BRB No. 99-0883

JESSE L. WEAVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Kristin Dadey (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-1691) of Administrative Law Judge Fletcher E. Campbell, 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 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 worked for employer since 1964 in its sheet metal department. His job duties required squatting, kneeling, climbing and crawling. On December 15, 1995, claimant presented at employer's clinic with pain in both knees. He received treatment commencing in February 1996 from Dr. Stiles. Dr. Stiles performed a right knee arthroscopy in April 1996. In November 1996, Dr. Stiles rated claimant's right knee impairment at 20 percent. In May 1997, Dr. Stiles opined that claimant is a candidate for a total knee replacement of the right knee and that claimant is totally disabled due to the impairment of both knees, which he rated at 30 percent for each knee in January 1998. Employer voluntarily paid benefits under the Act for temporary total disability, 33 U.S.C. §908(b), from March 26, 1996, to November 17, 1996, and for a 20 percent permanent partial disability of the right knee, 33 U.S.C. §908(c)(2), (19). Claimant sought benefits under the Act for permanent total disability based on his work-related knee injuries. 33 U.S.C. §908(a). The issues before the administrative law were whether employer established the availability of suitable alternate employment and employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge credited evidence that claimant is functionally illiterate and the opinion of Dr. Stiles as to claimant's work restrictions. Based on this evidence, the administrative law judge rejected as suitable alternate employment the 12 jobs identified in employer's labor market survey. Moreover, he discredited employer's survey, in general, because most of the jobs are beyond the restriction imposed by Dr. Stiles that the driving distance to work from claimant's home be no more that 15 to 20 miles, and because employer did not inform any of the prospective employers of Dr. Stiles's opinion that claimant would miss two to three days of work per month due to knee pain. Furthermore, the administrative law judge credited the uncontradicted testimony of claimant's vocational counselor, Mr. DeMark, that, in a competitive labor market, claimant's absence from work two to three days per month would disqualify him from consideration by any of the prospective employers in employer's labor market survey. Thus, the administrative law judge concluded that employer failed to establish the availability of suitable alternate employment, and he awarded claimant total disability benefits.

The administrative law judge next addressed employer's application for Section 8(f) relief. The administrative law judge found that notations in employer's clinic records of leg pain in 1965 and knee pain in 1973 fail to establish a manifest, pre-existing permanent partial disability which contributes to claimant's total disability. Moreover, the administrative law judge found that employer failed to establish a pre-existing disability from medical evidence that claimant had pre-existing hypertension, diabetes, and cervical arthritis. Accordingly, employer's application for Section 8(f) relief was denied.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment and the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. The Director, Office of Workers' Compensation Programs, responds in support of the denial of Section 8(f) relief.

We initially address employer's contention that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. Specifically, employer contends that the administrative law judge erred in crediting the restrictions placed by Dr. Stiles, alleging that his opinion is unsupported by objective evidence. Moreover, employer contends the administrative law judge erred by focusing on the competitiveness of the local labor market, and by failing to address claimant's refusal to meet with Mr. Karmolinski, employer's vocational counselor.

Where, as here, it is uncontested that claimant is unable to perform his 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 his age, education, work experience and physical or psychological restrictions, is capable of performing. *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT)(4th Cir. 1988). The administrative law judge may rely on the testimony of vocational counselors that job openings exist to establish the availability of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The administrative law judge should determine the employee's physical restrictions based on the medical opinions of record and apply them to the available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (Ramsey, C.J., dissenting on other grounds), *motion for recon. denied*, 17 BRBS 160 (1985). A vocational report may be rationally discredited if the counselor fails to take into consideration all relevant restrictions found by the administrative law judge. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

In the instant case, the administrative law judge found that claimant is functionally illiterate, *see* CX 4, and he credited the restrictions imposed by Dr. Stiles. Dr. Stiles opined that claimant could lift five pounds and carry it 30 feet using a cane. He restricted claimant

from climbing ladders and to climbing one flight of stairs one to two times per day. Claimant was further restricted from bending and twisting below chair height while standing and sitting. Dr. Stiles opined that claimant is unable to use manual foot controls and should drive no more than 15-20 miles from home to a job. CX 1 at 24-27. Claimant is further restricted from crawling, kneeling or squatting and may only occasionally stand. CX 10(f). Specifically, Dr. Stiles stated that claimant may stand up to 30 minutes three to four times a day and walk 15 to 20 minutes four to five times a day on even surfaces. CX 1 at 18, 20. As claimant has knee pain with prolonged sitting and may sit no longer than 45 minutes, he must also be able to stand and move about. CX 1 at 19-20. Finally, Dr. Stiles opined that claimant would nonetheless miss approximately two to three days of work per month due to knee pain and swelling. CX 1 at 21, 35-36.

The administrative law judge compared these work restrictions to the 12 specific jobs identified in employer's labor market survey. He rejected nine of the positions because, *inter alia*, they were located beyond claimant's 15 to 20 mile driving restriction. In further evaluating these nine jobs, the administrative law judge also found that claimant could not pass the written qualifications test for a security guard position nor could he work at a dispatcher position because there was no evidence claimant is capable of meeting the requirement that he type 30 words per minute. A donation center attendant position with Goodwill was rejected because it required duties beyond claimant's five pound lifting restriction, as was a cashier position because claimant would have to be standing for the entire shift. Finally, three cashier positions within claimant's driving limitation were rejected because claimant would have to stand for most the shift.

We reject employer's contention that there is no objective evidence supporting Dr. Stiles's driving restriction and his opinion that claimant would miss two to three days of work each month due to knee pain. Dr. Stiles has been claimant's treating physician from February 8, 1996. His office notes support his opinion as to claimant's work restrictions. Specifically, he notes that claimant's right knee gives out, and that claimant has painful crepitation and mild effusion. Claimant's left knee has mild crepitation. X-rays showed "marked collapse" of both medial compartments, narrowed spaces and metallic foreign bodies were observed in claimant's left knee. CX 10. On January 6, 1998, Dr. Stiles rated claimant as having a 30 percent impairment of each knee due to post traumatic arthritis and he opined that claimant is a candidate for a total replacement of his right knee. *Id.*

In adjudicating a claim, it is well-established that the administrative law judge is entitled to evaluate the credibility of all witnesses, and is not bound to accept the opinion or theory of any particular witness; rather, the administrative law judge may draw his own conclusions and inferences from the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). In the instant case, we hold that the administrative law judge's decision to

credit Dr. Stiles's work restrictions is rational and supported by substantial evidence.[1] *See O'Keeffe*, 380 U.S. at 359; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir.1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, as employer does not challenge the administrative law judge's finding that none of the jobs identified by its labor market surveys is within these restrictions, we affirm his conclusion that employer

[1]The administrative law judge discredited employer's labor market survey, as a whole, because employer did not notify any of the prospective employers in the survey that claimant would miss two to three days of work per month due to his knee impairment. Decision and Order at 13. Any error in this finding is harmless, as the administrative law judge rationally discredited each of the specific jobs listed in employer's survey. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997)(employer need not contact prospective employers to inform them of claimant's qualifications and limitations and determine if they would in fact consider hiring claimant). We also note that employer's allegation of error in the administrative law judge's crediting, in part, the competitiveness of the local labor market is moot, as this determination was not a factor in the administrative law judge discrediting the specific jobs identified in employer's labor market survey.

failed to establish the availability of suitable alternate employment.[2] *See Canty v. S.E.L. Maduro*, 26 BRBS 147, 151-152 (1992).

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 Director, OWCP v. General Dynamics Corp.[Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

Employer asserts that, from its clinic notes, claimant's alleged osteoarthritis constitutes a manifest, pre-existing permanent partial disability. *See* EX 16 at exs 1, 2.

[2]We note employer's argument that the administrative law judge erred by failing to address claimant's refusal to meet with employer's vocational counselor, Mr. Karmolinski, for a vocational assessment. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989). Employer fails to allege any resulting prejudice; moreover, under the facts of this case, any error is harmless as the administrative law judge rationally discredited employer's survey based on Dr. Stiles's work restrictions. Employer was not prejudiced by claimant's failure to meet with Mr. Karmolinski, as claimant's refusal was not a factor contributing to employer's not meeting its burden of establishing suitable alternate employment. *See generally Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999). Finally, we find no basis in the record for employer's assertion that the administrative law judge required that employer provide claimant with actual job offers in order to establish the availability of suitable alternate employment.

Specifically, in 1965 claimant presented at the clinic with pain in both legs. X-rays of claimant's legs, knees and feet were read as negative. Venous insufficiency was diagnosed. In 1973 claimant presented at the clinic with pain in his right knee which was not responding to heat treatment. Claimant was advised to see his own doctor. Twenty-two years later claimant sustained pain in both knees that is the subject of the instant claim.

After review of the record, we hold that the administrative law judge's denial of Section 8(f) relief is rational, supported by substantial evidence, and in accordance with law. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998). The administrative law judge found that the clinic notes from 1965 and 1973 provide no documentation of an arthritic condition or of any other permanent knee disability. He therefore discredited the opinion of Dr. Reid, based on these records, that claimant has a pre-existing chronic knee disability. The administrative law judge also rationally found that the opinion of Dr. Nevins does not establish a pre-existing knee disability discrete from claimant's current knee disability, which the administrative law judge found is due to cumulative work-related trauma from, *inter alia*, crawling, climbing, and squatting.[3] Decision and Order at 17-18. Moreover, the administrative law judge found that employer's clinic records fail to establish that any pre-existing disability was manifest. *Id*. at 19 and n.4. Thus, as the administrative law judge's determinations that employer failed to establish a serious and lasting physical condition, or that any such disability was manifest to employer is rational and supported by the record, these findings and the administrative law judge's consequent denial of Section 8(f) relief are affirmed. *See Callnan v. Morale, Welfare & Recreation Department of the Navy*, 32 BRBS 246 (1998); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998);

[3]Dr. Nevins stated in a 1997 letter that he agreed with Dr. Reid that claimant had "significant pre-existing knee problems." The administrative law judge found, however, that following his 1996 examination of claimant, Dr. Nevins stated that claimant's knee pain is the result of many years of "climbing, squatting, kneeling and working on hard surfaces." EX 5(a). The administrative law judge found that this report described claimant's work injury, and does not provide a basis for Dr. Nevins's later opinion that claimant had a pre-existing knee disability.

see also Caudill v. Sea Tac Alaska Shipbuilding, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge