BRB Nos. 92-1453
92-1453A

FLORENCE SNOWDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASHINGTON HOSPITAL CENTER	)	
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger S. Mackey (Law Offices of Conrad A. Fontaine), Fairfax, Virginia, for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer cross-appeals the Decision and Order - Award of Benefits (88-DCW-0086) of Administrative Law Judge Charles P. Rippey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 (1982) *et seq*., as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501 *et. seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

On September 7, 1978, claimant injured her lower back while lifting a patient during the course of her employment for employer as a psychiatric nurse. After receiving conservative treatment, claimant returned to work for employer in early 1979. Claimant continued to work until May 1979, at which time she injured her calf muscle and her back began hurting worse than it had previously. Claimant again returned to work although her back condition continued to wax and wane. In November 1987, claimant's back condition worsened, and she ultimately underwent a laminectomy and spinal fusion. Shortly thereafter, she underwent additional surgery to alleviate compression of her spinal nerves caused by cauda equina syndrome. A second laminectomy and spinal fusion were performed in May 1989. In December 1991, claimant's treating physician, Dr. Moskovitz, diagnosed a herniated disc at L5/S1, and pseudarthrosis. Employer voluntarily paid claimant temporary total disability compensation from 1988 until the time of the hearing. 33 U.S.C. §908(b). Claimant sought permanent total disability compensation commencing December 1990. *See* 33 U.S.C. §908(a).

The administrative law judge found that it was undisputed that claimant was unable to return to her prior work for employer as a psychiatric nurse. The administrative law judge further determined that claimant was entitled to permanent total disability compensation commencing December 18, 1990, inasmuch as employer had not met its burden of establishing suitable alternate employment based on the four home-bound positions identified by its vocational expert, Kathleen Sampeck. Finally, the administrative law judge awarded employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Director challenges the award of Section 8(f) relief, arguing that the administrative law judge failed to explicitly identify, discuss, and weigh the relevant evidence in violation of the Administrative Procedure Act, 5 U.S.C. §557(c). Employer responds, urging affirmance. Employer cross-appeals the award of permanent total disability compensation. Claimant has not responded to this appeal.

Employer's argument that the administrative law judge erred in awarding claimant permanent total disability compensation is rejected. To establish a *prima facie* case of total disability, claimant must show that she cannot return to her regular or usual employment due to a work-related injury. If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where claimant resides, which she is capable of performing, considering her age, education, work experience, and physical restrictions, and which she could secure if she diligently tried. *See generally Director, OWCP v. Berktresser*, 921 F.2d 306, 311-312, 24 BRBS 69, 73 (CRT)(D.C. Cir. 1990); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 145 (1992); *see also Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988).

Initially, we reject employer's contention that in awarding claimant benefits for permanent total disability, the administrative law judge misconstrued Dr. Moskovitz's opinion as indicating that claimant was not capable of any employment. In his Decision and Order, the administrative law judge correctly noted that although Dr. Moskovitz initially expressed the opinion that claimant was not employable, he subsequently indicated that claimant was capable of working at home on a flexible schedule. Decision and Order at 3. Moreover, we note that the administrative law judge's consideration of suitable alternate employment was clearly premised on the assumption that claimant was capable of home-bound employment.

We also find no merit to employer's argument that the administrative law judge erred in finding that the jobs identified by its vocational expert, Ms. Sampeck, were not sufficient to meet employer's burden of establishing the availability of suitable alternate employment. After initially interviewing claimant in December 1990 and considering the home-bound employment restriction described in both Dr. Moskovitz's January 8, 1992, deposition and the January 4, 1992, opinion of Dr. Gordon, Ms. Sampeck conducted a labor market survey on January 21, 1990. As a result of this survey, Ms. Sampeck identified four opportunities for homebound work which she considered suitable for claimant. The jobs identified included an appointment-setter position with Northwestern Mutual Insurance Company in Arlington, Virginia, a telemarketer position with United Business Machines in Lorton, Virginia, a telecom representative position with One Stop Financial in Damascus, Maryland, and a telemarketer position with Fiber Clean, a rug cleaning service located in Rockville, Maryland.

After considering employer's vocational evidence, the administrative law judge found that the position identified with Northwestern Mutual Insurance Company was not realistically available to someone with claimant's limitations. In so concluding, the administrative law judge credited claimant's testimony that when she attempted to follow up on this job lead by phoning Northwestern, she was informed that they did not have anything for anyone to do at home. Although Ms. Sampeck attempted to explain this occurrence by testifying that the work actually would have been with an agent named Robertson, with whom she was personally acquainted, and not with Northwestern, the administrative law judge found that this discrepancy cast doubt on Ms. Sampeck's credibility. The administrative law judge further determined that the fact that the job had not been identified until the day prior to the hearing gave it the "feel of a hurried muster to do something before trial." *See*

Decision and Order at 3. Finally, the administrative law judge concluded that this job was truly sheltered employment and also discredited this position based on the fact that the requirements of the job had not been presented to Dr. Moskovitz.

The administrative law judge similarly found that the telemarketer position identified with United Business Machines of Lorton was not realistically available to someone with claimant's limitations. This finding was based on claimant's testimony that when she called to inquire about this job, she was told that the work must be done in the office, and that there was no work available for people to perform at home.

The administrative law judge also found that the job with One Stop Financial of Damascus, Maryland, soliciting customers for AT&T long distance services would not suffice. Crediting claimant's testimony that when she attempted to call this company she was unable to obtain a telephone number either in the phone book or from directory assistance, the administrative law judge in essence found that employer had not established the availability of this job. Finally, the administrative law judge found that as the job identified with Fiber Clean setting up appointments for carpet cleaning services required a training period of at least two weeks in Rockville, which would be precluded by claimant's physical condition, this job was not reasonably available to claimant.

After careful review of the record, we affirm the administrative law judge's finding that employer did not meet its burden of establishing the availability of suitable alternate employment, because it is rational and supported by substantial evidence. *See Caudill v. Sea Tac Alaska Shipbuilding Inc.,* 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding, Inc. v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993). Employer argues that the administrative law judge erred in finding that the job identified with Northwestern was sheltered employment. We hold that any error the administrative law judge may have made in this regard is harmless inasmuch as the administrative law judge, in rejecting this position, also relied on the fact that Ms. Sampeck, who identified Northwestern initially as the employer subsequently changed her testimony, the fact that when claimant called Northwestern she was informed that they had no home-bound work available, and the fact that the job was not identified until the day prior to the hearing.

Employer's argument that the administrative law judge erred in rejecting the job at United Business Machines based on claimant's testimony that the company had informed her that no home-bound work was available similarly must fail. Although employer asserts that this was error because the fact that the work was not available when claimant called and inquired does not necessarily mean that the work was not available at the time it was identified, we disagree. In the present case, we hold that the administrative law judge reasonably inferred from claimant's testimony that inasmuch as United Business Machines

did not offer home-bound work, this job was not realistically available to claimant given her physical limitations.

Finally, we reject employer's argument that none of the positions identified was beyond claimant's physical restrictions. We note that since neither Northwestern nor United Business Machines offered home-bound work, these jobs are not suitable for claimant as a matter of law. We further note that the administrative law judge reasonably viewed the Fiber Clean position as not suitable for claimant based on the fact that it required a two week training period outside of the home which claimant was incapable of performing. As employer has failed to raise any reversible error made by the administrative law judge in evaluating the evidence and making credibility determinations, the award of permanent total disability compensation is affirmed. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

We now direct our attention to the Director's appeal of the administrative law judge's award of Section 8(f) relief. Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case of permanent total disability where an employee suffers from a manifest pre-existing permanent partial disability which combines with the work injury to result in the employee's permanent total disability; the permanent total disability must not be due solely to the work injury. 33 U.S.C. §908(f); *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175 (4th Cir. 1993). In order to constitute a pre-existing permanent partial disability, the pre-existing condition must be a serious, lasting physical problem. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985). Employer bears the burden of proving that the disability was in part caused by the pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). In order to satisfy the manifest requirement, employer must have had actual knowledge of the pre-existing disability, or constructive knowledge from medical records in existence from which the condition was objectively determinable. *See generally Berkstresser*, 921 F.2d at 310-311, 24 BRBS at 71-72 (CRT).

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be upheld because he did not adequately detail the evidence upon which he relied or the reasoning he employed in making the award. In the instant case, the administrative law judge's discussion of Section 8(f) consists solely of the following:

The claimant's injury to her back was exacerbated by her pre-existing lupus erythematosus.

The medical evidence to this effect in the record is uncontradicted.

Decision and Order at 7.

Because the administrative law judge failed to identify, weigh and discuss the relevant evidence and failed to identify the evidentiary basis for his conclusions, as is required by the Administrative Procedure Act, 5 U.S.C. §557, we vacate the award of Section 8(f) relief. On remand the administrative law judge must explicitly identify, discuss, and weigh the relevant evidence under the appropriate legal standard in accordance with the requirements of the Administrative Procedure Act. *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23

BRBS 380, 382-383 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1980).[1]

Accordingly, the administrative law judge's Decision and Order is affirmed insofar as it relates to the award of permanent total disability compensation. The award of Section 8(f) relief contained therein, however, is vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[1]By Order dated April 16, 1993, the Board held the Director's motion for summary reversal of the administrative law judge's award of Section 8(f), 33 U.S.C. §908(f), relief in abeyance pending the issuance of this Decision and Order. Given our decision to remand the case for reconsideration of Section 8(f) relief, the Director's motion is denied.