 at 315. There is also no evidence in the record that this job was available at the critical time when claimant was able to perform it, *i.e.*, upon reaching maximum medical improvement on April 2, 1984, approximately one year later. While Dr. Heath released claimant to return to part-time work within his restrictions for 4 to 5 hours per day prior to his reaching maximum medical improvement, *see* EX 25 at 289, EX 27 at 341, there is also no indication in the record that the service station attendant position identified by Ms. Prosser was ever available on a part-time basis. In view of the employer's failure to establish the precise nature and realistic availability of the service station or any other specific position, employer did not demonstrate that jobs were "realistically and regularly" available to claimant on the open market. As the administrative law judge's conclusion is not consistent with *Edwards, Hairston,* and *Bumble Bee*, we reverse the administrative law judge's finding that employer met its burden of demonstrating the availability of suitable alternate employment. As claimant established a *prima facie* case of total disability and employer failed to establish the availability of suitable alternate employment, the administrative law judge's Decision and Order is modified to reflect claimant's entitlement to permanent total disability benefits commencing April 4, 1984.

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[2]The administrative law judge relied on Dr. Heath's assessment that claimant should be restricted to lighter work that did not require significant lifting, forward flexion or jarring stresses, and that claimant could sit and walk eight hours a day, lift and bend up to one hour a day, squat two hours a day, climb one hour a day, kneel three hours a day, twist two hours a day, stand two hours a day, and lift between 20 and 50 pounds. Decision and Order on Remand at 3; EX 10 at 68A; EX 25 at 289.

Section 8(f) Relief

In his appeal, the Director challenges the administrative law judge's finding on remand that employer satisfied the pre-existing permanent partial disability requirement of Section 8(f) entitlement based on claimant's pre-existing psychological disorder and low intelligence. The Director avers that in making this determination, the administrative law judge misread the Board's instruction on remand to determine whether claimant's pre-existing intellectual/psychological problem was so severe as to motivate a cautious employer to fear greatly increased compensation liability, and violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), by summarily concluding that claimant's low intelligence and emotional problems constituted a pre-existing permanent partial disability in light of Ninth Circuit case precedent.

Section 8(f) of the Act shifts the liability to pay compensation for permanent partial and permanent total 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, 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 disability or death. *See generally Director, OWCP v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992)*; Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 1 (1992).

After review of the administrative law judge's Decision and Order on Remand in light of the record evidence and the Director's arguments, we affirm his finding that employer satisfied the pre-existing permanent partial disability requirement for Section 8(f) relief based on claimant's pre-existing psychological/ intellectual problems. Contrary to the Director's assertions, in making this determination the administrative law judge complied with both the Board's remand instructions and the requirements of the APA. Although the Director argues on appeal that the administrative law judge's sole reason for making this determination was that it was mandated by controlling Ninth Circuit case precedent, we disagree. In concluding that employer was entitled to Section 8(f) relief, the administrative law judge noted that claimant's low intelligence level and emotional problems were documented in a 1974 neuropsychological evaluation which revealed that claimant had a hypochondriacal passive dependent personality with poor social judgment and impulse disorder, and an I.Q. of 78 on the Wechsler's Intelligence Scale. Decision and Order on Remand at 4; EX 24 at 171-172. As the administrative law judge reasonably interpreted the documented conditions as indicative of permanent, irrevocable reductions in claimant's capacity, and the 1974 neuropsychological evaluation is such evidence that a reasonable mind might accept as adequate to support a conclusion "that claimant was suffering from immutable mental limitations," his conclusion that claimant suffered from a pre-existing permanent partial disability under Section 8(f) is consistent with the controlling case precedent of the United States Court of Appeals for the Ninth Circuit. *See Mayes,* 913 F.2d

at 1433, 24 BRBS at 35 (CRT); *State Compensation Ins. Fund v. Director, OWCP*, 818 F.2d 1424, 20 BRBS 11 (CRT)(9th Cir. 1987). As the 1974 neuro-psychological evaluation provides objective evidence of a serious lasting condition which would motivate a cautious employer to discharge the employee because of an increased risk of compensation liability, and the administrative law judge also credited Dr. Severtson's testimony that claimant's pre-existing mental limitations combined with his back condition to render him unemployable to the extent retraining would be required, we reject the Director's arguments and affirm the administrative law judge's award of Section 8(f) relief .

Accordingly, the administrative law judge's finding that employer met its burden of demonstrating the availability of suitable alternate employment based on the service station job is reversed, and his Decision and Order on Remand is modified to reflect claimant's entitlement to permanent total disability compensation. In all other respects the Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge