BRB No. 96-0326

DOROTHY RIECHEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE COMMAND	)	DATE ISSUED:
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Partial Decision and Order -- Award of Benefits, the Final Decision and Order -- Award of Benefits, and the Order Denying Employer's Request for Reconsideration and Motion to Admit Newly Available Evidence of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Joseph F. Manes (Manes & Manes), Millwood, New York, for claimant.

Francis M. Womack III (Lawrie, Cozier & Vivenzio), Mount Arlington, New Jersey, for employer.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel Oshinsky, Counsel for Longshore), 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 Partial Decision and Order -- Award of Benefits, the Final Decision and Order -- Award of Benefits, and the Order Denying Employer's Request for Reconsideration and Motion to Admit Newly Available Evidence (93-LHC-3500) of Administrative Law Judge Charles P. Rippey 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 April 18, 1993, claimant sustained injuries to her head, left shoulder, neck, and right upper arm, as well as carpal tunnel syndrome of her right wrist and hand, when she was caught between the closing doors of an elevator while working for employer. Claimant has not worked since the date of this incident. Employer voluntarily paid claimant temporary total disability benefits from April 29, 1993 through either June 9, 1993 or August 3, 1993.[1] 33 U.S.C. §908(b).

In his Partial Decision and Order, the administrative law judge found that claimant is incapable of resuming her previous employment duties as an accounting technician with employer. After next finding that employer failed to establish the availability of suitable alternate employment, the administrative law judge found that claimant was permanently totally disabled as a result of the April 18, 1993, work incident. The administrative law judge then left the record open for evidence of the date claimant reached maximum medical improvement and in support of employer's claim for Section 8(f), 33 U.S.C. §908(f), relief. Thereafter, in his Final Decision and Order, the administrative law judge found July 18, 1994, to be the date on which claimant reached maximum medical improvement, awarded claimant temporary total disability and permanent total disability benefits and denied employer's request for Section 8(f) relief. Employer's motion for reconsideration was subsequently denied by the administrative law judge.

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

Where, as in the instant case, claimant demonstrates an inability to return to her job because of a work-related injury, she has demonstrated a *prima facie* case of total disability under the Act,

[1]The administrative law judge noted that employer paid temporary total disability benefits for the period from April 29, 1993 through August 3, 1993, but at the hearing, employer's counsel stated that temporary total disability benefits were paid for the period from April 29, 1993 through May 9, 1993 and from May 14, 1993 through June 9, 1993. *See* Partial Decision and Order at 2.

and the burden shifts to the employer to establish the availability of suitable alternate employment in the claimant's community. *See Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991). In order to meet this burden, employer must show that there are jobs reasonably available in the geographic area where claimant resides which claimant is capable of performing based upon her age, education, work experience and physical restrictions, and which she could realistically secure if she diligently tried. *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985). Employer must establish realistic, not theoretical, job opportunities. *See Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting on other grounds).

Employer argues that the administrative law judge erred by placing the burden of persuasion on it when addressing the extent of claimant's disability. In support of this contention, employer asserts that, as the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), held that Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which provides that the proponent of a rule or order has the burden of proof, is applicable to cases arising under the Act, it is claimant as the proponent of a finding of total disability who must establish an inability to perform any work.[2] In his Partial Decision and Order, the administrative law judge rejected employer's argument in this regard, finding that as employer's burden of establishing the availability of suitable alternate employment was one of going forward with the evidence, and not the burden of persuasion, *Greenwich Collieries* was not applicable to the situation presented. We agree with the administrative law judge's analysis. In *Greenwich Collieries*, the Court distinguished the "burden of persuasion," which is "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose," from the "burden of production" which is "a party's obligation to come forward with evidence to support its claim." *Greenwich Collieries*, 114 S.Ct. 2255, 28 BRBS at 45 (CRT). In the instant case, the evidence of record is uncontradicted that claimant cannot return to her usual work; the administrative law judge thus properly shifted the burden to employer to produce evidence demonstrating the availability of suitable alternate employment. *See Palombo*, 937 F.2d at 70, 25 BRBS at 1 (CRT); *see also New Orleans (Gulfwide) Stevedore v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988). We therefore reject employer's assertion of error in this regard.

Employer next challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment. Specifically, employer asserts that the two telemarketing positions identified by its vocational expert, Ms. Jackson, constitute suitable alternate employment which claimant is capable of performing. In his decision, the administrative law judge discredited Ms. Jackson's testimony that claimant was capable of performing the two identified

[2]Employer thus argues that the administrative law judge erred by placing an additional burden of persuasion on it in establishing the existence of realistic alternate employment positions; in failing to shift the burden of persuasion back to claimant after employer produced evidence of existing employment positions; and by imposing an additional burden on employer of asking the prospective employers whether an individual with claimant's disabilities would be considered for employment.

telemarketing positions since, he determined, Ms. Jackson failed to persuasively demonstrate that claimant could realistically secure those positions. In rendering this conclusion, the administrative law judge specifically found that there is no evidence in the record that any of the ergonomic devices which Ms. Jackson testified would assist claimant in working would be available at the identified employers. Thus, the administrative law judge concluded that these positions were unsuitable for claimant.

Employer's argument has merit. As employer asserts in support of its allegation of error, the record reveals that although Ms. Jackson testified generally regarding various tools and accommodations available to help claimant return to work, Ms. Jackson did not testify that any of these accommodations would be necessary at either of the two telemarketing positions which she identified as being suitable for claimant. *See* Hearing Transcript at 113-124. Moreover, the record is devoid of any evidence that any of the items available to assist claimant return to work are in fact necessary for her return to gainful employment. *See* Employer's Exhibits D, E, G.

In determining whether an employment position constitutes suitable alternate employment, the administrative law judge must compare the jobs' requirements with the claimant's physical restrictions. *See generally Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). As the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment is premised upon an erroneous evaluation of the vocational evidence of record, that finding cannot stand. We therefore vacate the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment, and we remand the case to the administrative law judge for reconsideration of the evidence of record regarding this issue. *See generally Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

Lastly, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent 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 disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. Where an employee is permanently totally disabled, as the administrative law judge found in this case, the employer must show that claimant's total disability is not due solely to the subsequent work injury; specifically, the total disability must be caused by both her work injury and her pre-existing condition. *See 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).

After review of the record, we hold that the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe*, 380 U.S. 359; *see Dominey*, 30 BRBS at 137. Contrary to employer's contention, the opinions of Drs. Abramson and Patel, as well as the testimony of claimant and Ms. Jackson, while supportive of a finding that claimant's present condition is related to a combination of her two work-related injuries, do not

establish that claimant's total disability is not solely the result of her last injury. Employer's Exhibits A, E, H, I; Hearing Transcript at 52, 55-57, 109-112. Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, that finding is affirmed.[3] *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Partial Decision and Order -- Award of Benefits, the Final Decision and Order -- Award of Benefits, and the Order Denying Employer's Request for Reconsideration and Motion to Admit Newly Available Evidence are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[3]Inasmuch as the administrative law judge's denial of Section 8(f) is affirmed based upon employer's failure to satisfy the contribution element necessary for Section 8(f), the Director's alternate argument that the administrative law judge failed to determine the existence of a manifest pre-existing permanent partial disability prior to claimant's April 28, 1993, accident need not be addressed.