BRB No. 13-0191

SHANE L. CARRIER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 11/27/2013
	)	
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 Awarding Benefits and the Decision and Order Denying Special Fund Relief of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Gary W. Huebner (Law Office of Gerard R. Rucci), New London, Connecticut, for claimant.

Robert J. Quigley, Jr., and Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Special Fund Relief (2011-LHC-02181) of Administrative Law Judge Colleen A. Geraghty 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).

In 2003, employer hired claimant as a nuclear machinist. He injured his back on January 25, 2008, during the course of his employment, and he underwent surgery on December 4, 2008. Employer accepted the claim and paid claimant temporary total disability benefits from January 28, 2008, through March 22, 2011, and temporary partial disability benefits from March 23 through April 19, 2011. From May 23 through June 21, 2011, claimant obtained work as a machinist for Cascades Boxboard Company. He began a second job, also as a machinist, in July 2011 for East Coast Valve Services. Due to lack of work, he was laid off on January 11, 2012. Tr. at 31-32. Claimant filed a claim for additional benefits under the Act.

The administrative law judge found that claimant's two short-term jobs did not constitute suitable alternate employment but that employer established the availability of suitable alternate employment through its labor market surveys. However, the administrative law judge found that claimant diligently tried to obtain work but was unsuccessful in doing so. Specifically, the administrative law judge credited claimant's efforts in: enrolling in school for further education in the criminal justice field; looking for jobs online and in the newspapers; submitting applications for both criminal justice and machinist jobs; going to interviews; and keeping a log of over 200 contacts made in searching for work. As she found claimant was diligent in seeking, but was unable to obtain, work, the administrative law judge awarded claimant permanent total disability benefits from March 23 through May 22, 2011, June 22 through July 16, 2011, and from January 12, 2012, and continuing.[1] Employer appeals the award, and claimant responds, urging affirmance. In a separate decision, the administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief, finding that employer failed to establish that claimant had a manifest pre-existing permanent partial disability. Employer appeals that decision, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

[1]The parties stipulated that claimant's back condition reached maximum medical improvement on December 4, 2009, and that claimant cannot return to his usual work. Decision and Order at 2-3.

Employer first contends the administrative law judge erred in finding that claimant's actual post-injury work did not constitute suitable alternate employment and that his post-injury earnings are not representative of his post-injury wage-earning capacity.[2] As the parties agreed that claimant cannot return to his usual work, the burden shifted to employer to establish the availability of suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *see also CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). The administrative law judge found that claimant's post-injury work did not constitute suitable alternate employment but that employer met its burden with its June 8, 2012, labor market survey.[3] Nevertheless, as she found claimant diligently searched for, but was unable to secure, employment, she awarded permanent total disability benefits. Employer asserts that claimant was able to secure and maintain post-injury work for two periods of time, losing them for reasons unrelated to his work injury, that this establishes the availability of suitable alternate employment, and that claimant is not entitled to permanent total disability benefits. The administrative law judge, citing the similarities to *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (11-week job not shown to be "realistically and regularly available to claimant on the open market"), found that these short-term jobs did not establish the availability of suitable alternate employment because employer failed to show that they were sufficiently regular and continuously available in the open market. The administrative law judge thus relied on case precedent holding that short-term post-injury jobs do not establish the claimant is not totally disabled when that position is no longer available. *Id.*; *see also Carter v. General Elevator Co.*, 14 BRBS 90 (1981); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 734 (1978); *Seals v. Ingalls Shipbuilding, Div. of Litton Systems, Inc.*, 8 BRBS 182 (1978).

In this case, claimant held the first post-injury job for slightly less than one month and the second one for nearly six months. He was, effectively, laid off from both jobs due to lack of work. Although claimant secured post-injury work, he held it only for two short periods, and the administrative law judge found that employer did not show that

[2]In so asserting, employer emphasizes that during a 12-week period between July and October 2011 claimant had steady earnings that matched or exceeded his average weekly wage. Claimant testified that work decreased in the latter part of 2011, and he was laid off for lack of work in January 2012. Tr. at 33.

[3]The administrative law judge gave the March and June 2011 surveys little or no weight because they were based on outdated physical restrictions and/or were conducted during the time claimant had temporary work. Decision and Order at 13 n.9.

those types of jobs are regularly available on the open market.[4] In *Edwards*, the claimant was retrained by his employer and secured post-injury alternate work for another employer. The post-injury work lasted only 11 weeks, and the United States Court of Appeals for the Ninth Circuit held that the job did not constitute suitable alternate employment because it was not shown to be "realistically and regularly available" on the open market, as 11 weeks did not make the earnings therefrom sufficiently "regular" to establish a true post-injury wage-earning capacity.[5] Previously, the Board also had held that short-term post-injury employment does not preclude a finding of total disability. *See Carter*, 14 BRBS 90 (job of 3 ½ months not shown to be regularly available). Employer has not established that the administrative law judge's reliance on this case law is erroneous. The administrative law judge's finding that claimant's two post-injury jobs did not establish the ongoing availability of suitable alternate employment on the open market is rational, supported by substantial evidence, and in accordance with law. Thus, we affirm the administrative law judge's finding and reject employer's contention of error. *Edwards*, 999 F.2d 1374, 27 BRBS 81(CRT); *Carter*, 14 BRBS 90.

The administrative law judge found that employer established the availability of suitable alternate employment via its June 2012 labor market survey. Consequently, the burden shifted back to claimant to establish that he diligently, but unsuccessfully, sought post-injury employment. *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT). Employer contends the administrative law judge erred in crediting claimant's testimony that his search for work was diligent, as it asserts she failed to consider inconsistencies in claimant's testimony and to address the surveillance reports. Specifically, employer argues that the surveillance evidence undermines claimant's credibility as to his physical limitations and, thus, undermines his alleged work search. Contrary to employer's assertion, there is substantial evidence of record to support the administrative law judge's credibility determination and finding that claimant used reasonable diligence to look for work. The administrative law judge has the discretion to credit claimant's testimony and to weigh the conflicting evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

[4]Claimant got the second job through his brother, and he testified that the two companies were aware of his work restrictions and made accommodations for him. Tr. at 30, 32, 85.

[5]The administrative law judge did not award any benefits during claimant's periods of employment.

Dr. Willetts reviewed the surveillance video and, nevertheless, assessed claimant with a 14 percent impairment of the whole person and established work restrictions. These permanent work restrictions were then taken into account by employer's vocational expert in conducting the labor market survey, and the administrative law judge fully addressed the restrictions and the survey. Therefore, despite employer's assertion, the administrative law judge did not err in not separately assessing the surveillance reports. Moreover, the administrative law judge may not substitute her opinion for that of the doctor. *Pietrunti v. Director, OWCP,* 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997). Claimant testified his job search included using internet employment services, as well as filing paper applications with employers, including those listed in the labor market survey, and that he was interviewed several times, but once the prospective employers learned of his work restrictions, he did not hear from them again. Tr. at 33-34, 38-46, 66-67. Claimant also stated he took university classes on-line in the criminal justice field and registered for PoliceLink, a website for jobs in that field, but has been unable to obtain any work. Tr. at 35-37. The administrative law judge credited claimant's testimony and found he was diligent in his job search based on his summary of over 200 job contacts, his efforts in continuing his education, and his returning to work when he had the opportunity.[6] Decision and Order at 15. Substantial evidence of record supports the administrative law judge's finding, and the Board will not interfere with credibility determinations unless they are "inherently incredible or patently unreasonable." *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). Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant diligently searched for, but was unable to secure, post-injury employment and thus is totally disabled. *See DM & IR Ry. Co. v. Director, OWCP*, 151 F.3d 1120, 32 BRBS 188(CRT) (8th Cir. 1998); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Fortier v. Electric Boat Corp*., 38 BRBS 75 (2004).

We next address employer's alternative contention that the administrative law judge erred in denying it relief from the Special Fund. The administrative law judge bifurcated this issue from the remainder of the case in order to permit the Director to respond to the claim for relief, and the Director's response was a concession that employer is entitled to Section 8(f) relief. Despite this concession letter, the administrative law judge denied the requested relief. Employer contends the

[6]Employer contends the administrative law judge erred in finding claimant's efforts diligent for several reasons: his list of jobs included some for which he had not actually applied, other jobs were not suitable, and his list did not include several jobs identified in employer's labor market survey. However, a determination of a claimant's diligence in seeking post-injury employment is not limited to consideration of his efforts to obtain the precise jobs identified by the employer. *Livingston v. Jacksonville Shipyards, Inc.*, 32 BRBS 123 (1998).

administrative law judge erred in denying Section 8(f) relief, as claimant's degenerative back condition existed prior to the 2008 injury and contributed to his current disability. In response, the Director urges affirmance of the denial of Section 8(f) relief, despite the concession below.

Establishing entitlement to Section 8(f) relief in a case involving a permanent total disability requires an employer to show that the claimant had a pre-existing permanent partial disability that was manifest to the employer and that the claimant's permanent disability is not due solely to the work injury. 33 U.S.C. §908(f); *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). The manifest requirement is a judicially-created doctrine which serves the purpose of preventing discriminatory practices against employees with pre-existing disabilities. *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19(CRT) (1st Cir. 1998); *General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 14 BRBS 862 (1st Cir. 1982). In order to satisfy the manifest requirement for Section 8(f) relief, an employer must show that it was actually aware of the claimant's pre-existing permanent partial disability or that the condition was objectively determinable from medical records existing before the worker suffered the work-related second injury. *Reno*, 136 F.3d 34, 32 BRBS 19(CRT); *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *W.D. [Dresser] v. Bath Iron Works Corp.*, 41 BRBS 115 (2007); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). While the medical records need not indicate the severity or the precise nature of the pre-existing condition, they must "contain sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem." *Esposito*, 30 BRBS at 69.

In this case, the administrative law judge found that employer established the first element for Section 8(f) relief, a pre-existing permanent partial disability, but it failed to demonstrate that claimant's pre-existing back condition was manifest to it prior to his work injury. We agree. Although the doctors who treated the work injury stated that claimant's degenerative disease existed prior to his incurring the 2008 injury, the record does not contain any medical records dated before the work injury. Absent any evidence that employer had direct or constructive knowledge of claimant's pre-existing condition before the work injured occurred, the administrative law judge properly found employer failed to establish that claimant's pre-existing condition was manifest to it. *Callnan v. Morale, Welfare & Recreation Dep't of the Navy*, 32 BRBS 246 (1998); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Therefore, because employer has not satisfied one

of the requirements for Section 8(f) relief, we affirm the administrative law judge's denial of Section 8(f) relief.[7]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Denying Special Fund Relief are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[7]To the extent employer avers the administrative law judge erred in failing to accept the Director's original concession that employer is entitled to Section 8(f) relief, we reject the argument. The Director states that employer waived any arguments regarding the administrative law judge's decision not to accept the concession letter by failing to raise those arguments, and that appears to be a correct assessment of employer's brief. In any event, as the Director argues, the administrative law judge is not required to accept the concession as it was not supported by the evidence or in accordance with law. *See Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010); Dir. Brief at 4-5 n.4.