BRB No. 92-2492

ROBERT W. HARRELL	)	
	)	
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 Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

M. Janet Palmer (Wilder & Gregory), Richmond, Virginia, for self-insured employer.

Karen B. Kracov (Thomas S. Williamson, Jr., 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: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1449) of Administrative Law Judge Richard K. Malamphy awarding benefits 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).

Claimant worked as a grinder for employer in its welding department, and on July 28, 1989, he sustained a lumbosacral strain during the course of his work. Tr. 15, 26. As of July 1990, his condition reached maximum medical improvement, and his physician, Dr. Nichols, assigned permanent physical restrictions. Employer voluntarily paid temporary total disability benefits for those periods during which claimant was unable to work between August 2, 1989, and January 14, 1991. Emp. Exs. 1, 4, 6, 8-9. On January 14-15, 1991, claimant was assigned work as a grinder. Emp. Ex. 8; Tr. at 42. Back pain prevented him from continuing work, but the clinic refused to treat him and required him to use a personal pass to go home. Tr. at 42-49.

On January 18, 1991, Dr. Nichols determined that claimant's work aggravated his pain and told claimant to work within his restrictions. Consequently, Dr. Nichols advised claimant to avoid repetitive lifting and bending, climbing vertical ladders, and lifting over 40 pounds. Emp. Ex. 9. Claimant returned to work on January 21 and was assigned to pull weld lines. On January 22, he was put on firewatch inside the submarine, and on January 23, claimant was assigned a grinding job. Tr. at 52-54, 59. He complained of back pain each day and was forced to take a personal pass out after working 2.5 hours on January 23. Claimant returned to work on February 5, 1991, to discuss the possibility of light duty work, but because he did not have documentation to account for his absence, he was discharged for being absent without leave. Tr. at 64-68. In September 1991, claimant obtained employment with East Coast Aluminum in a job that falls within his medical restrictions.

The administrative law judge determined that claimant established a *prima facie* case of total disability and that employer failed to establish the availability of suitable alternate employment at its facility which claimant could perform given his experience and restrictions. Decision and Order at 8. Therefore, the administrative law judge concluded that claimant is entitled to permanent total disability benefits from January 14 through August 31, 1991, as well as permanent partial disability benefits from September 1, 1991, and continuing. *Id.* Additionally, the administrative law judge ordered employer to pay interest and medical expenses, and he held employer liable for an attorney's fee. Further, he denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief because employer failed to establish that claimant had a pre-existing permanent partial disability and that claimant's permanent total disability was not due solely to his 1989 injury. *Id.* at 9-10. Employer appeals the administrative law judge's decision. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.[1]

Employer contends it should not be held liable for disability benefits because it offered

[1]The Director urges the Board to affirm the administrative law judge's award of benefits. With regard to the Section 8(f) issue, the Director states that employer's brief is incoherent and the issue is inadequately discussed; therefore, under *Fish v. Director, OWCP*, 6 BLR 1-107 (1983), it should be dismissed. As employer's argument is discernable, we reject the Director's contention. Alternatively, the Director urges the Board to affirm the holding with regard to permanent total disability benefits, but states that it may be necessary to remand the issue with regard to permanent partial disability benefits as the administrative law judge did not discuss that aspect of the issue. *See* n.5, *infra*; Dir.'s Brief at 2-3.

claimant suitable alternate employment at its facility which claimant refused to perform. We reject employer's argument. The administrative law judge found, and the parties do not dispute, that claimant is unable to return to his usual work. Decision and Order at 8. As claimant has established a *prima facie* case of total disability, *see Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990), employer may prove that claimant is at most partially disabled by establishing the availability of other jobs he can realistically secure and perform given his age, education, physical restrictions and vocational history. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). A job in employer's facility may meet this burden, *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986); however, employer's offer of a job which is too physically demanding for the employee to perform is not considered suitable alternate employment. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Dr. Nichols, claimant's authorized physician, stated that claimant is to work in permanent light duty status, and he may not lift over 40 pounds or engage in vertical climbing or repetitive bending or crawling. Emp. Exs. 6, 9. Claimant testified that in order to reach his work station on January 14, 1991, he needed to carry his tool bag on his shoulder, climb vertical ladders, stoop through the entrance hole, climb and/or descend additional vertical ladders, and crawl through the submarine to locate an air hose and a drop light. He then had to lay at an angle, stoop, or hang over an edge to perform his work. Tr. at 42-45. In a note written on January 18, Dr. Nichols disapproved this job and reiterated claimant's limitations. Emp. Ex. 9. That same day, Dr. Nichols filled out an OWCP form on which he indicated that claimant may perform up to one hour of climbing provided it is not continuous. *Id.*

The shipyard medical status forms indicate that the clinic interpreted claimant's restrictions to mean that he should avoid "repetitive ladder climbing." Emp. Ex. 6. When claimant reported for work on January 21-23, 1991, Mr. Mason, claimant's supervisor, determined that claimant could roll up welding lines, gather heater bars, act as safety watch, and wire-brush oxidation off of the steel.[2] Tr. at 120-124. Further, he testified that claimant could have gotten to his work station on board the submarine by climbing a tapered ladder at the bottom of the vessel or by climbing the stairs to the top, descending the stairway through the engine room, then climbing down one vertical ladder to the reactor room. Tr. at 125. Given claimant's restriction from performing "repetitive" vertical climbing, Mr. Mason felt that the assigned jobs fell within claimant's physical restrictions. Mr. Mason also testified that had he known claimant was prohibited from vertical climbing, he would not have assigned work on the submarine. Tr. at 137-138.

The administrative law judge determined that the work proffered by employer did not fall within claimant's work restrictions, as he credited Dr. Nichols' statement that claimant should avoid vertical climbing. Although a controversy exists regarding claimant's medical restrictions, it is within the administrative law judge's discretion to credit claimant's testimony and Dr. Nichols' opinion over the testimony of employer's witnesses and the shipyard reports. *See Calbeck v.*

[2]A grinder and an air hose are necessary to use the wire-brush. Tr. at 121-122.

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). The administrative law judge also noted that employer did not present any vocational evidence reflecting available jobs claimant could perform. Consequently, he concluded that employer failed to establish the availability of suitable alternate employment and that claimant is entitled to permanent total disability benefits until September 1991 when he secured employment on his own. Decision and Order at 8. This conclusion is supported by the evidence of record. *See generally Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989). Therefore, we affirm the administrative law judge's award of benefits.[3]

Employer also contends it is entitled to Section 8(f) relief because claimant had a "serious pre-existing back condition." Er's Brief at 18. Employer avers that each time claimant attempted to work he sustained another injury. The administrative law judge determined there is no evidence of a back injury pre-dating claimant's July 1989 work injury. Further, he found there is no evidence of a discrete second injury and that claimant's present disability was caused by his July 1989 injury alone. Decision and Order at 9. The administrative law judge's findings are supported by the record.

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 totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); *Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting). Contrary to employer's assertions, the administrative law judge rationally determined that employer has not shown evidence of either a pre-existing permanent partial disability or an aggravation of claimant's condition due to his attempts to resume work. The only evidence in the record of an injury prior to claimant's 1989 back injury is a clinic note concerning a 1988 neck injury. Emp. Ex. 8. Further, the administrative law judge found that the post-injury medical reports do not indicate the occurrence of any discrete injuries; rather, they show that claimant suffered soreness, backaches, or an aggravation of his pain when he attempted to work.[4] *See* Emp. Exs. 9, 11. Moreover, the record supports the administrative law judge's conclusion that employer failed to

[3]Employer does not challenge the award of permanent partial disability benefits beginning September 1991.

[4]Employer argues that the instant case is similar to *Vlasic v. American President Lines*, 20 BRBS 188 (1987). This comparison is not persuasive. There was evidence in *Vlasic* which, if credited, could have supported a finding that the claimant's continued employment through October 1981 aggravated his February 1979 condition, resulting in a greater degree of disability. *Vlasic*, 20 BRBS at 192. Although there is evidence of episodes of pain resulting from attempts to resume work, the administrative law judge found this insufficient to establish the existence of a second injury or of an aggravation of the condition caused by the July 1989 injury.

establish that claimant's permanent total disability is not due solely to the July 1989 injury. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT). Therefore, we affirm the denial of Section 8(f) relief.[5]

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____

JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

[5]The Director states that this case should be remanded for the administrative law judge to consider whether employer is entitled to Section 8(f) relief of its liability for permanent partial disability benefits commencing September 1, 1991. As there is no evidence that claimant's disability is due to other than the July 1989 injury, such an inquiry would be futile.