BRB No. 05-0413

HELEN BEUMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY PERSONNEL COMMAND/MWR	)	DATE ISSUED: 11/15/2005
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Permanent Total Disability Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Robert L. Kelley (Law Offices of Robert L. Kelley), Camarillo, California, for claimant.

Christopher M. Galichon (Law Offices of Christopher Galichon APLC), San Diego, California, for self-insured employer.

Mark A. Reinhalter (Howard Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Permanent Total Disability Benefits (2003-LHC-1936) of Administrative Law Judge Jennifer Gee 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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). The Board heard oral argument in this case in Pasadena, California, on June 27, 2005.

Claimant was employed as a cook by employer in its Child Development Center on the Port Hueneme Naval Base near Ventura, California. On November 12, 1998, while carrying an empty tray, claimant slipped and fell at work. She immediately complained of pain in her right hip, shoulder and knee. Claimant subsequently treated with a number of physicians for various complaints of pain and discomfort to her knee, back and shoulder, and she underwent a total right knee replacement on December 16, 1999. Thereafter, during the course of her physical therapy to rehabilitate her right knee, claimant's back condition worsened. Although claimant received a series of caudal epidural injections in an effort to alleviate her back discomfort, her back pain continued and, on October 28, 2002, she underwent a L4-5 laminotomy and nerve root decompression. Claimant relocated to Santa Maria, California, approximately two years after the November 1998 work-incident and has not returned to gainful employment post-injury.

In her Decision and Order, the administrative law judge concluded that claimant's back condition is related to her November 12, 1998 work-incident, and that claimant's knee and back conditions reached maximum medical improvement on June 22, 2000, and September 4, 2003, respectively. Next, the administrative law judge determined that claimant is unable to return to her usual job as a cook with employer, and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from November 13, 1998, through September 3, 2003, and permanent total disability compensation from September 4, 2003, and continuing. 33 U.S.C. §908(a), (b). The administrative law judge also denied employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer avers that the administrative law judge erred in her determination regarding the nature and extent of claimant's disability, as well as her finding that employer is not entitled to relief pursuant to Section 8(f) of the Act. Claimant responds, urging affirmance of the administrative law judge's award of ongoing total disability benefits.[1] The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of the administrative law judge's award of compensation to claimant; additionally, the Director asserts that the Board should remand the case for the administrative law judge to reconsider employer's entitlement to relief pursuant to Section 8(f) of the Act.

MAXIMUM MEDICAL IMPROVEMENT

Employer initially challenges the administrative law judge's finding that claimant's back condition reached maximum medical improvement on September 4, 2003. Employer contends that the testimony of Dr. Victoria supports a determination that the totality of claimant's

[1] In its reply brief, employer seeks to strike a document attached to claimant's response brief. Employer's argument has merit. Claimant attached a deposition, labeled Exhibit A, to her brief, and this deposition was not offered into evidence before the administrative law judge. As evidence must be formally admitted into the record, *see* 20 C.F.R. §702.338; *Ross v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 224 (1984), we grant employer's request and strike claimant's Exhibit A from her response brief.

conditions reached a state of permanency on August 22, 2000. The determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120 (1988); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). A claimant's condition may be considered permanent when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). Thus, a finding of fact establishing the date of maximum medical improvement must be affirmed if it is supported by substantial evidence. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999); *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In concluding that claimant's back condition reached maximum medical improvement on September 4, 2003, the administrative law judge relied upon the reports of Dr. Victoria, claimant's treating physician.[2] In a progress report dated August 22, 2000, Dr. Victoria wrote that claimant's condition was permanent and stationary, Cl. Ex 63; approximately five weeks later, on September 27, 2000, Dr. Victoria wrote that claimant was permanent and stationary with regard to her knees. Cl. Ex. 141 at 327. In addressing these reports and their relationship to the issue of the permanency of claimant's back condition, the administrative law judge concluded that Dr. Victoria's September 2000 report clarified his August 2000 report as referring only to claimant's knee condition. Decision and Order at 18. Thereafter, on September 4, 2003, Dr. Victoria opined that claimant had maximized her improvement, and that claimant's condition is permanent and stationary. Cl. Ex. 141 at 272. After finding that Dr. Victoria was the only physician of record who based his findings regarding permanency upon an actual examination of claimant, the administrative law judge determined that claimant's back condition became permanent on September 4, 2003, pursuant to Dr. Victoria's report of that date. Accordingly, as the administrative law judge addressed the totality of Dr. Victoria's reports, and as the record contains substantial evidence to support the administrative law judge's determination on this issue, we affirm the administrative law judge's finding that claimant's back condition reached permanency as of September 4, 2003. *See Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989).

AVAILABILITY OF SUITABLE ALTERNATE EMPLOYMENT

Employer next assigns error to the administrative law judge's finding that claimant remains totally disabled as a result of her November 12, 1998, work-related fall. Specifically, employer challenges the administrative law judge's finding that it did not establish the availability of suitable alternate employment. Where, as in the instant case, it is uncontroverted that claimant is unable to return to her usual employment duties with employer as a result of her work-injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which

[2] Employer does not challenge the administrative law judge's finding that claimant's knee condition became permanent and stationary as of June 22, 2000; accordingly, that finding is affirmed.

she could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Employer submitted into evidence vocational testimony which it alleges establishes the availability of suitable alternate employment that claimant could perform; specifically, employer's vocational rehabilitation expert initially identified twelve employment positions which she deemed were suitable for claimant. *See* Emp. Ex. 9. Upon reviewing these identified positions, Dr. Kahmann, the surgeon who operated on claimant's back, approved six of them as being within claimant's capabilities. However, Dr. Victoria, claimant's treating physician, rejected each of the identified positions as being outside of claimant's current restrictions.[3] In her Decision and Order, the administrative law judge found that in approving these six positions, Dr. Kahmann considered only claimant's back condition. After one of these positions was eliminated by employer's expert,[4] the administrative law judge considered the suitability of the remaining five positions in light of both conditions. Decision and Order at 21. The administrative law judge concluded that each of these positions was unsuitable for claimant.

In this regard, the administrative law judge found that the employment opportunities with two security firms were inappropriate for claimant. Specifically, the administrative law judge found that the position with Segura Security Services, which required that applicants utilize their own vehicles, was not appropriate for claimant since claimant does not drive and employer failed to identify a specific position with this employer that could be compared to claimant's abilities, and that the position with Guard Access Control was similarly unsuitable for claimant pursuant to claimant's restrictions on sitting and the commute involved. The administrative law judge further found the positions of meal checker/cashier and receptionist to be unsuitable based on claimant's lack of skills and experience for those positions. Lastly, the administrative law judge determined that claimant's restrictions on sitting for more than one hour and her lack of skills rendered a sales clerk position unsuitable. Decision and Order at 22-24.

In challenging the administrative law judge's determination that it did not establish the availability of suitable alternate employment, employer contends that the administrative law judge erred by failing to determine the relevant geographic area for consideration when addressing this issue; in this regard, employer asserts that it was unduly prejudiced by claimant's move from Ventura to Santa Maria, California. Additionally, employer challenges the administrative law judge's finding that the positions identified by its vocational expert fail to satisfy its burden of proof. We reject employer's assertions of error. While the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has not addressed the issue of determining the relevant labor market when a claimant relocates post-injury, the United States Court of Appeals for the Fourth Circuit has ruled that, in cases where a claimant relocates following an injury, the administrative law judge should determine the

[3] Specifically, Dr. Victoria restricted claimant from sitting or walking more than one hour at a time, and standing more than 30 minutes at a time. Cl. Ex. 175.

[4] At the formal hearing, Ms. Wise, employer's vocational expert, withdrew from consideration one of the six positions which she had previously identified as being suitable for claimant. *See* H.Tr. at 154.

relevant labor market for establishing the availability of suitable alternate employment after considering such factors as claimant's residence at the time she files for benefits, her motivation for relocating, the legitimacy of that motivation, the duration of her stay in the new community, her ties to the new community, the availability of suitable jobs in that community as opposed to those in her former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994). The court also stated that the most persuasive definition of the relevant labor market is the "community in which [claimant] lives." *See*, 36 F.3d at 381, 28 BRBS at 102(CRT). The Fourth Circuit's holding in *See* was subsequently followed by the United States Court of Appeals for the First Circuit in *Wood v. U.S. Dept of Labor,* 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997), wherein that court endorsed an "on the facts approach" and further stated that the claimant's chosen community is presumptively the proper choice for determining a claimant's earning capacity and that employer bears the burden of showing that the move to a new locale is unjustified.

In the instant case, employer concedes that the record developed before the administrative law judge contains no discussion of claimant's motivation for relocating or ties to her new community; rather, employer contends only that it was unduly prejudiced by claimant's move to Santa Maria. The record reveals, however, that employer's vocational expert conducted labor market surveys in both the Ventura and Santa Maria locales, and that of the six positions approved by Dr. Kahmann, four were in the Santa Maria area while the remaining two were located in the Ventura area. Thus, the majority of positions identified by employer as suitable for claimant were located near claimant's new residence. Moreover, in addressing this issue, the administrative law judge considered all of the employment opportunities identified by employer's vocational expert. In doing so, it is well-established that she was entitled to weigh the evidence and draw her own inferences from it, *see John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and she is not bound to accept the opinion of any particular witness. *See Todd Shipyards v.* Donovan, 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge explicitly considered each of employment positions identified by employer and deemed suitable by Dr. Kahmann, and thereafter determined, after consideration of the totality of claimant's condition, her work experience and her skills, that claimant is incapable of performing any of these jobs. As the administrative law judge's findings are rational, supported by substantial evidence, and are in accordance with law, her conclusion that employer failed to meet its burden of demonstrating the availability of suitable alternate employment and consequent award of total disability benefits is affirmed. *See Wilson*, 30 BRBS 199; *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

SPECIAL FUND RELIEF

Lastly, employer challenges the administrative law judge's decision to deny its request for Section 8(f) relief. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §944. In a case where a claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that his permanent total disability is not due solely to the most recent injury. *Todd Pacific Shipyards*

Corp. v. Director, OWCP, 913 F.2d 1426, 1429, 24 BRBS 25, 28(CRT) (9th Cir. 1990); *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

Employer initially challenges the administrative law judge's determination that claimant's pre-existing bilateral knee condition did not constitute a pre-existing permanent partial disability. A "pre-existing partial disability" has been defined as "such a serious . . . disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of . . . compensation liability." *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 115(CRT) (1st Cir. 1992); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). The mere existence of a pre-existing condition, however, does not establish that claimant was disabled; rather, there must exist, as a result of that pre-existing condition, some serious lasting physical problem. *See Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). In the instant case, employer avers that the medical evidence of record establishes that claimant had a history of arthritis in her knees, that her medical history indicates that she would need a knee replacement, that her work-injury exacerbated that condition requiring that such surgery take place, and that claimant pre-injury had been medically restricted to part-time employment. In addressing this issue, the administrative law judge acknowledged the existence of medical records indicating that claimant suffered from osteoarthritis of her knees pre-injury, but she summarily concluded that employer was not entitled to Section 8(f) relief for claimant's knee condition.[5] Thus, she did not specifically address whether claimant's pre-existing osteoarthritis of the knees resulted in a serious and lasting condition sufficient to constitute a pre-existing partial disability for purposes of establishing employer's entitlement to Section 8(f) relief. Decision and Order at 26. As the administrative law judge did not address the totality of the evidence of record on this issue in light of the relevant caselaw, we vacate her finding that claimant's knee condition does not satisfy the first element required for Section 8(f) relief to be granted, and we remand the case for her to consider the issue of whether claimant's pre-injury knee conditions constituted a pre-existing permanent partial disability for the purposes of establishing employer's entitlement to such relief. If they do, the administrative law judge must then determine whether employer satisfied the requisite manifest and contribution elements required for relief pursuant to Section 8(f) to be granted.

Employer also contends that the administrative law judge erred in finding that it did not establish the contribution element with regard to claimant's back condition. Employer asserts that claimant's November 12, 1998, work-injury aggravated her pre-existing back condition, and

[5] In addressing this issue, the administrative law judge considered claimant's knee condition separately and distinctly from her back condition when, referencing Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), she noted that claimant's recovery for her knee would be for less than the 104 weeks of benefits referred to within Section 8(f). Decision and Order at 26. Claimant, however, injured both her back and knee, and she has been awarded ongoing permanent total disability benefits; thus employer is liable for more than 104 weeks of permanent disability benefits.

that consequently her subsequent total disability is not due solely to her work-injury. To establish the contribution element, employer must show that claimant's subsequent injury alone would not have resulted in her permanent total disability. *E.P. Paup Co.*, 999 F.2d 1341, 27 BRBS 41(CRT); *see Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Dominey*, 30 BRBS 134. While a work-related aggravation of a pre-existing condition may satisfy the contribution element in a case where claimant is totally disabled,) *see Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT (1st Cir. 1992), it is not sufficient if the evidence indicates only that the claimant's two injuries created a greater disability than the second injury alone. *E.P Paup*, 999 F.2d at 1353, 27 BRBS at 54(CRT). Rather, if the claimant's second injury was enough to totally disable claimant, it is not relevant that claimant's pre-existing condition made his total disability even greater. *Id.*

The administrative law judge initially determined that claimant had a manifest, pre-existing permanent partial disability to her back; specifically, the administrative law judge found that a September 3, 1997, x-ray of claimant's lumbar spine revealed degenerative scoliosis. Decision and Order at 26-27. The administrative law judge subsequently determined, however, that employer presented no evidence that this pre-existing back condition contributed to claimant's present permanent total disability, and she accordingly denied employer's request for Section 8(f) relief based upon that pre-existing condition. We affirm this finding. Dr. Victoria, although noting an increase in bony spurs when comparing claimant's 1997 and 2000 x-rays, did not specifically offer an opinion as to whether claimant's pre-existing back condition contributed to her present total disability. Cl. Ex. 143. Similarly, in a letter dated May 2, 2003, Dr. Sohn declined to render an opinion apportioning claimant's disability. Cl. Ex. 50. Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer is not entitled to relief pursuant to Section 8(f) as a result of an alleged relationship between her pre-existing back condition and her work-injury.

Accordingly, the administrative law judge's determination that the presence of claimant's bilateral knee conditions did not establish the existence of a pre-existing permanent disability is vacated, and the case remanded for further consideration in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Permanent Total Disability Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge