BRB No. 99-0745

STEPHANIE H. WHEELER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: _____
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; Carol A. De Deo, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-1696) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 worked for employer as a shipfitter since 1978. On May 26, 1992, while lying on her side in a tight space, she noticed pain and stiffness in her knees. She subsequently underwent two surgical procedures on her left knee and one on her right knee. Cl. Ex. 20 at 10, 22. The parties agree that claimant cannot return to her usual employment. Employer paid claimant scheduled permanent partial disability compensation benefits for a 15 percent disability to the right lower extremity and a 25 percent disability to the left lower extremity, as well as temporary total disability compensation for a period of time. Emp. Ex. 1. Claimant sought continuing benefits for permanent total disability.

In his decision, the administrative law judge found that employer failed to establish the availability of suitable alternate employment, and that claimant was permanently totally disabled as a result of her work-related injuries. The administrative law judge further found that employer's claim for Section 8(f) relief, 33 U.S.C. §908(f), was barred by the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3). Accordingly, the administrative law judge awarded claimant permanent total disability compensation at a rate of $332.71 per week, commencing October 31, 1995, and denied Section 8(f) relief to employer.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Employer also challenges the administrative law judge's denial of its request for Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's award of permanent total disability benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's determination that employer's request for Section 8(f) relief was barred by operation of Section 8(f)(3), an absolute defense to Special Fund liability.

Employer first contends that the administrative law judge erred in finding that it did not establish the availability of suitable alternate employment. Where, as in the instant case, claimant is incapable of resuming her usual employment duties with

employer, she has established a *prima facie* case of total disability; the burden thus shifts to employer to establish the availability of suitable alternate employment which claimant is capable of performing. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). In order to meet its burden, employer must establish the availability of realistic 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 she could realistically secure if she diligently tried. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74(CRT) (4th Cir. 1984). The credible testimony of a vocational rehabilitation specialist identifying suitable jobs may be sufficient to meet employer's burden of showing suitable alternate employment. *See Anderson v. Lockheed Shipbuilding & Constr. Co.,* 28 BRBS 290 (1994); *Villasenor v. Marine Maintenance Industries, Inc.,* 17 BRBS 99 (1985), *aff'd on recon.,* 17 BRBS 160 (1985) (Ramsey, C.J., concurring and dissenting); *Davenport v. Daytona Marine & Boat Works,* 16 BRBS 196 (1984). Contrary to employer's contention, a counselor's statement that claimant has a wage-earning capacity is alone insufficient to meet employer's burden. *See generally Thompson v. Lockheed Shipbuilding & Constr. Co.,* 21 BRBS 94 (1988).

We affirm the administrative law judge's finding that employer did not establish suitable alternate employment in this case. The administrative law judge considered each of the nine positions identified by employer in its labor market survey.[1] He first rejected as unsuitable the office receptionist work which claimant actually performed post-injury, crediting claimant's complaints of difficulties with her knees while doing the job. The administrative law judge found claimant's complaints were corroborated by Dr. Stiles. Cl. Ex. 19 at 8-10. In fact, claimant had a second surgery on her left knee shortly after performing this work. Thus, the administrative law judge's rejection of this position is affirmed. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge also found claimant's lack of experience rendered unsuitable the medical receptionist job at Arvon Staffing, the medical receptionist position with Ophthalmology Consultants, positions as customer service representative in the card service division and collector with Nations Bank, and customer representative with QVC Network. This finding is supported by the job descriptions, Emp. Exs. 11, 20, and Mr. Karmolinski's testimony, Tr. at 75-101, and is therefore affirmed. In

[1]Although the parties refer to nine identified positions, there are actually two positions listed at Nations Bank, one in the card service division, and the other as a collector, resulting in 10 positions. Tr. at 79.

addition, the administrative law judge found these and the remaining positions[2] unsuitable due to claimant's lack of verbal skills and use of incorrect grammar. The administrative law judge relied on his own observation of claimant and the testimony of Mr. Karmolinski. Mr. Karmolinski, employer's vocational consultant, agreed with the administrative law judge's statement that "one of the biggest turn-offs for a person dealing with the public, such as customer service representative or anyone else, is inarticulateness and bad grammar." Tr. at 98. Mr. Karmolinski stated that, not having met claimant before, and after hearing her testimony, she may not be a viable candidate for some of the positions, and that "generally the conditions [bad grammar and inarticulateness] might inhibit [her] from obtaining that sort of employment." Tr. at 98.

[2]These comprised two medical receptionist positions, a dispatcher assistant, an alarm monitor dispatcher, three customer representative positions, bank collector, and opinion survey taker. Emp. Ex. 11.

Employer contends that the administrative law judge substituted his opinion for that of the vocational expert that the jobs he identified are suitable for claimant. An administrative law judge may credit a vocational expert's opinion even if the expert did not examine the employee so long as the expert is aware of employee's age, education, industrial history and physical limitations. *Hogan v. Schiavone Terminal, Inc.,* 23 BRBS 290 (1990). An administrative law judge may also rationally reject a vocational counselor's opinion where he does not know the level of claimant's language or math skills. *See Uglesich v. Stevedoring Services of America,* 24 BRBS 180 (1991); *see also Canty v. S. E. L. Maduro,* 26 BRBS 147 (1992). In this case, Mr. Karmolinski reviewed claimant's medical restrictions and vocational history in identifying positions for the labor market survey, but was not permitted to meet with claimant. Emp. Ex. 20. The administrative law judge found several of the positions unsuitable based solely on claimant's lack of articulate speech and use of incorrect grammar. The administrative law judge certainly may consider his own observation of claimant at the hearing in assessing the suitability of jobs and claimant's employment capabilities. While, as employer asserts, Mr. Karmolinski did specifically focus on three of the identified positions in agreeing that claimant would have problems obtaining some jobs in view of her verbal shortcomings, Tr. at 99-100, he also agreed in general with the administrative law judge's observation that bad grammar and inarticulateness may be an obstacle to her obtaining jobs which require some customer service. Tr. at 98. *See generally Mendez v. Nat'l Steel & Shipbuilding Co.* 21 BRBS 22 (1988). Thus, the administrative law judge's conclusion that the jobs identified by employer are unsuitable due to claimant's poor verbal skills, as observed at the hearing, or claimant's lack of experience, is supported by substantial evidence and within his authority as factfinder.[3] *See Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98 (1997), *aff'd,* 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999); *see Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also Rochester v. George Washington University*, 30 BRBS 233 (1997).

Nonetheless, employer raises a legitimate argument that claimant's refusal to meet with Mr. Karmolinski in person may have prevented him from being aware of

[3]While the administrative law judge may have mischaracterized Ms. Kavanagh's position in rejecting the medical receptionist position with Ophthalmology Consultants, Cl. Ex. 13 at 9, 11, as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, this error is harmless, as a single opening is insufficient to satisfy employer's burden. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988).

her verbal deficiencies and from forming an accurate picture of her verbal qualifications, and thus from considering this factor in conducting the labor market survey. *See* Emp. Exs. 11 at 3, 20 at 2; Tr. at 66-67. To remedy this, employer may consider submitting a new labor market survey by way of a petition for modification under Section 22 of the Act, 33 U.S.C. §922, based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1 (CRT)(1995). Claimant's refusal to meet with Mr. Karmolinski at the time of the initial proceeding should not preclude employer's attempt to improve its evidence of suitable alternate employment upon its receipt of additional vocational information, as this would permit claimant to benefit through her lack of cooperation.[4] *See Jensen v. Weeks Marine, Inc.,* 33 BRBS 97 (1999).

[4]We note, moreover, that the administrative law judge may issue an order to compel a rehabilitation evaluation pursuant to Section 27(a) of the Act, 33 U.S.C. §927(a). *See Twigg v. Maryland Shipbuilding & Dry Dock Co.,* 23 BRBS 118 (1989); *see also Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985), *aff'd on recon.*, 17 BRBS 160 (1985)(Ramsey, C.J., concurring and dissenting).

Finally, with regard to suitable alternate employment, employer contends that claimant did not diligently seek employment.[5] Inasmuch as we affirm the finding that employer did not establish suitable alternate employment, however, whether claimant diligently tried to obtain a job following the one she performed is not dispositive of her entitlement to total disability benefits. *See Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *Piunti v. ITO Corp. of Baltimore*, 23 BRBS 367 (1990). Accordingly, we affirm the administrative law judge's determination that claimant is totally disabled.

Next, employer challenges the administrative law judge's denial of its request for Section 8(f) relief, contending that the administrative law judge erred in finding that the absolute defense to the Special Fund's liability bars employer's claim for Section 8(f) relief. Section 8(f)(3) provides that a request for relief and a statement of the grounds therefor shall be presented to the district director prior to consideration of the claim by the district director, and that failure to present such a request shall be an absolute defense to the Special Fund's liability unless the employer could not have reasonably anticipated the liability of the Fund prior to the issuance of a compensation order. 33 U.S.C. §908(f)(3)(1988). *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998). The implementing regulation, 20 C.F.R. §702.321, provides that employer must submit a fully documented application and states that a

[5]Based on the recommendation of Marc Cooper, a Department of Labor vocational counselor, claimant enrolled at Kee's Business College for eight months, obtaining a medical assistant certificate with honors. Tr. at 34; Emp. Ex. 8. Claimant testified that her training was geared more to working in the back office rather than the front office and that this was what she wanted to do. Tr. at 35. Mr. Cooper testified that in August 1996 claimant told him she did not know that she would be expected to go to work after her training. Tr. at 58. Following her inability to continue at the medical assistant job, claimant's attorney sent a letter to Mr. Cooper in January 1997 thanking him for his efforts and informing him that claimant would from then on look for work on her own. Emp. Ex. 11 at 3, 20 at 2; Tr. at 66-67.

request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is in dispute. 20 C.F.R. §702.321(a), (b). The regulations further provide that an employer, *for good cause*, may request an extension of time to submit a fully documented application. 20 C.F.R.§702.321(b)(2) (emphasis added).

The administrative law judge found that employer had notice of the issue of permanency on February 7, 1996, when claimant's attorney sent a letter to the district director requesting an informal conference, specifically stating that the issue of permanency was in dispute.[6] Dir. Ex. 1. Employer took no action for over 11 months, until January 21, 1997, when it asked for an extension in response to the district director's January 17, 1997, letter imposing a deadline of February 3, 1997, for submitting a completed application. The administrative law judge, in finding justified the district director's denial of an extension, found that employer did virtually nothing to satisfy the regulation at Section 702.321(b) by way of offering any extenuating circumstances to be considered by the district director in deciding whether to grant the request for an extension. As employer's one sentence request offered no reason whatsoever for requesting an extension, it did not establish good cause, and, contrary to employer's contention, the administrative law judge's finding that the district director's denial of an extension was not arbitrary and capricious is rational. Consequently, we affirm the administrative law judge's finding that employer's request for an extension of time to submit its Section 8(f) application was properly denied.

[6]The procedural history of this case relevant to Section 8(f)(3) is as follows: In a letter dated February 7, 1996, claimant asked the district director to schedule an informal conference on the issue of temporary total disability, "and in [the] alternative permanent total disability as of 11/16/95 or permanent partial disability...," Dir. Ex. 1, sending a copy to employer. On January 17, 1997, the district director sent a letter to the parties in which he asked employer if it intended to seek Section 8(f) relief and imposing a deadline of February 3, 1997, for submission of a fully completed application. Emp. Ex. 21 at 2; Dir. Ex. 2. In a one sentence letter dated January 22, 1997, employer requested a 60-day extension, Dir. Ex. 2, which the district director denied. Dir. Ex. 3. Pursuant to claimant's request, the district director referred the case to the Office of Administrative Law Judges on May 9, 1997. Employer did not submit an application for Section 8(f) relief after the claim was forwarded, and no such application is contained in the record. Emp. Exs. 1-21. The Director filed a pre-hearing statement on August 20, 1997, and sent a letter to the Office of Administrative Law Judges on March 13, 1998, asserting the "absolute defense," based on the Section 8(f)(3) absolute bar. A formal hearing was held on September 17, 1998.

Employer in fact does not dispute the administrative law judge's finding that it did not establish good cause. Rather, employer argues that the district director must "consider the claim" before a request for Section 8(f) relief can be labeled untimely, and as the district director's letter was dated January 17, 1997, and employer requested an extension on January 22, there is no evidence that the district director "considered" the claim between January 17 and January 22. We reject employer's argument. In *Container Stevedoring Co. v. Director, OWCP [Gross],* 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991), the court stated that "the regulations make clear that the deputy commissioner can 'consider' a claim in many ways short of a hearing." *Gross*, 935 F.2d at 1546, 24 BRBS at 218 (CRT); *see also Firth v. Newport News Shipbuilding & Dry Dock Co.,* 33 BRBS 75 (1999). In the January 17 letter, the district director wrote: "I reviewed the medical records on file and now render my recommendation." Emp. Ex. 21. He then denied claimant permanent total disability compensation based on the medical and vocational evidence. In fact, employer argues that permanency did not become an issue until January 17, 1997, when the claims examiner "reviewed claimant's request for permanent total disability, which she denied...," Emp. Post-Hearing Brief at 51, essentially conceding that the district director considered the claim prior to its January 21 request for an extension. *See Wiggins v. Newport News Shipbuilding & Dry Dock Co.,* 31 BRBS 142 (1997). Moreover, the burden is on the party disputing the district director's consideration. *Gross*, 935 F.2d at 1546 n.4, 24 BRBS at 218 n.4 (CRT). Employer also argues that the Director was not prejudiced by its failure to file a Section 8(f) application before the district director. This fact, however, does not supersede the plain statutory and regulatory requirements, which do not contain such an exception. *Firth,* 33 BRBS at 79.

Inasmuch as employer had notice that permanent disability was an issue in dispute while the case was before the district director, and as employer neither requested Section 8(f) relief nor provided good cause for an extension of time to submit an application, we affirm the administrative law judge's determination that employer's claim for Section 8(f) relief is barred by Section 8(f)(3).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge