BRB Nos. 11-0359

JAMES E. COLLINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 12/21/2011
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C.), New London, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-LHC-0919) of Administrative Law Judge Colleen A. Geraghty 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 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). The Board held oral argument in this case on October 25, 2011, in Providence, Rhode Island.

On December 2, 1997, while working in employer's testing department, claimant sustained an injury to his right knee; surgery to repair a torn medial meniscus was performed on February 27, 1998. Claimant performed light-duty work for employer from December 21, 1998, to August 15, 2005, when he went on medical leave to undergo obesity-related surgical procedures. On January 23, 2007, employer terminated

claimant's employment due to the expiration of his leave of absence. EX 14. It is uncontested that claimant's left knee became symptomatic as a direct result of his right knee injury and that, by December 26, 2006, his disability was due to both work-related knee conditions. JXs 1, 2. Employer voluntarily paid claimant temporary total disability benefits for his right knee injury from February 27 to December 20, 1998, and ultimately paid claimant permanent partial disability benefits under the schedule based on 37 percent impairment ratings to each leg. 33 U.S.C. §908(b), (c)(2).

In reports dated December 26, 2006 and January 23, 2007, Dr. Garrahan, claimant's treating orthopedic surgeon, stated that claimant is permanently totally disabled due to severe osteoarthritis of both knee joints and exogenous obesity.[1] CXs 21, 22. Dr. Willetts, an orthopedic surgeon who examined claimant at employer's request on August 30, 2007, stated that claimant was unable to return to his former employment, and he imposed physical restrictions on alternate employment claimant might perform.[2] EX 3. Claimant sought permanent total disability benefits under the Act, 33 U.S.C. §908(a), and on February 16, 2010, his claim was referred to the Office of Administrative Law Judges for a formal hearing.

On March 23, 2010, the administrative law judge issued a notice of hearing and prehearing order setting the case for hearing during the week of August 9, 2010.[3] ALJX

[1]In a subsequent office note dated April 1, 2010, Dr. Garrahan stated that claimant was unable to climb stairs, stoop, kneel or stand for any length of time, and that he could walk about 40 feet with Canadian crutches. CX 24.

[2]Dr. Willetts precluded claimant from climbing stairs or ladders, squatting, kneeling, crawling, or lifting/carrying more than 20 pounds. EX 3. Having noted that claimant uses Canadian crutches to walk, Dr. Willetts stated that claimant could briefly stand and walk if he was allowed to frequently sit and change positions and that he could sit and drive for 1½ to 2 hours. *Id.*

[3]The prehearing order, in pertinent part, required that the parties:

1) exchange all reports from expert witnesses expected to testify at the hearing 30 days before the date of the hearing (section 3(A) of order);
2) complete all discovery 15 days before the date of the hearing (section 3(B) of order); and
3) exchange copies of exhibits and witness lists one week before the date of the hearing (section 3(D) of order).

ALJX 2 at 3-4. The Order further provided that "[f]ailure to comply with the provisions of this prehearing order may result in . . . the exclusion of evidence, . . ." *Id.* at 7.

2. On July 7, 2010, employer obtained a labor market survey prepared by Donna White which identified alternate jobs she believed claimant could perform; specifically, Ms. White's report documented three dispatcher positions, two customer service representative positions and one mailer position, which Ms. White opined were suitable for claimant.[4] EX 1.

At the formal hearing held on August 10, 2010, employer's counsel sought to introduce a letter written on July 26, 2010 by Dr. Garrahan in response to an *ex parte* communication from employer's claims adjuster, Khristine Sutton.[5] Proposed EX 16 (excluded). Claimant's attorney objected to the admission of Dr. Garrahan's letter on the basis that it was not timely exchanged in compliance with the prehearing order issued in this case and that her receipt of Ms. Sutton's *ex parte* letter and the doctor's response a week before the hearing deprived her of the opportunity to inquire of the doctor what he meant by his brief response. Tr. at 7, 67-68. The administrative law judge initially ruled to exclude proposed Exhibit 16, Tr. at 10, 12; however, after a discussion off the record at the conclusion of the hearing, she took the matter under advisement. *Id.* at 67-68.

A second evidentiary issue arose at the hearing with respect to claimant's testimony about his hearing loss. On direct examination, claimant responded affirmatively when asked whether he has a work-related hearing loss. Tr. at 35. When claimant's counsel asked a follow-up question about the extent of that loss, employer's counsel objected on the ground that the scope of the hearing was confined to claimant's bilateral knee condition. *Id.* After claimant's counsel responded that claimant's hearing

[4]A prior labor market survey prepared by Stephanie Farland on December 14, 2007, EX 15, is not at issue in the appeal before the Board.

[5]By letter dated July 20, 2010, Ms. Sutton sent Dr. Garrahan a copy of Ms. White's July 7, 2010, labor market survey and inquired whether he agreed that claimant could perform the identified jobs. Ms. Sutton failed to copy this letter to claimant's attorney or to employer's own attorney, who was unaware of his client's letter. Proposed EX 16; Tr. at 7-8. In his July 26, 2010, response, Dr. Garrahan stated that as the jobs listed in the labor market survey apparently entailed sitting and not much walking, it appeared that claimant could perform all of the identified jobs. Proposed EX 16. On Aug. 2, 2010, Ms. Sutton faxed copies of her July 20, 2010 letter and Dr. Garrahan's July 26, 2010 response to claimant's attorney and to employer's attorney. *Id.;* Tr. at 9.

loss is one of the pre-existing conditions that affect his employability, the administrative law judge allowed claimant's testimony.[6] *Id.*

In her decision, the administrative law judge excluded Dr. Garrahan's July 26, 2010 letter, proposed Exhibit 16, from the record on the basis that employer's attempt to admit this exhibit into evidence was not in compliance with the requirement set forth in the prehearing order that discovery be completed 15 days prior to the hearing date; the administrative law judge further stated in this regard that claimant's attorney was not provided with the proposed exhibit until August 2, 2010, just eight days before the hearing. Decision and Order at 2 n.1. With respect to the second evidentiary issue, the administrative law judge overruled employer's objection to the admission of claimant's testimony regarding his work-related hearing loss "to the extent that the Claimant's hearing loss is a physical impairment that affects his employability." *Id.* at 4 n.3. The administrative law judge found that employer did not establish the availability of suitable alternate employment with Ms. White's labor market survey.[7] Decision and Order at 11-12. Accordingly, the administrative law judge awarded claimant permanent total disability benefits commencing December 19, 2006, and continuing. 33 U.S.C. §908(a).

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[6]Employer's vocational expert, Ms. White, testified that until the hearing, she was not aware that claimant had a hearing loss, and that she did not know whether his hearing loss and use of hearing aids would be a problem for the customer service and dispatcher jobs identified in her labor market survey, which she acknowledged are located in relatively noisy call centers. Tr. at 63-66.

[7]Having found that the restrictions assigned by Drs. Garrahan and Willetts are essentially the same, the administrative law judge relied on those restrictions, with the exception that she found that claimant was precluded from doing any lifting when using his crutches to walk. Decision and Order at 11. The administrative law judge additionally credited claimant's testimony that he has difficulty hearing in noisy environments and, at times, on the telephone. *Id.*

The administrative law judge found the dispatcher and customer service jobs identified in Ms. White's labor market survey to be unsuitable primarily on the basis of claimant's hearing impairment. Decision and Order at 12; *see also id.* at 7-8. The administrative law judge found the single mailer position identified in the labor market survey to be unsuitable in light of claimant's restrictions on lifting and carrying and his need to regularly change positions; she found that even if the position was considered to be suitable, employer cannot satisfy its burden of establishing suitable alternate employment by presenting a single, minimum wage position. *Id.* at 12; *see also id.* at 8.

On appeal, employer contends that the administrative law judge erred in excluding from the record Dr. Garrahan's July 26, 2010 response to Ms. Sutton's inquiry regarding the suitability of the positions identified in Ms. White's labor market survey. Employer further contends that the administrative law judge erred in allowing claimant to testify regarding his hearing loss where employer had no notice that claimant's hearing loss would be an issue at the hearing. Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings.

Employer first argues that the administrative law judge erred in excluding from the record Dr. Garrahan's July 26, 2010 letter for failure to comply with the terms of her pre-hearing order. An administrative law judge's determinations concerning the admission or exclusion of evidence are discretionary, and any decision regarding the admission or exclusion of evidence is reversible only if it is arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). An administrative law judge has the discretion to exclude even relevant and material evidence for failure to comply with the terms of her pre-hearing order. *Burley*, 35 BRBS at 187; *Durham v. Embassy Dairy*, 19 BRBS 105 (1986); *Williams v. Marine Terminals Corp.*, 14 BRBS 728 (1981). The Board has recognized in this regard that "[p]re-hearing orders serve a useful purpose, providing the parties advance opportunities to prepare arguments, raise issues, and seek discovery" and that "they facilitate the conduct of a hearing." *Williams*, 14 BRBS at 733. Moreover, a party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing. *See Burley*, 35 BRBS at 187; *Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987).

In this case, the administrative law judge excluded Dr. Garrahan's July 26, 2010 letter on the basis that it did not comply with the provision in the administrative law judge's prehearing order requiring that discovery be completed 15 days prior to the hearing date.[8] Decision and Order at 2 n.1. The administrative law judge excluded

[8]We reject employer's contention that the administrative law judge erroneously relied on the discovery deadline provision of the prehearing order in finding that employer failed to comply with the order. Employer argues in this regard that it complied with the relevant provision of the prehearing order, which requires the exchange of exhibits no later than one week before the hearing date. The fact that Dr. Garrahan's letter was timely exchanged in accordance with the provision governing the exchange of exhibits does not obviate compliance with the additional requirement contained in the prehearing order that discovery be *completed* no later than 15 days before the hearing date. The administrative law judge rationally determined that

evidence obtained by employer on an *ex parte* basis and thereafter provided to claimant's counsel after the deadline for conducting discovery had passed. Employer has not demonstrated that it exercised due diligence in developing its evidence,[9] or that the administrative law judge's decision to exclude Dr. Garrahan's report is arbitrary, capricious or an abuse of discretion. Therefore, the administrative law judge's exclusion of this evidence is affirmed. *See Burley,* 35 BRBS 185; *Smith,* 22 BRBS 46; *Sam,* 19 BRBS 228; *Durham,* 19 BRBS 105; *Williams,* 14 BRBS 728.

Employer further contends that the administrative law judge's decision to allow claimant to testify regarding his hearing loss over employer's objection represents reversible error. We disagree. Initially, we note that during oral argument, employer's counsel conceded that his client was aware of claimant's hearing loss, *see* Oral Argument Tr. at 51; additionally in its Petition for Review and brief, employer acknowledges that claimant was previously paid compensation and was provided with hearing aids for his work-related hearing loss by this employer. *See* Emp. brief at 8 n.3, 9. Employer nonetheless contends that it had no notice that claimant's hearing loss would be at issue at the hearing and, thus, the allowance of this testimony resulted in unfair surprise and prejudice to employer. Employer avers in this regard that claimant's hearing impairment was not included in claimant's prehearing statement or in any of his pre-trial filings and that, therefore, claimant's work-related hearing loss was not part of this claim and thus was not properly before the administrative law judge. Emp. brief at 9.[10] Noting that

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employer's solicitation of Dr. Garrahan's opinion as to the suitability of the jobs listed in Ms. White's labor market survey was subject to the discovery deadline provision of the prehearing order. As neither counsel for employer nor claimant was provided with Dr. Garrahan's response to Ms. Sutton's inquiry until after the deadline for completing discovery, the administrative law judge rationally concluded that employer failed to comply with that provision of her prehearing order.

[9]We note in this regard that employer's first labor market survey was prepared by Ms. Farland on December 14, 2007. EX 15. Employer waited until May 27, 2010 to take Ms. Farland's deposition, *id.,* and did not obtain a second labor market survey, conducted by Ms. White, until July 7, 2010. EX 1. Employer then sought Dr. Garrahan's opinion as to the suitability of the alternate jobs identified by Ms. White on July 20, 2010. Proposed EX 16. As this chronology does not demonstrate an attempt by employer to develop its case in a timely manner, employer has not shown an abuse of discretion by the administrative law judge in excluding Dr. Garrahan's letter from the record.

[10]In this regard, employer cites a provision of the prehearing order regarding Section 8(i), 33 U.S.C. §908(i), settlements, ALJX 2 at 6, in an apparent attempt to argue by analogy that claimant failed to provide notice of his intention to have his hearing loss claim included in the administrative law judge's consideration of this claim. This

employer's vocational expert, Ms. White, was unaware of claimant's hearing loss when she conducted her labor market survey, *see* n.8 *supra,* employer argues that it was prejudicial for the administrative law judge to rely on claimant's testimony regarding his hearing loss in finding the jobs identified in Ms. White's labor market survey to be unsuitable for claimant. Employer further contends that as claimant has already been fully compensated for his hearing loss, he should not be permitted to use his hearing impairment to defeat employer's showing that claimant is capable of performing alternate employment.

As correctly noted by the administrative law judge, claimant's hearing loss is a pre-existing physical impairment that may be properly considered in addressing claimant's ability to perform alternate post-injury employment. Decision and Order at 4 n.3; *see J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92, 102 (2009); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). Claimant's testimony regarding his hearing impairment therefore constitutes relevant and material testimony that should be received into evidence. *See* 20 C.F.R. §702.338. It is undisputed that employer had actual or constructive notice of claimant's hearing impairment and his use of hearing aids. *See generally G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15, 17 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, No. 09-72979, 2011 WL 2689355 (9th Cir. July 12, 2011); *Everson v. Stevedoring Services of America*, 33 BRBS 149, 151-152 (1999). Moreover, employer had the opportunity during the course of discovery to inquire about the existence of any medical conditions that might affect claimant's ability to perform alternate work.[11] In eliciting testimony from claimant regarding his hearing loss, claimant's attorney was not raising a new issue, nor was counsel seeking benefits under the Act for claimant's hearing loss. Rather, claimant presented testimony relevant to a disputed issue, the suitability of the alternate jobs identified by employer's vocational expert, that was already before the administrative law judge for resolution. *See generally Patterson v. Omniplex World Services*, 36 BRBS 149, 152 (2003).

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argument is without merit as claimant's previous hearing loss claim itself was not before the administrative law judge in this case; rather, evidence of claimant's hearing loss was presented solely for the purpose of showing that it "is a physical impairment that affects his employability." Decision and Order at 4 n.3.

[11]Employer does not suggest that claimant attempted at any time to conceal information regarding his hearing loss. Moreover, we note that Ms. White met with claimant prior to conducting her labor market research. EX 1. During that meeting, it was incumbent upon Ms. White to specifically inquire about any medical conditions which might affect claimant's employability.

We are not persuaded by employer's attempt to distinguish a pre-existing work-related impairment, for which claimant previously received compensation under the Act, from other pre-existing physical or vocational conditions affecting the claimant's ability to perform alternate employment.[12] In both cases, the claimant's impairment or other condition affecting his employability is a relevant consideration in evaluating the suitability of jobs relied upon by the employer to establish suitable alternate employment. *See generally Tracy*, 43 BRBS at 102; *Fox*, 31 BRBS 118. We do not agree with employer that the administrative law judge's consideration of claimant's hearing impairment in her evaluation of employer's suitable alternate employment evidence effectively represents a double recovery for claimant's hearing loss. Rather, having credited claimant's testimony regarding his hearing loss, the administrative law judge rationally found that such testimony established that claimant would be unable to successfully perform the customer service and dispatcher positions identified by Ms. White as establishing the availability of suitable alternate employment. Consequently, the administrative law judge committed no error in allowing claimant to testify regarding his hearing impairment in order to defeat employer's attempt to establish the availability of alternate employment that claimant is capable of performing. *See id.*

Employer's challenge to the administrative law judge's conclusion that employer failed to establish the availability of suitable alternate employment rests solely on its assignment of error to the administrative law judge's evidentiary rulings regarding Dr. Garrahan's letter and claimant's testimony concerning his hearing loss. As we have upheld both of those rulings as neither arbitrary nor capricious and within the administrative law judge's discretion, the administrative law judge's finding that employer has not met its burden of establishing suitable alternate employment is affirmed. Therefore, we affirm the award of permanent total disability benefits. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997).

[12]There is no evidence in this case that claimant would be impermissibly receiving scheduled benefits for his hearing loss simultaneously with permanent total disability benefits for his bilateral knee condition. *See Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge 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