BRB No. 97-1544

ALICE DAWSON	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF THE ARMY	)	
	)	
	)	
and	)	
	)	
ALEXSIS, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Catherine Dellinger Buckley and Gregory J. Crabb (Hamilton, Westby, Marshall & Antonowich, L.L.C.), Atlanta, Georgia, for employer/carrier.

LuAnn B. Kressley (Marvin Krislov, Deputy Solicitor for National Operations; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-2649) of Administrative Law Judge Gerald M. Tierney 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).

Claimant, a budget analyst at Ft. Leavenworth, injured her back on March 12, 1991, after tripping over a rolled up rug. After finding that claimant established her *prima facie* case of total disability, the administrative law judge determined that employer did not establish suitable alternate employment. The administrative law judge awarded claimant temporary total disability benefits from March 25, 1991, to October 27, 1991, and from January 23, 1992, to March 10, 1993, and permanent total disability benefits from March 10, 1993, and continuing. Since the record was devoid of evidence regarding claimant's wages at the time of injury, the administrative law judge remanded the case to the district director.[1] The administrative law judge also awarded medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

[1]The administrative law judge stated, "In light of the scant evidence contained in the record regarding the Claimant's wages, I am remanding this matter to the Director, Office of Workers' Compensation so the parties can submit evidence on this issue, and an informed and appropriate finding on annual earnings can be made." Decision and Order at 14 n. 19.

On appeal, employer challenges the administrative law judge's award of benefits and denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief to employer, and asserts that the administrative law judge improperly remanded the case to the district director for a determination of claimant's average weekly wage.[2] Claimant has not responded to this appeal.

Employer first contends that the administrative law judge erred in finding that it did not establish suitable alternate employment. Once claimant establishes that she is unable to perform her 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 her age, education, work experience, and physical restrictions, is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In determining that employer did not establish suitable alternate employment, the administrative law judge considered the labor market survey performed by Mr. Fischer, employer's vocational expert, which identified four positions available to claimant, all of which were approved by Dr. Whitehead, an independent medical examiner.[3] Decision and Order at 12-13; Emp. Ex. 10. The administrative law judge, however, did not give any weight to the survey. First, the administrative law judge rationally found that Dr. Whitehead's approval of the four jobs carried little weight in that he believed that Dr. Whitehead failed to closely review the requirements of the positions since the requirements of the hospital clerk position exceeded the limitations the physician had himself imposed.[4] *See generally Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS

[2]We accept employer's appeal in the interest of justice even though it may be interlocutory. *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *see also Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989). Although the administrative law judge should have decided the average weekly wage issue by requiring the parties to submit evidence relevant to the issue, it is not necessary to remand this case to the administrative law judge for consideration of this issue, or for the entry of a final order as the Director urges, prior to our consideration of this appeal as it involves issues separate from claimant's average weekly wage. 20 C.F.R. §702.338.

[3]The positions included a clerk position at St. John's Hospital, a secretarial position at Benedictine College, an office assistant position at the state penitentiary in Lansing, Kansas, and a payroll/accounting clerk position at Atchison County Courthouse. Emp. Ex. 10.

[4]The clerk position at the hospital required that claimant work 12 hour shifts two to three times a week with lifting and carrying of unknown objects. Dr. Whitehead limited claimant to working a half day schedule at first and to lifting and carrying

73, 78 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); Decision and Order at 12; Emp. Ex. 10, Dir. Exs. 2, 4. Second, the administrative law judge rationally concluded that Mr. Fischer could not have a clear understanding of claimant's physical abilities and restrictions after incorrectly assuming that Dr. Whitehead was claimant's treating physician and only considering Dr. Whitehead's reports and restrictions, to the exclusion of two physicians, Drs. Cristiano and Szabados, who found claimant unable to work, and two other physicians, Drs. Beatty and Holleman, who imposed limitations on claimant. *See generally Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196, 199-200 (1984); Decision and Order at 12-13; Cl. Exs. 2, 3, 7, 8; Dir. Exs. 2, 4, Emp. Ex. 10; Tr. at 102, 109-110.

The administrative law judge also found that the individual positions did not constitute suitable alternate employment. *See* Decision and Order at 13 n. 8. As previously mentioned, the administrative law judge rationally found that the clerk position at the hospital did not constitute suitable alternate employment as it exceeded the limitations imposed by Dr. Whitehead. The administrative law judge also rationally found that as the secretarial position at the college did not list a salary, employer did not establish suitable alternate employment through this position. *See generally Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978); Emp. Ex. 10. Moreover, any error in the administrative law judge's discrediting of the two jobs as office assistant at the state penitentiary and payroll/accounting clerk at the courthouse based on an absence of evidence establishing that they are different from claimant's usual job as a budget analyst, which she cannot do, is harmless in that these two positions exceed the restrictions imposed by Drs. Beatty, Holleman, and Whitehead, the three physicians imposing restrictions, because they require frequent and/or continuous sitting which these physicians state claimant cannot do. Cl. Exs. 3, 8; Dir. Exs. 2, 4. Consequently, we affirm the administrative law judge's finding that employer did not establish suitable alternate employment, and that claimant is entitled to total disability benefits. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Employer next contends that the administrative law judge erred in denying it Section 8(f) relief, asserting that the evidence establishes that claimant suffered from a manifest pre-existing permanent partial disability and that her present disability is not due solely to the 1991 work injury. Section 8(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. §§908, 944. An employer may be granted Special Fund relief, in a case where a claimant is

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between 10 and 20 pounds. Emp. Ex. 10; Dir. Exs. 2, 4.

permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). A pre-existing permanent partial disability is a serious lasting physical condition that would motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8 (CRT)(6th Cir. 1998); C *& P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). In the instant case, employer sought to establish that claimant suffered from a pre-existing permanent partial disability as a result of an impairment rating due to back surgery in 1972, as well as due to a 1980 back fracture, a 1987 back disc compression, and pre-existing degenerative disc disease.

The administrative law judge concluded that a cautious employer would not have hired or would have fired claimant because of a greatly increased risk of employment-related accident and compensation liability, citing *C&P Telephone Co.*, 564 F.2d at 503, 6 BRBS at 399. Decision and Order at 14-15. The administrative law judge found that claimant stated she recovered completely from each of her prior back injuries and was able to work as a bartender from 1978 to 1981 for an eight hour shift and as a cashier for six months in 1990 and 1991 in addition to her day job at Ft. Leavenworth in which she required no accommodations.[5] Claimant's deposition at 33-34; Tr. at 62, 89-91. Moreover, Drs. Whitehead and Szabados stated that claimant was asymptomatic prior to the 1991 injury. Dir. Exs. 2, 4, 6; Dr. Whitehead's deposition at 34-35; Dr. Szabados' deposition at 17. Although employer correctly asserts that conditions similar to claimant's conditions can constitute pre-existing disabilities, *see, e.g., Smith v. Gulf Stevedoring Co.,* 22 BRBS 1 (1988); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988), the administrative law judge's finding that claimant's prior injuries did not constitute pre-existing permanent partial disabilities in this case is supported by substantial evidence. *See*

[5]Additionally, the administrative law judge did not give any weight to Dr. Beatty's deposition testimony that claimant's pre-existing injury was exacerbated by the work injury and manifested itself as back and leg pain as the physician never treated claimant before her work injury. Decision and Order at 14. Moreover, the administrative law judge did not credit the testimony of one of claimant's former co-workers, Ms. Pippin, that claimant complained of back and leg pain as the former co-worker was equivocal as to the type and frequency of pain from which claimant suffered. Decision and Order at 14 n. 20.

CNA Ins. Co. v. Legrow, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1 (CRT)(9th Cir. 1986); *Director, OWCP v. Campbell Industries*, *Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C & P Telephone*, 564 F.2d at 503, 6 BRBS at 399; *Kubin*, 29 BRBS at 117; Decision and Order at 14-15; Dir. Exs. 2, 4, 6; Claimant's deposition at 33-34; Dr. Whitehead's deposition at 34-35, 39, 48-49, 51, 54; Dr. Szabados' deposition at 17; Tr. at 62, 89-91. We, therefore, affirm the administrative law judge's finding that employer is not entitled to Section 8(f) relief.[6]

[6]We thus need not address the administrative law judge's finding that employer did not establish that claimant's disability is not due solely to the work injury.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge