BRB Nos. 01-0543
and 01-0543A

STEVEN YOUNG	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 18, 2002
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Order Denying Motion to Reconsider of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert J. MacBeth (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

James M. Mesnard (Seyfarth Shaw), Washington, D.C., for self-insured employer.

Thomas G. Giblin (Eugene Scalia, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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:

Claimant appeals, and employer cross-appeals, the Decision and Order, and the Order Denying Motion to Reconsider (99-LHC-3081, 00-LHC-1692) of Administrative Law Judge Daniel A. Sarno, Jr., 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 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).

Claimant worked for employer as a welder from June 19, 1977, until May 1, 1989. On February 25, 1988, he injured his right hand while moving a piece of equipment at work, and subsequently had a ganglion cyst surgically removed from the right wrist. Claimant returned to work for employer after this surgery, but he sustained a left elbow injury on March 25, 1988. Claimant returned to work for employer in May 1988. However, he continued to complain of bilateral arm, shoulder and neck pain. Claimant stopped working for employer on May 1, 1989, and has not worked since that time. Over several years, various diagnoses of claimant's pain were made. On July 19, 1988, Dr. Muizelaar diagnosed thoracic outlet syndrome (TOS). Tests in 1999 revealed a disc herniation and bone spurs at C6-7 with nerve compression. EX 30. Claimant underwent four additional surgeries between 1990 and 2000: right and left first rib resections related to the TOS, left elbow ulnar nerve surgery, and surgery for the cervical spine condition. Employer paid claimant benefits for a ten percent permanent partial impairment to claimant's left arm as a result of the March 25, 1988, left elbow injury, and for various periods of temporary total and temporary partial disability. Tr. at 5-7; EX 9. Claimant filed claims for the wrist and elbow injuries.

In his decision, the administrative law judge found that claimant established a *prima facie* case under Section 20(a) of the Act, 33 U.S.C. §920(a), that his TOS and cervical spine problems are causally related to his employment, that employer did not establish rebuttal of the presumption, and that employer established the availability of suitable alternate employment. He thus awarded claimant continuing permanent partial disability benefits of $239.50, based on an average weekly wage of $359.25, commencing July 27, 2000. The administrative law judge determined that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).[1]

[1]The administrative law judge denied claimant's motion for reconsideration. Claimant argued that as employer never paid compensation benefits for his TOS and spinal conditions, the administrative law judge should not have stated that employer is entitled to a credit for any payments made for these conditions.

On appeal, claimant contends that the administrative law judge erred in not awarding temporary total disability benefits from February 23, 1998, through July 27, 2000, or, in the alternative, permanent partial disability benefits during this period. In its appeal, employer argues that the administrative law judge erred in finding that claimant's TOS and cervical spine conditions are work-related, as claimant did not establish that these conditions are related to the right wrist and left elbow injuries for which claimant filed claims, and that the cervical spine condition is an intervening cause of claimant's disability. Thus, employer contends that claimant's TOS and cervical spine conditions are neither work-related nor properly before the administrative law judge. Employer contends, in the alternative, that it established the availability of suitable alternate employment in 1992, and that, should the Board affirm the administrative law judge's award of permanent partial disability benefits, it should reverse the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's appeal, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

We first address employer's challenge to the administrative law judge's finding that claimant's TOS and cervical condition are work-related. Employer argues that the administrative law judge erred in considering whether claimant's TOS and cervical injury are causally related to his employment, because the only two claims before him were those for the right hand and left elbow injuries. Employer alleges that the administrative law judge used an estoppel-type argument against it as to the work-relatedness of the TOS and the cervical spine condition, simply because it voluntarily paid for the medical care and surgeries related to these conditions. Employer also contends that even if the TOS is work-related, the cervical spine injury is an intervening cause of claimant's disability.

Initially, we hold that the administrative law judge properly considered whether the TOS and cervical spine conditions are work-related. The administrative law judge rejected employer's theory that, since the two formal claims filed in the case relate to the right wrist and left elbow injuries, claimant cannot recover for his bilateral TOS or cervical spine conditions unless they are medically related to the two claimed injuries. The administrative law judge found that employer was well aware that claimant's continuing complaints of pain were gradually diagnosed as being due to something other than the traumatic injuries to claimant's wrist and elbow, as its clinic was apprised of the continuing treatment of claimant's pain. The administrative law judge stated that the record clearly shows that employer, through the various physicians to whom it referred claimant, subsumed under either of the 1988 claims all treatments and surgeries related to claimant's TOS and cervical spine condition. Decision and Order at 12. Moreover, the administrative law judge found that claimant was unaware at the time that his treatment, including the surgeries, was not related to the two injuries for which he filed formal claims.

The evidence supports the administrative law judge's conclusion that the claims before him encompassed all of claimant's conditions. For example, Dr. Reid, employer's physician, wrote that claimant was diagnosed with TOS, and "[w]hile this condition was carried under the paperwork for the February 25, 1988 injury, it is a separate condition [from the right hand]." EX 15 at 1-2. Employer's clinic records state that claimant complained of shoulder and neck pain as early as September 1987. EX 14. In a May 27, 1998, letter, Mr. Holmes, a case manager for employer informed the district director that claimant had three relevant injuries, including bilateral TOS with surgery. EX 16. Further, Mr. VanArsdale, employer's case manager, wrote to the district director on May 12, 1995, that "[w]hile the case is carried under the OWCP number for the 1988 injury, the record is clear that the final injury was left side thoracic outlet syndrome which appeared after 1988. . . . The contested issue is extent of disability." EX 15 at 3. Moreover, claimant's 1997 claim form for the elbow injury references a "pinched nerve." EX 11. Contrary to employer's assertion, the administrative law judge did not use the fact that employer paid for the medical treatment for these conditions to estop employer from challenging the work-relatedness of claimant's conditions, but rather as an illustration of employer's awareness of the existence of these conditions and their potential work-relatedness. The administrative law judge could properly consider that employer knew of all of claimant's conditions, and paid for medical treatment, as the facts he relied upon undercut employer's argument that it was prejudiced by its alleged lack of knowledge of their existence because no formal claim for them was filed.

The Supreme Court has stated that an employer is not required to rebut every conceivable theory of recovery; thus, the Section 20(a) presumption attaches only to claims raised by the employee alleging the occurrence of a work-related injury. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Nonetheless, the court noted that liberal pleading rules apply under the Act, permitting the amendment of claims so long as prejudice to the opposing party is avoided. *See id.*, 455 U.S. at 613 n.7, 14 BRBS at 633 n.7; *see also Pool Co. v. Cooper*, 274 F.3d 173, 35 BRBS 109(CRT) (5th Cir. 2001); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001). For example, in *Meehan Service Seaway Co. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT)(8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998), claimant initially sought benefits for an injury to his right knee, but eventually sought benefits for a cumulative trauma injury. The United States Court of Appeals for the Eighth Circuit rejected employer's argument that claimant was not entitled to the Section 20(a) presumption that his cumulative trauma was causally related to his employment, despite not originally proceeding under this theory, as employer was on notice that claimant had continuing problems with his knee. Similarly, in this case employer's own correspondence and medical reports from physicians to which it referred claimant demonstrate its awareness of claims for TOS and a cervical spine condition. Indeed, it is clear that claimant sought benefits for his pain, which merely originated with the wrist and elbow injuries claimed and which subsequently was diagnosed as other conditions. Thus, the

administrative law judge rationally determined that employer was aware of claims for these conditions. As employer does not dispute that claimant has TOS and a cervical spine problem, and that claimant's working conditions could have caused these conditions, the administrative law judge's finding that claimant has established a *prima facie* case that his TOS and cervical spine condition are work-related is affirmed. *See* EXS 14, 15; EX 26 at 2-3; EX 28 at 21-22; EX 30; *see also Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Once claimant presents sufficient evidence to invoke the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that the injury was not caused by the employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In support of its argument that even if claimant has established a *prima facie* case under Section 20(a), it has rebutted the presumption, employer cites evidence in support its argument that claimant's TOS and spine problems are not related to his right wrist or left elbow injuries. As employer does not allege, however, that the evidence demonstrates that claimant's TOS and cervical spine problems are not related to his work, and indeed no evidence supports such a proposition, the administrative law judge's finding that these conditions are related to claimant's work is affirmed. *See generally Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

Employer also argues that claimant's cervical spine condition, even if it contributes to his inability to work, is an intervening cause of claimant's disability. An employer can rebut the Section 20(a) presumption by showing that the claimant's disabling condition is caused by a subsequent intervening event, provided the employer also proves that the subsequent event was not caused by the claimant's work-related injury. *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). As we, however, affirm the administrative law judge's finding that claimant's cervical spine condition is work-related because employer has offered no evidence to the contrary, employer has not rebutted the presumption in this regard.

In keeping with its argument that claimant's right wrist and left elbow injuries are the only compensable work-related injuries in this case, employer next argues that under *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980), claimant is limited to compensation provided by the schedule. In *PEPCO*, the United States Supreme Court held that an employee who sustains a permanent partial disability to a body part covered by the schedule provisions of Section 8(c)(1)-(20) of the Act must be compensated under the schedule and may not receive compensation under Section 8(c)(21) for a loss of wage-earning capacity. As claimant's TOS and cervical spine conditions are work-related and therefore compensable, and as these conditions are not covered by the

schedule, *PEPCO* is not applicable in this case.

We next turn to claimant's contention in his appeal that he is entitled to temporary total disability benefits from February 23, 1998, through July 27, 2000. The administrative law judge did not address claimant's entitlement to benefits prior to July 27, 2000.[2] To establish a *prima facie* case of total disability, claimant must establish that he is unable to perform his usual employment due to his work-related injury. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999); *Gacki v. Sea-Land Service, Inc.*, 33 BRBS 127 (1998). Claimant's argument has merit. Claimant's spinal surgery was performed on January 18, 2000. In determining the date on which employer established suitable alternate employment, the administrative law judge relied on the date Dr. Parent approved the alternate positions, and he stated that both Dr. Partington and Dr. Davlin deferred to Dr. Parent with regard to permanent work restrictions. On March 24, 2000, Dr. Partington, who performed claimant's cervical spine fusion, stated that he expected claimant to be able to return to employment in eight to twelve weeks following surgery in light of that condition only, but that with regard to claimant's total condition due to other problems, his return to work depends on restrictions imposed by Drs. Parent and Davlin. EX 40. As the administrative law judge rationally found that because of the January 18, 2000 spinal fusion and claimant's subsequent recuperation, employer did not establish suitable alternate employment until Dr. Parent approved the positions on July 27, 2000, and employer cites no evidence to the contrary, we hold that claimant is entitled to temporary total disability benefits from January 18, 2000, until July 27, 2000.

Employer contends that it established the availability of suitable alternate employment in 1992, rather than in 2000, as found by the administrative law judge, and thus that if it has overpaid benefits, it is entitled to a credit.[3] Where claimant is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Hord*, 193 F.3d 797, 33 BRBS 170(CRT); *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Gacki*, 33 BRBS 127. The administrative law judge found that employer established suitable alternate employment on July 27, 2000, the date Dr. Parent approved the jobs identified by the vocational expert. We vacate the administrative law

[2]Employer voluntarily paid various periods of temporary total and temporary partial disability benefits between March 3, 1988 and November 30, 1992. EX 9. In addition, employer paid temporary total disability benefits from February 26, 1997 to February 22, 1998, and permanent partial disability benefits for a ten percent impairment to the arm. EX 13.

[3]Employer contends that claimant is not entitled to any compensation between March 21, 1996, and September 19, 1996, when Dr. Parent removed all restrictions.

judge's finding in this regard and remand the case for him to reconsider this issue. Laura Whitfield, a vocational consultant, prepared a supplemental labor market survey dated July 26, 2000, in which she identified several positions available from 1992 to 1998, which she believed were within claimant's physical capabilities. Tr. at 89-94; EX 58. The administrative law judge rejected the retrospective survey because he found that of the jobs identified, none was approved by any physician. An administrative law judge can, however, make a determination regarding the suitability of alternate employment based on a credited medical opinion as to claimant's restrictions and the requirements of the prospective positions. *See Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 232, 35 BRBS 87, 91(CRT) (4th Cir. 2001); *see generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT). There is no requirement that positions be approved by a doctor.

Prior to the January 18, 2000, cervical spine surgery, claimant had no restrictions imposed with regard to that condition. During the period contemporaneous with the retrospective survey, claimant's restrictions were those limited to his elbow and TOS. EX 26 at 14, 22. There also was a period when he was released for work without any restrictions. EX 26 at 20. Employer may meet its burden of establishing the availability of suitable alternate employment by relying on a retrospective labor market survey so long as the jobs were available during the "critical period" during which claimant was able to work. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988); *see also Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) (employer may establish suitable alternate employment with a retrospective survey as long as the evidence is found to be credible and trustworthy). We therefore agree with employer that as claimant was released for work with and without restrictions during several periods between 1992 and 1998, and several of the positions identified in Ms. Whitfield's survey appear potentially suitable, the case must be remanded for the administrative law judge to reconsider the availability of suitable alternate employment prior to claimant's spinal fusion on January18, 2000.[4] On remand, the administrative law judge should consider the retrospective labor market survey in light of the restrictions imposed by the physicians he credits; employer is entitled to a credit for any benefits it previously paid during this period against any benefits due claimant. 33 U.S.C. §914(j).

We next address employer's challenge to the administrative law judge's denial of Section 8(f) relief. To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to

[4]Claimant does not challenge the administrative law judge's finding that he was not diligent in seeking employment.

the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079,1081, 31 BRBS 164, 166(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). Employer filed two applications for Section 8(f) relief. The administrative law judge found that Dr. Reid's opinion upon which employer relied in the claim for Section 8(f) relief for the February 25, 1988, right wrist injury, did not specifically identify a permanent partial disability which pre-existed this injury. Decision and Order at 15. The administrative law judge also rejected the second Section 8(f) claim, for the March 28, 1988, left elbow injury, which relies on the February 25, 1988, wrist injury as the pre-existing condition. The administrative law judge found that Dr. Reid's opinion, assigning a five percent permanent partial disability due to the wrist impairment, is not well reasoned, as no work restrictions were imposed for the right wrist by May 9, 1998, that claimant was never awarded compensation benefits for permanent impairment of the right wrist, that Dr. Reid did not explain how he arrived at the rating, and that no other doctor came to the same conclusion, including the doctor who operated on the wrist.

On appeal, employer does not specifically contest the above findings, but argues that the right wrist and left elbow injuries were serious pre-existing conditions which materially and substantially contributed to claimant's ultimate disability arising from his TOS and cervical spine disability, the conditions for which administrative law judge awarded permanent partial disability benefits. Employer contends that the administrative law judge failed to address this basis for Section 8(f) relief.

We reject the Director's contention that employer is raising this theory for the first time on appeal. Dr. Reid's opinions, in support of employer's applications for Section 8(f) relief, are based on the premise that claimant's TOS is the compensable injury, and that claimant's pre-existing right and left arm conditions contribute to claimant's current disability. *See* EXS 15, 16. Nonetheless, we hold that employer has not established that claimant's current permanent partial disability is not due solely to the subsequent injuries. Dr. Reid's opinion highlights the bilateral nature of claimant's TOS, and he states that the TOS reduced claimant's ability to lift and to perform overhead work. The applicable law dictates that employer offer proof of the extent of the permanent partial disability had the pre-existing injury never existed, in order for the administrative law judge to determine whether claimant's permanent partial disability is materially and substantially greater due to the pre-existing disability. *See Harcum I*, 8 F.3d at185-86, 27 BRBS at 130(CRT). The evidence cited by employer on appeal establishes that, as a result of the subsequent injury, claimant is

unable to return to his usual work. Thus, employer has not established that claimant's permanent partial disability is not due solely to the subsequent injury and that the pre-existing disability materially and substantially contributes to claimant's current disability. As employer has not met its burden of proof, we affirm the administrative law judge's determination that employer is not entitled to Section 8(f) relief.

Accordingly, the administrative law judge's decision is modified to reflect that claimant is entitled to temporary total disability benefits from January 18, 2000, to July 27, 2000. His conclusion that employer did not establish the availability of suitable alternate employment prior to July 27, 2000, is vacated, and the case is remanded for further consideration of the extent of disability consistent with this opinion. In all other respects the Decision and Order and the Order Denying Motion to Reconsider are affirmed.

SO ORDERED.

NANCY S. DOLDER
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge