BRB Nos. 99-502
and 99-1046

DAVID HINTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINAL	)	DATE ISSUED:_____
	)	
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 Benefits and the Decision and Order Denying Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Sidney L. Ravkind (The Ravkind Firm), Houston, Texas, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits and the Decision and Order Denying Modification (98-LHC-1136) of Administrative Law Judge Daniel F. Sutton 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, 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).

Claimant worked as a hold man for employer. On December 3, 1992, while he was loading containers onto a ship, he was crushed between a container swinging on a crane and a stationary container. He sustained an injury to his chest which has resulted in lingering pain to his chest wall. After a hearing on the matter, the administrative law judge awarded claimant permanent total disability benefits, finding that employer did not establish the availability of suitable alternate employment. Decision and Order at 12, 14.

Employer filed a motion for reconsideration, arguing that the parties stipulated that claimant was partially disabled with a post-injury wage-earning capacity of between $4.25 and $6.50 per hour, based on the jobs identified in its labor market survey. Employer maintained that it had decided not to have its vocational expert testify at the hearing regarding the suitability of the jobs in the survey because of this stipulation. The administrative law judge rejected employer's contention that the parties had stipulated that claimant was partially disabled. Nonetheless, finding that there was a *bona fide* misunderstanding regarding this issue, the administrative law judge granted employer the opportunity to offer the deposition testimony of its vocational expert via a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, with claimant being given the opportunity to rebut the evidence presented. Order at 3-4; Decision and Order Denying Modif. at 1-3.

Employer submitted the deposition of its expert, Lorie Johnson-McQuade, to the administrative law judge; attached to the deposition were exhibits, including a new labor market survey conducted shortly before the hearing. Employer also sought relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge refused to admit the new labor market survey into evidence, stating that employer could have developed this evidence prior to the initial hearing. The administrative law judge also excluded claimant's vocational evidence, developed in rebuttal to the new survey, finding as well that claimant's decision not to introduce any vocational evidence at the initial hearing could not be rectified on modification. After reviewing the expert's testimony, the administrative law judge again concluded that employer did not establish suitable alternate employment, and he affirmed the award of permanent total disability benefits. The administrative law judge also denied employer's application for Section 8(f) relief as untimely. Decision and Order Denying Modif. at 5. Employer appeals the administrative law judge's initial decision, BRB No. 99-502, as well as the denial of modification, BRB No. 99-1046. Claimant responds, urging affirmance.[1]

[1]Claimant also moves for oral argument before the Board. Because this case can be resolved on the briefs of the parties, we deny the motion. 20 C.F.R. §§802.303(a), 802.306.

Employer first contends the administrative law judge erred in his initial decision in finding that claimant is unable to return to his usual work. It argues that he erred in not giving the independent medical examiner's opinion greater weight. Dr. Stevens, the independent examiner, found that, although claimant has believable complaints of pain, he is not disabled and can return to his usual work. Emp. Ex. 10. In contrast, Dr. Gold concluded that claimant cannot return to his usual work; however, he may be able to perform light or sedentary work. Cl. Ex. 4 at 41; Cl. Ex. 6 at 23, 28. He determined that claimant suffers from costosternal syndrome which is essentially the non-healing of damage to the joints in the sternum. *Id.* at 12, 14. On palpating claimant's chest wall, Dr. Gold obtained consistent complaints of pain over a five-year period, indicating points of tenderness at the third, fourth, and fifth costochondral junctions of the left side of claimant's sternum.[2] *Id.* at 16.

[2]Dr. Gold stated that other than performing surgery, palpations are the only way to assess this kind of injury. Moreover, during the course of his treatment, Dr. Gold tried to trick claimant to determine whether he was malingering, but claimant's reactions never varied. Cl. Ex. 6 at 15-17.

The administrative law judge gave greatest weight to the opinion of claimant's treating physician, Dr. Gold, noting that he has treated claimant for a long time, his diagnosis is supported by his findings, and it is not inconsistent with the findings of other doctors.[3] Decision and Order at 10-11. The administrative law judge stated that he placed little reliance on Dr. Stevens's opinion because he did not consider claimant's condition in terms of a soft tissue or cartilage injury. Decision and Order at 10; *see* Emp. Ex. 10. Contrary to employer's argument, there is no requirement that the administrative law judge give greater weight to the opinion of an independent medical examiner. Rather, he may accept or reject all or any part of any testimony according to his judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), and he may consider a variety of medical opinions, as well as the claimant's testimony, in determining the extent of the claimant's disability. *See generally Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). It is not unreasonable for an administrative law judge to credit the treating physician where his opinion is based on claimant's consistent complaints of pain, despite discrediting claimant's hearing testimony regarding his complaints.[4] *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89(CRT) (2d Cir. 1997). That the administrative law judge referred to claimant's consistent complaints of pain to Dr. Gold as "objective findings" is also not sufficient reason to reverse his determination. In this case, the administrative law judge provided rational reasons for crediting Dr. Gold's opinion, and it is substantial evidence supporting his finding that claimant cannot return to his usual work. Therefore, we affirm the administrative law judge's determination that claimant is unable to return to his usual work, and that he has established a *prima facie* case of total disability.[5] *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988);

[3]Dr. Walker believed claimant has no permanent disability and that the only positive finding was legitimate pain on pressure to the chest. He concluded claimant could return to work, but only with non-steroidal medication to alleviate the chest wall pain. Emp. Ex. 8. Dr. McCann diagnosed an intercostal nerve problem which was resolved with nerve blocks. He also diagnosed pain on palpation of the chest wall, and concluded claimant suffered a soft tissue injury, leading to prolonged pain. Emp. Ex. 11. Dr. Davis noted the paucity of hard clinical findings, but noted the reproducibility and consistency of claimant's complaints. He diagnosed the "strong possibility" of a soft tissue injury and post-traumatic chest wall pain. Cl. Ex. 4.

[4]The administrative law judge stated he did not consider claimant's complaints of pain at the hearing in assessing the extent of disability because he found that claimant's complaints and testimony with regard to taking medication were not supported by the records from the pharmacy. Decision and Order at 11 n.9.

[5]Contrary to employer's contention, the decision in *Roberson v. Bethlehem Steel Corp.*, 8 BRBS 775 (1978) (Miller, dissenting), in not controlling in the instant case. In *Roberson*, the credited physician examined claimant only once, just prior to the hearing and

Williams v. Halter Marine Service, Inc., 19 BRBS 248 (1987).

Once a claimant establishes his *prima facie* case of total disability, employer may establish that the claimant is at most partially disabled by identifying the availability of alternate jobs that are suitable for the claimant, considering his age, education, vocational history, and physical capabilities. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). Employer first contends that the administrative law judge erred in addressing the issue of suitable alternate employment, as he mistakenly determined that the parties did not stipulate that employer established suitable alternate employment. In this regard, employer contends that the administrative law judge erred in disregarding the unopposed affidavit of employer's counsel as to his understanding of the parties' agreement.

We reject employer's contention. The parties clearly stipulated to employer's withdrawal of one of the jobs in its labor market survey. Tr. at 102. Employer's attorney thereafter stated that the parties agree "to allow the remainder of the jobs to be before the Court for consideration." If the administrative law judge were to decide that claimant cannot return to his former employment, he was to consider "whether these positions - - which one of them would equate to his residual earning capacity." Tr. at 103. Thereafter, the administrative law judge clarified which position was being withdrawn. *Id.*

Prior to addressing employer's motion for reconsideration, the administrative law judge held a conference call regarding the scope of the stipulation, during which claimant's counsel disagreed with employer's interpretation. In his order denying reconsideration, the administrative law judge stated that the stipulation was only to the withdrawal of one of the

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18 months after the work injury. He diagnosed a disc injury based on claimant's complaints of pain alone, and the administrative law judge had serious doubts about claimant's credibility. A majority of the Board thus held that the administrative law judge's decision was not supported by substantial evidence. In the instant case, claimant's complaints of pain were consistent for over five years, and no doctor doubted their validity. The administrative law judge merely rejected claimant's contention that his pain was so severe that he required daily narcotic pain medication. *See* n. 4, *supra*.

jobs in the labor market survey, and that the parties then intended that he was to determine whether any of the remaining positions would represent claimant's wage-earning capacity. Before the wages paid in alternate employment can be found to represent claimant's post-injury wage-earning capacity, however, it is necessary for the administrative law judge to assess the jobs' suitability. *See generally Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992). Given the ambiguous nature of the exchange between counsel at the hearing, the administrative law judge was not required to give determinative weight to employer's position as set forth in its counsel's unopposed affidavit. Thus, as the administrative law judge's interpretation of the parties' colloquy is reasonable, we affirm it, as well as his consequent decision to address the suitability of the remaining positions identified in the labor market survey.

Next, we address employer's contention that the administrative law judge erred in finding that the jobs identified in its 1993 labor market survey, as described by its vocational expert, Ms. McQuade-Johnson, do not establish the availability of suitable alternate employment.[6] In his initial Decision and Order, the administrative law judge found that employer did not show that the positions proffered were suitable for an illiterate man with little or no basic mathematical skill who has worked in heavy labor all his life. Decision and Order at 11-12. In his decision on modification, the administrative law judge found that employer established that there are jobs within claimant's physical abilities available for which an illiterate person would receive consideration. Nevertheless, he found that these jobs are unsuitable for claimant given his lack of mathematical skills which would be required for the identified cashier positions. Decision and Order on Modif. at 14. Further, he noted that Ms. McQuade-Johnson failed to discuss with the potential employers that claimant was 70 years old as of the date of the hearing and that he has always worked in unskilled, heavy, manual labor. *Id.* Thus, in light of claimant's age and vocational history, the administrative law judge concluded that employer failed to establish the availability of alternate employment that claimant could likely secure. The administrative law judge therefore denied modification, finding there was no mistake in a finding of fact regarding the extent of claimant's disability, and again awarded claimant permanent total disability benefits. *Id.* at 15.

Employer, noting that Ms. McQuade-Johnson's deposition testimony is uncontradicted, maintains that the administrative law judge erred in finding that the identified jobs were not suitable due to claimant's limited mathematical skills and age. With

[6]We note that neither party challenges the administrative law judge's decision on modification to exclude evidence concerning a more recent labor market survey prepared by Ms. McQuade-Johnson in conjunction with the deposition permitted by the administrative law judge. This finding, therefore, is affirmed.

regard to the former, employer contends that there is no evidence that the cashier jobs require mathematical skills and that the administrative law judge erroneously disregarded Ms. McQuade-Johnson's belief that claimant's life experience provided him with adequate skills for the position given that most cash registers compute the change to be given. *See* EMX 1 at 52, 80-81. With regard to claimant's age, employer contends the administrative law judge erred in taking judicial notice of regulations promulgated by the Social Security Administration without giving employer proper notice, and in using this regulation to find that claimant's age precludes his employment in the cashier positions identified.

We affirm the administrative law judge's conclusion that employer did not establish that claimant realistically could obtain the cashier positions identified in the 1993 labor market survey. The inquiry concerning suitable alternate employment does not necessarily end once the employer identifies jobs that the claimant is physically capable of performing. The Fifth Circuit has held that once such jobs are identified, the inquiry turns to whether the claimant can compete for, and realistically and likely secure, the positions if he diligently tried, given his age, education, and vocational background. *Turner,* 661 F.2d at 1043, 14 BRBS at 165. In *Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998), for example, the Fifth Circuit held that the administrative law judge must consider whether the claimant had the mental ability or skills necessary to work successfully as a car salesman; that the job was physically suitable for the claimant was an insufficient basis on which to find that the employer established suitable alternate employment. In *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 89(CRT) (2d Cir. 1997), a case in which the claimant had a significant psychiatric impairment as well as a physical impairment, the Second Circuit, in emphasizing that an employer must establish the availability of positions for which the claimant can realistically compete, stated that "[t]his requirement has particular relevance where the claimant's educational background, medical impairment and job qualifications are such that suitable job opportunities would be limited, at best." *Id.*, 119 F.3d at 1042, 31 BRBS at 89(CRT). Thus, the administrative law judge in the instant case validly questioned whether an illiterate 70-year old man with minimal mathematical skills who has performed only unskilled manual labor could realistically compete for and obtain work in a retail or service environment. *See* Decision and Order on Modif. at 14-15. Contrary to employer's contention, the administrative law judge's discussion of regulations promulgated by the Social Security Administration in regard to its disability assessments is not erroneous as he used them merely to illustrate the valid point that a variety of factors are relevant in assessing the vocational potential of a given individual. Indeed, courts have used similar analogies in addressing the issue of suitable alternate employment. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 n.10, 24 BRBS 116, 120 n.10(CRT) (5th Cir. 1991); *Turner,* 661 F.2d at 1042 n.15, 14 BRBS at 165 n.15; *see also Universal Maritime Corp. v. Moore*, 126 F.3d 256, 265, 31 BRBS 119, 125(CRT) (4th Cir. 1997).

Addressing the evidence produced by employer on these issues, the administrative

law judge found it lacking. Specifically, he stated that although Ms. McQuade-Johnson's testimony on deposition established that claimant could compete for positions given his illiteracy, the expert witness did not effectively establish that he could do so given both his illiteracy and lack of mathematical skills. The administrative law judge acknowledged her statement that computerized equipment minimizes the need for such skills, but also noted that she said the ability to perform basic addition and subtraction is a "helpful" skill. EMX 1 at 52-53; Decision and Order on Modif. at 14. The administrative law judge stated that this statement alone casts doubt on the suitability of the positions identified, an inference which is rational, *see generally Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 759-760, 14 BRBS 373, 380 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (administrative law judge may draw inferences from the record evidence that "he deems most reasonable in light of the evidence as a whole and the common sense of the situation"), but further found that employer did not establish that claimant could effectively compete for jobs given his age, 70, in addition to his other limiting factors.[7] Neither Ms. McQuade-Johnson's deposition testimony nor the 1993 labor market survey addresses the effect, if any, of claimant's age on his employability in the identified positions. The administrative law judge therefore rationally found that employer did not establish the availability of suitable alternate employment. Inasmuch as educational abilities and age are factors affecting claimant's ability to compete realistically for identified positions, and the administrative law judge's inferences are rational, his determination that employer's evidence is insufficient to establish the availability of suitable alternate employment for which claimant could realistically compete and likely secure is supported by substantial evidence and in accordance with law. *See generally Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge's award of permanent total disability benefits therefore is affirmed.

Employer lastly contends the administrative law judge erred in denying it Section 8(f) relief due to its untimely request for such relief. Employer argues that the absolute defense against Special Fund liability contained in Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), is waived due to the failure of the Director, Office of Workers' Compensation Programs (the Director), to raise and plead the defense. In his decision denying modification, the administrative law judge found that employer's request for Section 8(f) relief was untimely,

[7]Although the administrative law judge erred to the extent his reasoning suggests employer was required to contact potential employers directly regarding whether they would employ someone of claimant's age, *see Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1990), in context this error is harmless as age is a relevant factor in assessing suitable alternate employment.

as the record clearly demonstrates that claimant sought either permanent total or permanent partial disability benefits at the initial hearing and employer failed to raise the issue at that time. Decision and Order Denying Modif. at 14. We affirm the administrative law judge's finding.

Under Section 8(f)(3) of the Act, employer must raise the applicability of Section 8(f) relief prior to the district director's consideration of the claim, unless employer could not have reasonably anticipated the Special Fund's liability at that time or the permanency of claimant's disability was not at issue. 33 U.S.C. §908(f); 20 C.F.R. §702.321. This is an affirmative defense which must be raised and pleaded by the Director. *Abbey v. Navy Exchange*, 30 BRBS 139 (1996). As employer correctly notes, the Director did not raise the defense in this case. Nonetheless, employer is not absolved of its responsibility to raise the issue of Section 8(f) relief in a timely manner. Under the case law decided prior to the enactment of Section 8(f)(3), an employer is required to raise Section 8(f) at the first hearing wherein permanent disability benefits are at issue, *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998); *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979), and attempts to raise the issue for the first time on reconsideration or on modification have been rejected absent extenuating circumstances. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Director, OWCP v. Edward Minte Co.*, 803 F.2d 731, 19 BRBS 27(CRT) (D.C. Cir. 1986); *Verderane v. Jacksonville Shipyards, Inc.*, 772 F.2d 775, 17 BRBS 155(CRT) (11th Cir. 1985); *General Dynamics Corp. v. Director, OWCP [Woodberry]*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

In this case, employer did not request Section 8(f) relief until it moved for modification of the initial decision. The record clearly supports the administrative law judge's determination that the claim herein has always been one for permanent disability benefits. ALJ Ex. 2; Cl. Exs. 1, 4 at 41. Employer's assertion that the confusion regarding the stipulation prevented it from filing its application is meritless, as the stipulation involved the extent of claimant's disability and not the nature of it. Therefore, as employer did not request Section 8(f) relief at the first hearing wherein permanency was at issue, and as no extenuating circumstances have been established, we affirm the denial of Section 8(f) relief as being untimely requested. *Woodberry*, 673 F.2d at 23, 14 BRBS at 636; *American Bridge Div. v. Director, OWCP [Carroll]*, 679 F.2d 81, 14 BRBS 923 (5th Cir. 1982).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits and the Decision and Order Denying Modification are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge