BRB No. 03-0689

EUGENE W. COSSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	DATE ISSUED: July 13, 2004
	)	
Employer/Adjuster-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Stephen M. Vaughn (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Marilyn T. Hebnick (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for self-insured employer.

Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (2003-LHC-00197) of Administrative Law Judge Clement J. Kennington 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).

On August 6, 1996, claimant injured his neck and back during the course of his employment for employer as a driver. Claimant underwent spinal fusion surgery at L3-4 on May 1997. On March 3, 1999, claimant was examined by Dr. DeFrancesco, who opined that claimant could return to medium or light duty work with no regular heavy lifting. A labor market survey conducted on March 12, 1999, identified eight specific available jobs within Dr. DeFrancesco's restrictions. Employer voluntarily paid compensation for temporary total disability from August 7, 1996, to March 30, 1999. 33 U.S.C. §908(b). On March 31, 1999, employer commenced paying compensation for permanent partial disability, based on a loss of wage-earning capacity. 33 U.S.C. §908(c)(21). Prior to the April 9, 2003, hearing before the administrative law judge, the parties stipulated that claimant's injuries reached maximum medical improvement on March 30, 1999, and that claimant is unable to return to his usual employment as a driver.

In his decision, the administrative law judge found that claimant sustained work-related neck and back injuries, including herniated discs at C5-6 and L3-4, and that claimant's neck condition will likely require future surgery. The administrative law judge credited the restrictions of claimant's treating physician, Dr. Donovan. Specifically, Dr. Donovan stated that claimant was capable of performing medium duty work from October 7 to December 2, 1998, when claimant became unable to work due to an increase in his neck and back symptomatology. Dr. Donovan opined that claimant was capable of performing sedentary work beginning on February 24, 1999, and that on October 12, 1999, claimant could perform medium to heavy duty work. On March 20, 2001, Dr. Donovan opined that claimant is totally disabled due to an increase in his neck symptoms. The administrative law judge found that the parties' stipulation that claimant's injuries reached maximum medical improvement on March 30, 1999, is not supported by the evidence. He determined that claimant's injuries reached maximum medical improvement on October 12, 1999, when Dr. Donovan released claimant for medium to heavy duty work.

The administrative law judge found that employer's March 12, 1999, labor market survey failed to identify the availability of suitable alternate employment. The

administrative law judge also found that none of the jobs identified in employer's March 27, 2003, labor market survey is suitable as claimant has been unable to work since March 20, 2001. The administrative law judge rejected employer's contention that claimant voluntarily retired. The administrative law judge found that claimant's election to receive retirement pay at age 62 on October 1, 1999, was based on his length of service, and that claimant stopped working due to his work injury. The administrative law judge found employer liable for a Section 14(e) assessment, 33 U.S.C. §914(e), on all additional compensation payable from September 29, 1999, when claimant filed his claim, to November 8, 1999, when employer controverted the claim. Finally, the administrative law judge denied employer's petition for Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f). In his supplemental decision, the administrative law judge awarded claimant's counsel an attorney's fee totaling $24,595.90, representing 79.71 hours of attorney work at $250 per hour, 5.13 hours of paralegal work at $90 per hour, and expenses of $4,228.50.

On appeal, employer challenges the administrative law judge's finding as to the date of maximum medical improvement, his finding that employer did not establish the availability of suitable alternate employment, and his denial of Section 8(f) relief. Employer also appeals the award of an attorney fee. Claimant responds, agreeing with employer that the administrative law judge erred by not accepting the parties' stipulated date of maximum medical improvement. Claimant otherwise urges affirmance of the administrative law judge's compensation award. The Director, Office of Workers' Compensation Programs (the Director), responds, that the administrative law judge's denial of Section 8(f) relief must be remanded for the administrative law judge to reconsider employer's Section 8(f) petition under the correct legal standard.

Employer first contends the administrative law judge's finding that claimant's work injury reached maximum medical improvement on October 12, 1999, is not supported by substantial evidence and, alternatively, that the administrative law judge erred by rejecting the parties' stipulated March 30, 1999, date of maximum medical improvement. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Initially, we hold that the administrative law judge acted within his discretion to credit the opinion of claimant's treating physician, Dr. Donovan, regarding claimant's work capacity. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). Specifically, the administrative law judge credited Dr. Donovan's reports stating in March and July 1999 that further

treatment was indicated, his April 1999 report that claimant should not return to work, and his October 12, 1999, report releasing claimant to work at medium or heavy duty. Thereafter, claimant did not seek further treatment until March 2001, when Dr. Donovan opined that claimant is unable to work due to a worsening of his cervical symptoms. As claimant continued to undergo treatment and the administrative law judge's crediting of Dr. Donovan is rational, we reject employer's contention the administrative law judge's finding that claimant's work injury reached maximum medical improvement on October 12, 1999, is not supported by substantial evidence in the current record. *See Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993).

However, an administrative law judge may not reject a stipulation without giving the parties notice that he will not accept the stipulation and an opportunity to present evidence in support of their positions on the issue in question. *See, e.g., Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000); *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001). In this case, we agree with employer that the administrative law judge erred by rejecting the parties' stipulation that claimant's work injury reached maximum medical improvement on March 30, 1999, inasmuch as the administrative law judge did not give the parties notice that he would not accept the stipulation and an opportunity to present argument and evidence in support of their positions on this issue. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). Accordingly, we vacate the administrative law judge's finding as to claimant's date of maximum medical improvement, and we remand this case to the administrative law judge so that the parties may present their arguments and any additional evidence on this issue. The administrative law judge then must determine the date of maximum medical improvement in light of the evidence of record.

Employer next contends the administrative law judge erred by finding that employer failed to establish the availability of suitable alternate employment. Where, as here, it is uncontested that claimant is unable to return to his usual employment claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish 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 and which he could realistically secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F. 2d 1031, 14 BRBS 156 (5th Cir. 1981). In addressing this issue, the administrative law judge must compare claimant's restrictions and vocational factors with the requirements of the positions identified by employer in order to determine whether employer has met its burden. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *Ledet v. Phillips Petroleum Co.*, 163 F.2d 901, 32 BRBS 212 (CRT) (5th Cir. 1999).

In this case, the administrative law judge credited vocational evidence that claimant is functionally illiterate and Dr. Donovan's opinion that on February 24, 1999, claimant was capable of being re-trained to perform sedentary work. Decision and Order at 21-22, 25-26; *see* CXs 7 at 70-71; 12 at 4; 14 at 23-24. The administrative law judge compared these work restrictions to the eight positions identified in employer's March 12, 1999, labor market survey. The administrative law judge eliminated two of the positions based on the testimony of employer's vocational consultant, Ms. Colenburg, that the positions are unavailable due to claimant's lack of education. Tr. at 94. Similarly, the administrative law judge found that a telemarketer position is not suitable because it requires the ability to read, and that a security guard position requires the ability to read and to write reports. Tr. at 117, 148. The administrative law judge credited the testimony of claimant's vocational consultant, Ms. Lopez, to find that a dispatcher position is not suitable because claimant does not have the ability to learn computer skills. Tr. at 147-148; *see* CX 12 at 5. The administrative law judge also credited Ms. Lopez's testimony that jobs as a parts delivery driver and bus driver are not sedentary positions, and that the bus driver job requires an operator's license, which claimant does not possess. Tr. at 149-150. Finally, the administrative law judge found that claimant could not realistically secure a position as a machine operator. The administrative law judge credited Ms. Lopez's testimony that the position requires 12-hour shifts, entails operating overhead cranes and forklifts, and that the employer preferred warehouse experience and familiarity with the equipment which claimant does not possess. Tr. at 150-151. The administrative law judge therefore concluded that employer's March 12, 1999, labor market survey failed to establish the availability of suitable alternate employment.

We affirm the administrative law judge=s conclusion that employer did not establish that claimant realistically could obtain the positions identified in the March 1999 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*, 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. *Ledet*, 163 F.2d at 905, 32 BRBS at 214-15(CRT). 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 A[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 a functionally illiterate 66-year old who has performed only unskilled manual labor could realistically compete for and obtain work as a security guard, telemarketer, dispatcher, and machine operator. *See Ceres Marine Terminal*, 243 F.3d 222, 35 BRBS 7(CRT). Moreover, the administrative law judge rationally found that claimant was not qualified to work as bus driver, and that the parts driver position is not within Dr. Donovan's February 1999 sedentary work restrictions. 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 March 12, 1999, labor market survey 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).

Employer further contends that its March 12, 1999, and April 9, 2003, labor market survey and the testimony of Ms. Colenburg and Ms. Lopez establish the availability of general job openings during the period when claimant was physically able to work. In *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992), the Fifth Circuit held that in order to establish suitable alternate employment an employer does not need to provide evidence of specific job openings, but may meet its burden by demonstrating the availability of general job openings in certain fields in the surrounding areas. *Guidry*, 967 F.2d at 1044-45, 26 BRBS at 33-35(CRT); *see also Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). In his decision, the administrative law judge did not address this assertion of general job availability. Nevertheless, evidence of general job availability cannot aid employer in this case. The administrative law judge rationally rejected the similar specific jobs identified by employer because they were not suitable given claimant's skills, and not because of a lack of availability. Employer's evidence that the local economy contains general jobs similar to the specific jobs rejected by the administrative law judge therefore is legally insufficient to establish that *suitable* alternate jobs exist in the local community. *See generally Ceres Marine Terminal*, 243 F.3d 222, 35 BRBS 7(CRT). Accordingly, employer's contention that it established the availability of suitable alternate employment is rejected.[1] *SGS Control Serv. v. Director,*

[1] As employer failed to establish the availability of suitable alternate employment, we need not address employer's contention that claimant did not exhibit diligence in

OWCP, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996).

Employer next contends that claimant voluntarily withdrew from the workforce on October 1, 1999, when he elected to receive longevity benefits from the International Longshoremen's Association (the I.L.A.). Employer argues that, after October 1, 1999, claimant may no longer receive compensation under the Act. The administrative law judge rejected employer's contention, inasmuch as he found that claimant's retirement was involuntary as claimant is unable to return to his usual work for employer due to his work injury. Decision and Order at 27-28. In this regard, the administrative law judge properly applied the Board's decision in *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). In *Harmon,* the claimant injured his back, which required surgery. While recuperating, he received Social Security disability benefits, filed a claim under the Act, and filed a claim for longevity retirement benefits, which became effective prior to his back condition's reaching maximum medical improvement. The administrative law judge awarded the claimant benefits for temporary total disability up to the date the claimant=s retirement became effective as he could not determine whether the claimant=s retirement was voluntary or was due to the work injury. The Board reversed the administrative law judge=s denial of benefits commencing after the claimant retired. The Board held that in cases of traumatic injury which renders the claimant unable to perform his usual employment, his retirement at some point thereafter does not affect whether he has a disability under the Act. *Harmon*, 31 BRBS at 48. The Board noted that an inquiry into the retirement status of a claimant is relevant only when the claimant has an occupational disease, as the 1984 Amendments to the Act provide a formerly unavailable remedy to retirees whose occupational diseases manifest themselves after retirement. *See* 33 U.S.C. ''902(10), 908(c)(23), 910(d)(1994); *Harmon*, 31 BRBS at 48; *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). In a traumatic injury case, the relevant inquiry is whether claimant=s return to his usual work is precluded by the work injury. *Harmon*, 31 BRBS at 48. If so, the burden shifts to employer to establish the availability of suitable alternate employment. *See*, *e.g.*, *Turner*, *supra*. In this case, *Harmon* is dispositive as the parties stipulated that claimant is unable to return to his usual employment as a driver due to his work-related back injury. Decision and Order at 3. Thus, in order to mitigate its liability for total disability, employer had to establish the availability of suitable alternate employment, which the administrative law judge rationally found it failed to do. Accordingly, we reject employer's contention that claimant is not entitled to compensation after the date he elected to receive longevity retirement benefits from the I.L.A.

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seeking alternate work. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Employer next challenges the administrative law judge's finding that claimant has been unable to work at all since March 20, 2001, when Dr. Donovan opined that claimant is totally disabled due to an increase in his cervical symptoms. Employer contends there is no medical evidence supporting an increase in claimant's disability rating after Dr. Donovan released claimant to perform medium–level work in October 1999. In his decision, the administrative law judge credited Dr. Donovan's deposition testimony that, whereas claimant's March 1999 examination showed the C6 nerve to be intact, on August 27, 2001, the C6 nerve root was decreased bilaterally, which would cause periodic numbness and difficulty sleeping. Decision and Order at 22-23; *see* CX 14 at 33-34. The administrative law judge also credited Dr. Donovan's opinion that claimant's neck condition had objectively deteriorated from 1999 to 2001. *Id.* In this regard, Dr. Donovan testified that since 1999 claimant's neck developed increased neurological changes in the C5 and C6 areas that are shown by clinical examination and by the June 29, 2001, EMG and NCV, which indicate that the C5-6 disc is getting worse and that claimant will eventually require surgery. CX 14 at 43-45; *see also* CX 9. It is within the administrative law judge=s authority to evaluate and to draw inferences from the medical evidence of record. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In this case, the credited evidence establishes that Dr. Donovan increased claimant=s work restrictions to total disability based on Dr. Donovan's clinical examination and EMG and NCV testing of claimant's neck. Accordingly, we hold that the administrative law judge's finding that claimant is unable to work after March 20, 2001, is supported by substantial evidence and rational.[2] *See generally Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997). Accordingly, we affirm the administrative law judge's finding that claimant is entitled to continuing compensation for total disability from August 7, 1996.

Employer=s only contention on appeal regarding the administrative law judge's fee award is that it should be vacated in the event the Board vacates the administrative law judge=s award of benefits. Inasmuch as we have affirmed the award of benefits, we likewise affirm the fee award. 33 U.S.C. '928.

[2] Accordingly, we need not address employer's contention that its March 27, 2003, labor market survey established the availability of suitable alternate employment after March 2001. Moreover, as we have affirmed the administrative law judge's findings that claimant is totally disabled and that employer failed to establish the availability of suitable alternate employment during the period claimant was able to work, *see SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996), we need not further address employer's unsupported assertion that the preponderance of the evidence establishes that claimant has not been totally disabled since March 1999.

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 Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *see also OWCP v. General Dynamics Corp.[Bergeron],* 982 F.2d 790, 26 BRBS 139(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).

Employer challenges the administrative law judge's determination that employer did not satisfy the contribution requirement; specifically, employer contends that the administrative law judge's consideration of this requirement is not in accordance with *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT). The Director responds in agreement with employer; the Director urges that the case be remanded for the administrative law judge to apply the correct legal standard for establishing the contribution element for Section 8(f) relief in cases of permanent total disability. In order to establish the contribution element of Section 8(f) in cases of permanent total disability, employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's permanent total disability. *See Two "R" Drilling Co.*, 894 F.2d at 750, 23 BRBS at 35(CRT); *see also Allred*, 118 F.3d at 389-90, 31 BRBS at 93(CRT); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992). In this case, the administrative law judge stated that the contribution element requires that the employee's pre-existing permanent partial disability render the second injury more serious than it otherwise would have been, and that the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. Decision and Order at 28. This statement of the contribution element, however, applies in cases of permanent partial disability. *See Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997). Because the administrative law judge did not address the relevant evidence of record in accordance with the applicable legal standard for establishing contribution, we vacate his finding that the contribution requirement is not met, and remand the case for reconsideration of the evidence consistent with the applicable standard. *Allred*, 118 F.3d 387, 31 BRBS 9(CRT).

Accordingly, the administrative law judge's finding that claimant reached maximum medical improvement on October 12, 1999, is vacated, and the case remanded for the administrative law judge to provide the parties an opportunity to present evidence in support of their stipulation on the date of maximum medical improvement. The administrative law judge's denial of Section 8(f) relief also is vacated, and the case is remanded for the administrative law judge to apply the correct legal standard for establishing the contribution element in cases of permanent total disability. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge