BRB Nos. 91-208
and 91-208A

EZEKIEL WADE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES, LIMITED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Supplemental Decision and Order - Awarding Attorney's Fees of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum, San Francisco, California, for claimant.

Albert H. Sennett (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for self-insured employer.

Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Benefits, and employer appeals the Supplemental Decision and Order - Awarding Attorney's Fees (89-LHC-1453) of Administrative Law Judge Ellin M. O'Shea 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant suffered a back injury while working as a utility man for employer on August 3, 1987. Claimant was initially diagnosed as having rib contusions but later was diagnosed as having a lumbosacral strain. Claimant has not worked since the injury. Employer voluntarily paid claimant temporary total disability benefits from August 4, 1987 through September 16, 1988, and from July 19, 1989 to August 14, 1989. Claimant sought temporary total disability compensation under the Act from August 3, 1987 to August 19, 1989, and permanent total disability compensation thereafter. The administrative law judge awarded claimant temporary total disability compensation from August 3, 1987 to September 10, 1988, and permanent partial disability compensation thereafter. The administrative law judge also denied employer, Section 8(f), 33 U.S.C. §908(f), relief. In a Supplemental Decision and Order - Awarding Attorney's Fees, claimant's counsel was awarded $9800 in fees and $1072 in costs.

Employer appeals the award of permanent partial disability compensation, arguing that this award cannot rationally be reconciled with the administrative law judge's finding that claimant was capable of performing his usual work. Employer further asserts that the administrative law judge erred in awarding claimant compensation based on his motivation for secondary gain, retirement wish factors, and a non work-related left hand injury, as these are not legitimate compensable consequences of the work injury. Employer also appeals the denial of Section 8(f) relief and contends that the fee award made by the administrative law judge is excessive.

Claimant cross-appeals the denial of permanent total disability compensation, arguing that the administrative law judge's finding that claimant was able to return to his usual work is belied by her subsequent determination that claimant has credible symptoms and at times limitations which will affect and color his performance of that employment. Claimant maintains that as he established a *prima facie* case of total disability and as the vocational evidence submitted by employer is insufficient to establish the availability of suitable alternate employment, the administrative law judge erred in failing to award him permanent total disability compensation. In the alternative, claimant asserts that even if employer's vocational evidence is sufficient to establish suitable alternate employment, the administrative law judge erred in concluding that claimant had a post-

injury wage-earning capacity of at least $440[1] because the jobs which employer's vocational expert identified paid between $3.75 to $9.20 an hour in 1987, at the time of claimant's injury.[2]

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to a work-related injury. If claimant meets this burden, employer must establish the existence of realistically available job opportunities within the geographical area where claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *See Edwards v. Director, OWCP*, __ F.2d __, No. 91-70648 (9th Cir. July 14, 1993); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1992).

In the present case, the administrative law judge initially stated that claimant was capable of performing his usual work, crediting the opinion of a multidisciplinary panel consisting of Dr. Scherman, a board-certified psychiatrist and neurologist, Dr. Perkins, a neurosurgeon, and Dr. Shaffer, a clinical psychologist, rather than the contrary opinions of Drs. Mark and Greenwald.[3] The administrative law judge also based this determination in part on testimony provided by Mr. Barber, a former co-worker, and Mr. Herndon, claimant's superintendent, regarding the current job requirements of a utility man at the Container Freight Station (CFS), which were considerably lighter than those required at the time of claimant's injury, noting that claimant would be returning to this work. The administrative law judge then concluded that, notwithstanding her finding regarding claimant's ability to return to his usual work, he sustained a loss in wage-earning capacity based on the residual subjective effects of the work injury on his ability to perform his usual and other available work. *See* Decision and Order at 15. With regard to claimant's ability to find gainful employment other than his usual and customary work, the administrative law judge found that employer established the availability of suitable alternate employment based on the testimony of its vocational consultant, Lawrence Deneen, who identified sedentary to light jobs consistent with the limitations imposed by Drs. Marks and Greenwald which paid from $6.50 to $11 an hour.

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[1]Although, as claimant contends, the administrative law judge did not state how she obtained $440, she apparently relied on the $11 maximum paid for the alternate jobs identified by Mr. Deneen in 1990.

[2]Claimant proposes using the median of this wage range, $6.24, as the basis for determining his post-injury wage-earning capacity.

[3]On July 13, 1988, Dr. Greenwald, an orthopedic surgeon opined that claimant is not capable of returning to his usual work. On August 19, 1988, Dr. Greenwald gave claimant an 11.5 percent permanent impairment rating of the back and opined that claimant could lift 5 to 10 pounds. Dr. Marks, a board-certified neurologist, believed that claimant could not perform his usual work because he was subject to light duty restrictions of lifting no more than 30 pounds, standing for no more than an hour, no bending or stooping, sitting for no more than 20 minutes, and working six to eight hours a day.

As claimant and employer recognize, the administrative law judge's finding that claimant suffered a loss in wage-earning capacity cannot on its face be reconciled with her finding that claimant can perform his usual work based on medical opinions indicating he is not disabled. The parties disagree as to the effect of this inconsistency, with employer urging us to conclude that because claimant is able to perform his usual work he is not disabled, and claimant asking that we find him permanently totally disabled. We are unable to do either in light of the inconsistencies in the administrative law judge's analysis.

The Board has previously recognized that a claimant's credible complaints of pain alone may be sufficient to establish his inability to perform his usual work. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989). In the present case, however, the administrative law judge determined that claimant could perform his usual work, crediting the opinion of the multidisciplinary panel of physicians who found no objective evidence of physical disability and no psychological disorder. The administrative law judge noted that while the existence of subjective complaints was not at doubt, the issue was whether they preclude claimant's performance of his usual work; she then concluded claimant could do so. Decision and Order at 15. In the succeeding paragraphs, however, the administrative law judge found claimant entitled to compensation based on the credible subjective effects of his injury on his ability to perform his usual work as well as the identified alternate employment. Contrary to the parties' arguments, the inconsistency in this analysis does not allow one to draw a conclusion as to whether claimant is or is not disabled. Moreover, in determining that claimant could perform his usual work, the administrative law judge erroneously relied on testimony regarding the current job requirements of a utility man at CFS, rather than the regular duties of claimant's employment at the time he was injured.[4] *See Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). We therefore vacate the award of permanent partial disability compensation and remand this case for the administrative law judge to reconsider her findings and provide an opinion which complies with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c). *See Williams v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 61, 62-63 (1985).

[4]Both claimant and his co-worker Bernie Barber testified that claimant's usual work involved lifting up to 170 to 180 pounds. Tr. I, 45-46, 154. Mr. Herndon, claimant's superintendent, testified that the greatest lifting required was 85 pounds. Tr. II, 118-119. Mr. Herndon testified that claimant would be rehired if he wished to return to work for employer with a partner to assist him. He also testified, however, that he could not guarantee that claimant would not have to lift over 75 pounds, or that he would not be required to perform constant bending or twisting.

On remand, the administrative law judge must initially reconsider whether claimant is capable of performing his usual work. In making this determination, the administrative law judge must compare the employee's medical restrictions with the specific requirements of his formal employment at the time of the work injury. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985). If the administrative law judge ultimately determines on remand that claimant is able to perform his former job without restriction, he is not disabled. A finding that claimant's subjective complaints preclude his performance of an aspects of his job supports the conclusion, however, that he cannot return to his former work and is disabled to some extent.[5] Thus, if claimant's former job has been altered so that it is currently within his restrictions, it may be suitable alternate employment but would not equate to a finding that claimant has no disability.

If the administrative law judge determines on remand that claimant cannot perform his usual work, thereby establishing a *prima facie* case of total disability, she must then reconsider whether employer has established the availability of suitable alternate employment. In making this determination, the administrative law judge must specifically determine the employee's restrictions based on the medical evidence of record and apply them to the specific available jobs identified by the vocational expert. *See generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 96-97 (1991); *Merrill*, 25 BRBS at 146. Although claimant argues that the testimony of employer's vocational expert, Mr. Deneen, is insufficient to support a finding of suitable alternate employment because he did not interview any doctors or base his report on any particular medical opinion, the record indicates that Mr. Deneen considered a variety of medical opinions as well as claimant's assessment of his own capabilities in concluding that suitable sedentary to light duty work was available. The administrative law judge may credit a vocational expert's opinion, as long as the expert was aware of the employee's age, education, industrial history, and physical limitations in exploring local job opportunities. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290, 292 (1990). Moreover, while claimant asserts that Mr. Deneen's testimony cannot properly support a finding of suitable alternate employment because he failed to inform prospective employers of claimant's limitations, we note that the Act does not require that a vocational expert contact prospective employers directly. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT)(4th Cir. 1984).

If on remand, the administrative law judge finds that employer succeeded in establishing the availability of suitable alternate employment based on Mr. Deneen's testimony, she may reaffirm her finding that claimant is entitled to permanent partial disability compensation. Claimant's post-injury wage-earning capacity will have to be recalculated, however, because, as claimant contends, the administrative law judge incorrectly determined that claimant retained a post-injury wage-earning capacity of at least $440 based on Mr. Deneen's testimony regarding the wages paid in the

[5]As employer states, factors such as claimant's motivation for secondary gain, his wish to retire, and the effects of a subsequent non work-related hand injury do not provide proper support for an award of permanent partial disability under Section 8(c)(21). Contrary to employer's argument, our reading of the administrative law judge's Decision and Order at 15 indicates she was not relying on these factors, but rather was attempting to discount their effects on claimant's subjective complaints.

alternate jobs in 1990. An award for permanent partial disability under Section 8(c)(21) must be based on the difference between claimant's pre-injury average weekly wage and the wages paid in the alternate employment at the time of claimant's injury to account for the effects of inflation. *See generally Sproull v. Stevedoring Services of America*, 25 BRBS 100, 108-109 (1991). Mr. Deneen testified that the alternate jobs identified paid from $3.75 to $9.30 in 1987, at the time of claimant's injury. Accordingly, on remand if the administrative law judge finds that employer established the availability of suitable alternate employment based on Mr. Deneen's testimony, she must reconsider claimant's post-injury wage-earning capacity in light of Mr. Deneen's testimony regarding the applicable hourly wages paid in the alternate jobs in 1987, and recalculate the award of permanent partial disability compensation accordingly. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980) .

Although the case is being remanded for the administrative law judge to reconsider whether claimant is entitled to permanent partial disability compensation, we nonetheless affirm the administrative law judge's denial of Section 8(f) relief in this case. In order to be entitled to Section 8(f) relief, employer must establish that 1) claimant has a pre-existing permanent partial disability, which 2) combines with the subsequent work-related injury so that claimant's disability is not due to the work injury alone, and 3) the pre-existing disability was manifest to employer. *See Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Maryland Shipbuilding and Drydock Co. v. Director, OWCP*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980).

In the present case, employer submitted Kaiser Permanente records dating from 1972 until 1984 in support of its claim for Section 8(f) relief. These records reveal that on December 13, 1972, claimant was seen for right shoulder pain diagnosed as spinatus syndrome. From December 17, 1974 to August 20, 1975, claimant sought treatment for knee pain which had been bothering him intermittently for several years, and underwent successful knee surgery in May 1975 involving removal of the medial meniscus. In January 1978, he sought treatment for left shoulder pain which was diagnosed a year later as bursitis, and again sought treatment for this condition in August, 1984. In February 1980, claimant was diagnosed as having a wry neck, and in May 1981, was diagnosed as having a cervical strain. Claimant also sought treatment for his neck pain in August 1984. In November 7, 1981, claimant initiated treatment for severe left anterior hip and groin pain, which was diagnosed as bursitis, or arthritis or myalgia arthralgia of the lift hip and left lower leg of uncertain etiology. These conditions apparently resolved as of April 1982.

In denying employer Section 8(f) relief, the administrative law judge found that although the Kaiser treatment records indicated that claimant had been seen for a variety of ailments to his knee, shoulder, hip, and neck, prior to the work injury, there was no evidence that these incidents resulted in any serious lasting physical problems sufficient to constitute a pre-existing permanent partial disability for Section 8(f) purposes. In so concluding, the administrative law judge noted that claimant did not seek any treatment for these medical conditions after 1984, that claimant denied having any prior injuries or significant lasting problems prior to the work injury in statements made to his physicians, and that claimant and his co-worker, Mr. Barber, testified that claimant did not lose any significant time prior to the August 3, 1987 injury for any medical problems. The administrative law judge further determined that employer failed to present any evidence sufficient to establish that claimant's current disability was in any way affected by any of the pre-existing conditions reflected in the Kaiser records.

On appeal, employer contends that inasmuch as a cautious employer made aware of the extensive medical conditions referred to in the Kaiser records would have been motivated to discharge claimant because of a greater risk of employment accident and compensation liability, the administrative law judge erred in failing to find that these conditions constituted pre-existing permanent partial disabilities within the meaning of Section 8(f). Employer further asserts that the only inference that can be drawn from this evidence of claimant's history of shoulder, neck, hip and knee problems is that claimant had a chronic degenerative spine disease which was aggravated and worsened by the August 3, 1987 work injury. In support of this contention, employer cites Dr. Marks' opinion that claimant had an pre-existing asymptomatic degenerative back condition which was "lit up" by the August 3, 1987 injury.[6] The Director responds, urging that the administrative law judge's denial of Section 8(f) relief be affirmed, inasmuch as the Kaiser records fail to establish that any of claimant's pre-existing conditions resulted in any serious lasting physical problem or that these conditions contributed in any way to claimant's current disability. With regard to claimant's pre-existing degenerative back condition, the Director also asserts that as this condition was not discovered until subsequent to the subject work injury, it cannot provide a proper basis for an award of Section 8(f) relief.

[6]Employer also contends that it is entitled to Section 8(f) relief based on the administrative law judge's finding that claimant's post-injury non work-related left hand complaints contribute to his loss in wage-earning capacity. As the administrative law judge found that this unrelated condition developed subsequent to claimant's work injury, a finding which is not challenged on appeal, we hold that claimant's left hand condition does not constitute a pre-existing permanent partial disability sufficient to support an award of Section 8(f) relief.

We reject employer's assertion that the administrative law judge erred in failing to conclude that claimant's pre-existing medical conditions constituted pre-existing permanent partial disabilities for Section 8(f) purposes. We agree with the Director, that given the intermittent nature of the treatment rendered, the three year gap in seeking treatment after 1984, and the fact that both claimant and his co-worker, Mr. Barber, denied that claimant had any significant medical problems prior to the work injury, the administrative law judge rationally determined that claimant's pre-existing neck, shoulder, and hip problems did not constitute pre-existing permanent partial disabilities within the meaning of Section 8(f). *See generally Director, OWCP v. Berkstresser,* 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority,* 22 BRBS 280 (1989). While claimant's pre-existing left knee problems which required surgery arguably constitute a pre-existing permanent partial disability under Section 8(f), *see generally Lockheed Shipbuilding v. Director, OWCP,* 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991), we nonetheless affirm the administrative law judge's finding that this condition cannot properly support an award of Section 8(f) relief because there is no evidence of record which indicates that this, or any other of the pre-existing conditions detailed in the Kaiser records, played any part in increasing the level of any disability that claimant may currently have. *See generally Luccittelli v. General Dynamics Corp.*, 964 F.2d 1303, 26 BRBS 1(CRT)(2d Cir. 1992). The physicians who found claimant disabled, Drs. Marks and Greenwald, specifically indicated that claimant's current disability was due solely to the work injury with no element of apportionment for any prior problems. As employer asserts, Dr. Marks did testify that claimant had a pre-existing degenerative condition of the spine which was "lit up" as a result of the work injury, but as this pre-existing condition was not manifest until diagnostic tests were performed subsequent to claimant's August 3, 1987 injury,[7] we agree with the Director that this condition also cannot properly support an award of Section 8(f) relief. *See generally Bunge Corporation, INA v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir 1991). As employer failed to prove at least one of the essential elements necessary to establish Section 8(f) relief with regard to each of claimant's pre-existing conditions, the administrative law judge's denial of Section 8(f) relief in this case is affirmed. *See Sproull,* 25 BRBS at 110-111.

The final issue concerns employer's appeal of the administrative law judge's attorney's fee award. Claimant filed an attorney's fee petition for work performed before the administrative law judge, requesting $10,780 representing 77 hours of attorney services at an hourly rate of $140, plus $1072.90 in costs. Employer filed objections. In a Supplemental Decision and Order, the administrative law judge disallowed 7 hours, but otherwise approved the fee as requested, awarding claimant's counsel $10,872 representing $9800 in attorney's services and $1072.90 in costs.

On appeal, employer contends that the administrative law judge erred in disallowing only 5 of the 27.75 hours claimed for review and preparation of miscellaneous correspondence and phone calls; employer asserts that the administrative law judge did not adequately explain which hours she disallowed. Employer also contends that the administrative law judge erred in deducting only .25 hours of the 5.25 hours to which it objected from the 27.25 hours requested for claimant's counsel's preparation and attendance at trial. Employer avers that if claimant's counsel is entitled to a high

[7]Based on an MRI and CT scan taken after claimant's August 3, 1987 injury, Drs. Marks and Greenwald concluded that claimant had degenerative disc disease which pre-existed the August 3, 1987 injury.

hourly rate in light of his experience, it follows that the reduction in these hours should have been substantially greater. Employer also contends that the administrative law judge should only have awarded 10 hours instead of 18 hours requested for claimant's post-trial brief because it was only 11 1/2 pages in length and presented a mainly factual argument involving little legal research. Claimant responds, urging affirmance of the attorney's fee award.

In view of our decision to vacate the award of disability compensation, we also vacate the award of an attorney's fee. On remand, the administrative law judge should reconsider and explain her decision regarding time claimed for telephone calls and review and preparation of correspondence. With regard to time claimed for trial preparation and attendance, the administrative law judge stated that in view of counsel's experience and high hourly rate, he should be awarded "only 27 hours." As employer notes, however, this resulted in the disallowance of only one-quarter hour. On remand, the administrative law judge should reconsider and explain her decision in this regard. The administrative law judge did not abuse her discretion in finding the time claimed for claimant's brief reasonable in view of the testimony and medical evidence presented. Finally, the administrative law judge should enter a new fee award commensurate with the benefits awarded on remand and the regulatory factors at 20 C.F.R. §702.132. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983).

Accordingly, the administrative law judge's award of permanent partial disability benefits is vacated, and the case is remanded for further consideration of the extent of claimant's disability consistent with this opinion. The Supplemental Decision and Order - Awarding Attorney's Fees is also vacated and the fee award remanded for reconsideration consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge