BRB No. 99-0792

ROBERT G. BRIZENDINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 27, 2000
	)	
	)	
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 Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Kristin Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer (96-LHC-1100) of Administrative Law Judge Richard K. Malamphy 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 second class specialist at employer's shipyard, injured his cervical and lumbar spine when he was struck and pinned momentarily by a six ton crane on March 12, 1994. Claimant has undergone a cervical discectomy and he has received physical therapy for neck and lower back pain. Employer voluntarily paid claimant temporary total disability benefits from March 15, 1994, through May 17, 1994, and from May 23, 1994, through April 24, 1995, and temporary partial disability benefits for a loss of overtime from April 25, 1995, to September 13, 1996, when claimant returned to work in the tool storage and equipment shop for the machinery installation department. 33 U.S.C. §908(b), (e). The parties stipulated that claimant is entitled to benefits for permanent partial disability from July 24, 1996, based on a loss of overtime. 33 U.S.C. §908(c)(21). Claimant sought benefits under the Act for permanent total disability. 33 U.S.C. §908(a).

In his Decision and Order, the administrative law judge credited claimant's testimony that he essentially does no actual work for employer, and he found that claimant's job at the tool storage and equipment shop fails to establish the availability of suitable alternate employment as it constitutes sheltered employment. The administrative law judge therefore awarded claimant benefits for permanent total disability from July 24, 1996. The administrative law judge next addressed employer's application for Section 8(f) relief. 33 U.S.C. §908(f). The administrative law judge found that a prior knee injury in 1993 established a manifest, pre-existing permanent partial disability; however, the administrative law judge found that employer failed to establish that the knee injury contributed to claimant's permanent total disability. The administrative law judge found that claimant's physical abilities are virtually unaffected by his prior knee injury and that claimant's present disability is exclusively attributable to his back and neck injuries. Accordingly, employer's application for Section 8(f) relief was denied.

On appeal, employer contends the administrative law judge erred in finding that claimant's job is sheltered and therefore does not constitute suitable alternate employment.

Employer also contends the administrative law judge erred in denying it Section 8(f) relief as claimant's prior knee injury contributes to his permanent total disability. Claimant responds, urging affirmance of the administrative law judge finding that his employment is sheltered and that employer thus failed to establish the availability of suitable alternate employment. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judges denial of Section 8(f) relief.

Employer initially contends that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment, and asserts that claimant's job at employer's tool storage and equipment shop is necessary work that fulfills employer's burden of proof. Once, as here, claimant establishes that he is unable to perform his usual work, the burden shifts to employer to demonstrate the availability of realistic job opportunities within the geographic area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). Employer can meet its burden by offering claimant a job in its facility, including a light duty job. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). The Board has affirmed a finding of suitable alternate employment where employer offers claimant a job tailored to his specific restrictions so long as the work is necessary and beneficial to employer. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987); *Darden*, 18 BRBS at 224. Sheltered employment, on the other hand, is a job for which claimant is paid even if he cannot do the work or which is unnecessary and is created merely to place claimant on the payroll; such employment is insufficient to constitute suitable alternate employment and claimant is entitled to benefits under the Act for total disability while working in a post-injury job under this circumstance. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980).

The administrative law judge's determination that claimant's work is sheltered and that employer therefore failed to establish suitable alternate employment is rational and supported by substantial evidence. Specifically, the administrative law judge credited claimant's testimony that he spends most of his working hours locked alone in an office where he reads magazines and sometimes sleeps due to his medication, Tr. at 24-26, 36, and that in the last two years he has done approximately two months of actual work. Tr. at 39. The administrative law judge further credited the testimony of claimant's supervisor that claimant accurately recited the extent of his work activities in the last year, that three or four days per week there is nothing for claimant to do, and that he could not recall the last time he assigned work to claimant. Tr. at 89, 102-110. The administrative law judge also credited the testimony of employer's general foreman that claimant's duties do not keep him busy eight hours a day and he could not recall the last time he saw claimant working. Tr. at 69, 75-76. Moreover, the administrative law judge rationally gave less weight to employer's

evidence that such jobs have existed for decades and that others are assigned to similar duties, based on the actual work, or lack thereof, that claimant is required to perform.[1] The administrative law judge thus concluded that claimant receives full-time wages for "doing essentially no work." Decision and Order at 10. In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991). In the instant case, we hold that the administrative law judge's decision to credit claimant's testimony, as supported by the testimony of claimant's supervisor and employer's general foreman is rational, and his finding that claimant's position in the machinery installation department is sheltered thus is supported by substantial evidence. *CNA Ins. Co.*, 935 F.2d at 430, 24 BRBS at 202 (CRT). Accordingly, we affirm his conclusion that employer therefore failed to establish the availability of suitable alternate employment, and the consequent award of benefits for permanent total disability. *Id.*

We next address the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not solely due to the subsequent work-related injury. *See Director, OWCP v. General Dynamics Corp.[Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

[1]Claimant and employer's general foreman of the machine installation department, Doug Deese, testified that employer has always assigned personnel to maintain equipment in the department. Tr. at 53, 63. Claimant's foreman, Neal Haley, testified that maintenance of this equipment is essential to the building of ships. Tr. at 112.

After review of the record, we hold that the administrative law judge's denial of Section 8(f) relief is rational, supported by substantial evidence, and in accordance with law. The administrative law judge found that employer failed to establish that claimant's permanent total disability is not due solely to the work injury. Claimant sustained a work-related knee injury in March 1993, resulting in an arthroscopy to repair a torn medial meniscus on April 13, 1993. EX 8. The administrative law judge found that employer established a manifest pre-existing permanent partial disability based on this knee injury. Employer's in-house physician, Dr. Reid, opined on October 16, 1997, that the knee injury resulted in a permanent and serious impairment, which materially and substantially contributed to claimant's overall disability. Dr. Reid also stated that, with his bad back and neck, claimant can perform available light work, but that his knee impairment would limit his ability to work in a job with a lot of walking, such as a security job position. *Id.* The administrative law judge gave no weight to this opinion as he found it unsupported by any evidence of record.[2] The administrative law judge noted that claimant testified only that his knee hurts when he squats, which he has to do because his work injury prevents him from bending over. Tr. at 41. Moreover, the administrative law judge found Dr. Reid's opinion contrary to the evidence of record establishing that, solely as a result of his back and neck injuries, claimant has extensive permanent work restrictions, *see, e.g.*, EX 17, Tr. at 18-19, and that claimant was able to perform his usual work prior to the work injury. Thus, the administrative law judge rationally concluded that claimant is virtually unaffected by his knee injury. Accordingly, as the administrative law judge rationally concluded that employer failed to establish that claimant's permanent total disability is not solely due to claimant's March 12, 1994, work injury, the administrative law judge's denial of Section 8(f) relief is affirmed. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998); *Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT).

Accordingly, the administrative law judge's Decision and Order Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer is affirmed.

SO ORDERED.

ROY P. SMITH

[2]The record contains evidence that claimant had work restrictions due to his knee injury prior to the knee operation, but as the administrative law judge noted, none of the reports generated after the work injury mentions any such restrictions. EX 8. Moreover, the record does not contain any vocational evidence which would put Dr. Reid's opinion in context.

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge