BRB No. 98-0355

BEVERLY J. WILLIAMS	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
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 and Decision Granting Employer's Motion For Reconsideration and Granting Relief in Part of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

D.A. Bass-Frasier (Huey & Leon), Mobile, Alabama for claimant.

Paul B. Howell (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

LuAnn B. Kressley (Martin Krislov, Deputy Solicitor for National Operations; Carol 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order and Decision Granting Employer's Motion For Reconsideration and Granting Relief in Part (96-LHC-1990) of Administrative Law Judge Richard K. Malamphy 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).

On September 2, 1994, claimant, a welder for employer, developed symptoms of carpal tunnel syndrome (CTS). Dr. William Crotwell, a Board-certified orthopedic surgeon, ultimately performed four surgical procedures for this condition. After the initial surgeries in October and November 1994, claimant was released to full duty work in February 1995. Following an exacerbation of her condition, claimant was again taken off work. Claimant returned to full duty in May 1995, but her problems persisted. In July 1995, Dr. Crotwell diagnosed recurrent CTS and imposed permanent restrictions. On July 21, 1995, claimant left her job with employer due to a lack of suitable work within her department. Employer voluntarily paid various periods of temporary total disability compensation, and permanent partial disability compensation under the schedule for 10 percent impairment of each hand and a 15 percent impairment of the left third finger. Claimant sought temporary total disability and permanent total disability compensation under the Act.

In his Decision and Order, the administrative law judge found that as claimant had worked substantially all of the year prior to her injury and the record reflected that she was a 5-day worker who had worked 184 days and earned $19,686.35, her average weekly wage calculated pursuant to Section 10(a), 33 U.S.C. §910(a), was $534.95. The administrative law judge further found that inasmuch as claimant was unable to perform her usual work and employer had not introduced evidence of suitable alternate employment, claimant was entitled to permanent total disability compensation as of July 21, 1995. Finally, he denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief.

Employer requested reconsideration of the administrative law judge's findings with regard to the applicable average weekly wage, the availability of suitable alternate employment, and the date of maximum medical improvement. In his Decision Granting Employer's Motion For Reconsideration and Granting Relief in Part, the administrative law judge modified his initial Decision and Order to reflect that claimant reached maximum medical improvement on January 9, 1996 rather

than July 2, 1995, but otherwise rejected employer's arguments.

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment, in calculating claimant's average weekly wage, and in denying Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's findings regarding the applicable average weekly wage and the extent of disability. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Employer replies, reiterating the arguments made in its Petition for Review.

Employer's argument that the administrative law judge erred in finding that it did not meet its burden of establishing the availability of suitable alternate employment is rejected. In the present case, inasmuch as it was undisputed that claimant was unable to perform her usual welding work for employer, the burden shifted to employer to establish the availability of suitable alternate employment which claimant, considering her age, education, work experience, and physical restrictions, is capable of performing and for which she can compete and reasonably secure. *See P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). In the present case, employer attempted to meet this burden through the vocational testimony of Ms. Berthaume and Mr. Walker, who, after considering Dr. Crotwell's limitations,[1] identified a number of available job opportunities within the categories of jobs Dr. Crotwell indicated claimant might be capable of performing.[2] Based on a labor market survey performed in April 1996, Ms. Berthaume identified a security job, two dispatcher positions, and a parking lot attendant position. EX-20, pp.1-6. In addition, in February and March 1997, she conducted additional vocational surveys and identified jobs available for a security guard, a parking toll booth cashier/attendant, and an appointment setter. EX-20, pp. 8-14. In August 1995, Mr. Walker also conducted a labor market survey and identified available cashier, security, dispatcher, telephone sales, and cab driving jobs which he believed were

[1]In July 1995, Dr. Crotwell imposed permanent restrictions of no lifting more than 5 pounds, no repetitive hand or wrist motion, and no heavy gripping or bending.

[2]Dr. Crotwell opined that claimant could probably perform desk-type work involving little or no use of her hands, if such a position could be found for her, EX-17, p. 31, or work as a parking lot attendant, toll booth operator, or cashier if she is not doing a lot of repetitive motion, or twisting and bending with the hands, or lifting anything heavy. EX-17, p. 33.

within claimant’s capabilities. EX-19.

The administrative law judge found the identified jobs were insufficient to establish that jobs suitable for claimant were available. The administrative law judge relied on Dr. Crotwell's opinion claimant could "possibly" or "probably" perform desk-type work or work as a parking lot attendant, toll booth operator, or cashier provided that her restrictions were strictly followed. CX-1, pp. 22, 24. He then discussed the physical requirements of the jobs described in the vocational reports, and found that as each job required writing, the use of a phone or computer, or involved activities such as making change, stamping cards, or receiving money, the jobs were not suitable given Dr. Crotwell's serious doubts about claimant's dexterity. In his Decision Granting Employer's Motion For Reconsideration and Granting Relief in Part, after reconsidering the relevant testimony, the administrative law judge again found the evidence insufficient; he concluded that while employer had made the satisfactory argument that work was available within the generic classifications approved by Dr. Crotwell, it had not proven that the jobs identified were suitable, given that Dr. Crotwell had questioned claimant's strength, dexterity, and gripping ability. Inasmuch as the administrative law judge rationally found that the jobs identified by employer's vocational experts require substantial hand usage, and Dr. Crotwell specifically conditioned his opinion regarding the types of work claimant might be able to do on strict adherence to her restrictions and on the potential jobs involving little or no use of her hands, the administrative law judge acted within his authority in concluding that employer did not meet its burden of showing that these jobs were suitable. Inasmuch as the administrative law judge's conclusion that the jobs identified by Ms. Berthaume and Mr. Walker were not, in fact, suitable is rational and supported by substantial evidence, his determination that employer failed to meet its burden of establishing the availability of suitable alternate employment is affirmed.[3]

[3]A claimant may rebut employer's showing of suitable alternate employment and retain entitlement to total disability benefits by demonstrating that he diligently tried but was unable to secure alternate employment. *See Roger's Terminal and Shipping Corp. v. Director, OWCP,* 781 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 107 S.Ct. 101 (1986). In his initial Decision and Order, although the administrative law judge stated that he did not need to decide whether claimant had exhibited due diligence in attempting to secure alternate work in light of employer's failure to establish suitable alternate employment, he nonetheless noted that claimant had made some attempts to find work and was not successful, and explicitly concluded that claimant had made a good case in disputing the availability of the alternate jobs. Inasmuch as these findings equate to a finding of due diligence, we note that any error the administrative law judge may have made with regard to whether suitable alternate employment was established would, in any event, be harmless. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25

We agree with employer, however, that the administrative law judge erred in calculating claimant's average weekly wage. To determine a claimant's average annual earnings under Section 10(a), her average daily wage is multiplied by 260 (for a five-day-per-week worker), and the resulting figure is divided by 52, pursuant to Section 10(d), 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. *See O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978). Thus, Section 10(a) seeks to approximate claimant's annual earnings; time lost due to strikes, personal business, illness or other reasons is therefore not deducted from the computation. *See Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340, 343 n.4 (1992); *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 136 (1990).

BRBS 1 (CRT)(2d Cir. 1991); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991).

Based on information contained in employer's wage records, CX-3, the administrative law judge calculated claimant's average daily wage by dividing her yearly earnings of $19,686.35 by 184 days, and then, as claimant was a 5-day worker, multiplying the resulting figure of $106.90 by 260, which resulted in annual earnings under Section 10(a) of $27,817.40. He then divided this figure by 52 as is required under by Section 10(d), 33 U.S.C. §910(d), yielding an average weekly wage of $534.95. In contesting this computation, employer correctly argues that the administrative law judge erred in determining that claimant had worked for 184 days rather than 189 days in the year prior to her injury. Inasmuch as average weekly wage under Section 10(a) includes vacation pay in lieu of vacation, we agree with employer that the 5 days of vacation pay received by claimant on January 1, 1994,[4] CX-3, p.18, should have been included in determining the number of days she worked in the year prior to her injury. *Duncan*, 24 BRBS at 136. Accordingly, we vacate the administrative law judge's average weekly wage determination and modify his Decision and Order to reflect that as claimant worked 189 rather than 184 days in the year prior to her injury, her average weekly wage under Section 10(a) is $520.80[5] rather than $534.95.

Finally, employer argues that the administrative law judge erred in denying its request for Section 8(f) relief. Employer maintains that as claimant testified at the hearing that prior to her work injury she suffered from hypertension and arthritis which required medical attention, caused her to miss time from work, and prevented her from performing work requiring climbing stairways and exposure to temperature extremes, the administrative law judge erred in concluding that these medical conditions were not pre-existing permanent partial disabilities.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes

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[4]On this date claimant was paid for one day of work and five days of vacation. CX-3, p.18.

[5]$19,686.35 in earnings divided by 189 days = average daily wage of $104.16 x 260 = $27,081.75 divided by 52 = $520.80.

that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). To constitute a pre-existing permanent partial disability, the prior injury must have resulted in a serious lasting physical problem prior to the injury on which the compensation claim is based. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied,* 459 U.S. 1104 (1983); *C&P Telephone*, 564 F.2d at 513, 6 BRBS at 415.

In the instant case, the administrative law judge found that employer failed to establish that claimant's arthritis and hypertension were pre-existing permanent partial disabilities within the meaning of Section 8(f). In so concluding, he noted that claimant's hearing testimony reflected that she had undergone treatment for arthritis and elevated blood pressure prior to her 1994 hand injury. Tr. at 19. Inasmuch, however, as employer did submit the relevant medical records from Dr. Coleman documenting this treatment, and the record is devoid of evidence that claimant's hypertension and arthritis resulted in any restrictions, or in any way affected her ability to work as a welder prior to her 1994 hand injury, the administrative law judge rationally determined that employer failed to demonstrate that these conditions qualified as pre-existing disabilities.[6] *See generally Campbell Industries*, 678 F.2d at 836, 14 BRBS at 974. As mere evidence of prior injuries does not establish the existence of a serious lasting physical problem, *Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), we affirm the administrative law judge's determination that employer did not establish the pre-existing permanent partial disability element of Section 8(f) entitlement, and consequently his denial of Section 8(f) relief. *See Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP,* 131 F.3d 132 (2d Cir. 1997).

[6]In addition, even if the pre-existing permanent partial disability requirement of Section 8(f) entitlement had been satisfied, inasmuch as the administrative law judge found that Dr. Coleman's reports regarding treatment of claimant's pre-existing conditions were not submitted into evidence, and there is no other record evidence in existence prior to claimant's 1994 injury documenting these conditions, the manifest requirement was not met. *See generally Ceres Marine Terminal v. Director, OWCP [Allred],* 118 F.3d 387, 31 BRBS 91 (CRT) (5th Cir. 1997).

Accordingly, the administrative law judge's average weekly wage determination is modified to $520.80. In all other respects, his Decision and Order and Decision Granting Employer's Motion For Reconsideration and Granting Relief in Part are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge