BRB No. 97-1345

GEORGE E. BOLTON	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
DESC KSE	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John J. Osterhage, Crestview Hills, Kentucky, for claimant.

Laura Stomski (Marvin Krislov, Deputy Solicitor for National Operations; Carol De Deo, 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-LHC-1204) of Administrative Law Judge Robert L. Hillyard 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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).

Claimant, a bartender at an Army Officers' Club in Dayton, Ohio, sustained work-related injuries to his left knee on November 17, 1989 and February 28, 1991. Claimant has not worked since the 1991 injury. Employer voluntarily paid claimant temporary total disability compensation for various periods, 33 U.S.C. §908(b), as well as permanent partial disability benefits for a 50 percent scheduled loss of use of his left leg, 33 U.S.C. §908(c)(2), (19). At the formal hearing, employer conceded that claimant is unable to perform his previous employment duties for employer.

In his Decision and Order, the administrative law judge found that claimant's work-related condition became permanent in June 1994. After 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 his work-related injuries. The administrative law judge further found that employer's claim for Section 8(f), 33 U.S.C. §908(f), relief was untimely filed. Accordingly, the administrative law judge awarded claimant permanent total disability compensation commencing July 1, 1994, and denied Section 8(f) relief to employer.

On appeal, employer challenges the administrative law judge's finding that it failed to establish the availability of suitable alternate employment.[1] 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 (the Director), also responds, urging affirmance of the administrative law judge's determination that employer's request for Section 8(f) relief was barred by operation of Section 8(f)(3), 33 U.S.C. §908(f)(3), an absolute defense to Special Fund liability.

Employer first challenges the administrative law judge's determination that claimant is totally disabled, arguing that the administrative law judge erred in finding that employer failed to establish the availability of suitable alternate employment. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson*

[1]The Board hereby accepts employer's supplemental authority submitted in support of its argument that the administrative law judge erroneously found that employer failed to establish the availability of suitable alternate employment.

v. Todd Shipyards Corp., 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). Where, as in the instant case, it is undisputed that claimant is unable to return to his former work, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Palombo v. Director, OWCP,* 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Anderson v. Lockheed Shipbuilding & Const. Co.,* 28 BRBS 290, 292 (1994). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Anderson,* 28 BRBS at 292. The credible testimony of a vocational rehabilitation specialist is sufficient to meet employer's burden of showing suitable alternate employment. *See Anderson,* 28 BRBS at 293; *Villasenor v. Marine Maintenance Industries, Inc.,* 17 BRBS 99 (1985); *Davenport v. Daytona Marine and Boat Works,* 16 BRBS 196 (1984).

In the instant case, employer contends that the administrative law judge erred in rejecting the testimony of Ms. Motter, its vocational consultant, which, employer avers, is sufficient to establish the availability of suitable alternate employment which claimant is capable of performing. Specifically, employer asserts that Ms. Motter, after taking into consideration the physical restrictions imposed by claimant's treating orthopedic surgeon Dr. Urse,[2] identified several specific positions which she

[2]We note that the administrative law judge's finding that the restrictions imposed by Dr. Urse are entitled to determinative weight is not challenged by employer on appeal. Dr. Urse restricted claimant from doing any lifting, bending, climbing, squatting, kneeling, and twisting. He restricted walking and standing to 15-30 minutes at a time for a maximum of one hour of intermittent standing and one hour of intermittent walking. Dr. Urse reported that claimant must be allowed to

testified claimant could perform. Employer thus asserts that the administrative law judge's rejection of Ms. Motter's testimony is inconsistent with applicable law and unsupported by the evidence of record.

Ms. Motter conducted two labor market surveys, the first on January 9, 1996, and the second on April 2, 1996. In initially conducting the January 9, 1996, labor market survey, Ms. Motter utilized the physical limitations placed on claimant by Dr. Harper, which were less restrictive than those set by Dr. Urse. At the hearing, however, Ms. Motter testified that seven of the 12 jobs listed in the January 9, 1996, survey were within Dr. Urse's restrictions. Tr. at 74-77. In his decision, the administrative law judge acknowledged Ms. Motter's testimony that some of the jobs listed in her first survey would comport with the more stringent work restrictions imposed by Dr. Urse, but rejected these jobs on the basis that Ms. Motter did not communicate Dr. Urse's work restrictions to the prospective employers identified in that survey. *See* Decision and Order at 15 n. 6. In this regard, we agree with employer that, in order to meet its burden of establishing suitable alternate employment, employer need not contact prospective employers to inform them of claimant's limitations. *See, e.g., Universal Maritime Corp. v. Moore,* 126 F.3d 256, 264, 31 BRBS 119, 125 (CRT) (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann,* 841 F.2d 540, 542, 21 BRBS 10, 15 (CRT)(4th Cir. 1988). Thus, the administrative law judge's rejection of these jobs on this basis cannot be affirmed, as the administrative law judge's reasoning does not comport with applicable law. We, therefore, vacate the administrative law judge's finding on this issue and remand the case for consideration of the positions listed in the January 9, 1996, labor market survey that Ms. Motter testified fall within the restrictions imposed on claimant by Dr. Urse.

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change positions, i.e., stand or straighten, as necessary to make himself comfortable. EX-38, EX-39. Dr. Urse indicated that claimant could perform the cashier, counter clerk, service clerk and desk guard positions listed in Ms. Motter's January 8, 1996 labor market survey if the above restrictions were followed. EX-39; CX-1 at 37-39.

Employer next assigns error to the administrative law judge's rejection of seven of the jobs identified in Ms. Motter's April 2, 1996, labor market survey. We agree that the record evidence does not support the inferences drawn by the administrative law judge with respect to the requirements of the jobs listed in the April 2, 1996, survey.[3] *See Anderson,* 28 BRBS at 294-295. We therefore are unable to affirm the administrative law judge's determination that none of the positions identified in Ms. Motter's second labor market survey comports with Dr. Urse's physical restrictions. As employer asserts in support of its allegation of error, the administrative law judge failed to explain his rejection of both Ms. Motter's uncontroverted opinion that the jobs listed in her April 1996 survey are within Dr. Urse's restrictions and her testimony that all employers were advised of the physical restrictions assigned by Dr. Urse and indicated that the job requirements comport with Dr. Urse's restrictions. *See* EX-48; EX-49; Tr. at 77, 81. Moreover, as

[3]Specifically, our review of the record suggests that the administrative law judge's determinations that claimant would be unable to pick up trash with a stick as required of the PMI cashier position and that claimant could not clean booth windows and sprinkle salt around the cashier position are not clearly supported by the physical restrictions imposed by Dr. Urse. Further, the administrative law judge's inference that Dayton Mall and Cross Pointe Cinemas cashiers are required to stand when busy appears inconsistent with evidence that these employers could accommodate a cashier who needed to sit. *See, e.g., Lacey v. Raley's Emergency Road Service,* 23 BRBS 432, 436-437 (1990), *aff'd mem.* 946 F.2d 1565 (D.C. Cir. 1991). Lastly, the administrative law judge's inference that the telemarketing positions at Channel 16 and the Dayton Opera require that the employee sit for the duration of the shift appears inconsistent with record evidence that these positions allow for changing positions. *See* EXS 48; 49; n. at 78-81, 92-95.

employer asserts, the administrative law judge failed to address Ms. Motter's express statements that all of the identified jobs allow claimant to change his position. *See* EX-49, Tr. at 94-97. Based upon the foregoing, we additionally vacate the administrative law judge's determination that the April 2, 1996, labor market survey fails to establish the availability of suitable alternate employment. On remand, the administrative law judge must resolve the inconsistencies between the testimony of Ms. Motter regarding the description of the positions identified as being suitable for claimant and the administrative law judge's interpretation of those positions. After having considered the positions identified by Ms. Motter in both labor market surveys as being suitable for claimant, the administrative law judge must make appropriate findings regarding the issue of whether employer has established the availability of suitable alternate employment. *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, contending that the administrative law judge erred in finding that the absolute defense to Special Fund liability bars employer's claim for Section 8(f) relief.[4] Section 8(f)(3) provides that a request for relief and a statement of the

[4]The procedural history of this case relevant to Section 8(f)(3) is as follows: on June 14, 1991, an informal conference was held; at issue were additional temporary total disability and permanent partial disability benefits. DX-1. By letters dated April 28, 1992 and April 27, 1993, claimant requested an informal conference to address claimant's entitlement to temporary total disability or permanent total disability and permanent partial disability. DX-4; CX-1 at 156. A notice of Informal Conference dated May 3, 1993 stated that a determination would be made as to whether claimant is permanently totally disabled or is limited to the schedule, and noted that a firm deadline for submission of a Section 8(f) application would be set at the conference. DX-5. Thereafter, on May 24, 1994 and January 10, 1995, claimant asserted a claim for permanent total disability benefits. DX-6; DX-8. Claimant's pre-hearing statement dated January 24, 1995 asserts a claim for temporary total disability or, alternatively, for permanent total disability. DX-9. A transmittal letter referring the case to the Office of Administrative Law Judges was sent on February 14, 1995, indicating that "Section 8(f) relief has not been raised in this case." DX-9. In response to administrative law judge's pre-trial order, employer filed a pre-hearing statement on August 16, 1996, stating that Section 8(f) is at issue. EX-47. On August 26, 1996, the Director filed a motion to dismiss employer's Section 8(f) claim based on the Section 8(f)(3) absolute bar, noting that he had not been served with employer's pre-hearing statement until that day. A formal hearing was held on August 27, 1996; the Director subsequently stated in a post-hearing brief that he was unable to appear at the hearing due to the late notice that Section 8(f) relief was

grounds therefor shall be presented to the district director prior to consideration of the claim by the district director, and that failure to present such a request shall be an absolute defense to the Special Fund's liability unless the employer could not have reasonably anticipated the liability of the Fund prior to issuance of a compensation order. 33 U.S.C. §908(f)(3)(1988). The implementing regulation, 20 C.F.R. §702.321, provides that employer must submit a fully documented application and states that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is in dispute. 20 C.F.R. §702.321(a), (b). The regulation also provides that where a claimant's condition has not reached maximum medical improvement by the time the case is referred to the Office of Administrative Law Judges, an application need not be submitted to the district director to preserve employer's right to later seek Section 8(f) relief and that the failure to submit a fully documented application to the district director shall be an absolute defense to the liability of the Special Fund only if the defense is affirmatively raised and pleaded by the Director. Lastly, the regulation provides that the failure of an employer to present a timely and fully documented application for Section 8(f) relief may be excused only where the liability of the Special Fund could not have been reasonably anticipated prior to the district director's consideration of the claim. 20 C.F.R. §702.321(b)(3).

In challenging the administrative law judge's determination that its claim for Section 8(f) relief is barred by the absolute defense, employer initially contends that the administrative law judge erred by relying upon evidence submitted by the Director subsequent to the hearing. We disagree. Section 702.338 of the regulations states that an administrative law judge has the duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents; the hearing may be reopened to receive such evidence. *See* 20 C.F.R. §702.338; *Olsen v. Triple A Machine Shops, Inc.,* 25 BRBS 40, 44 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* Nos. 91-70642, 92-70444 (9th Cir. June 15, 1993). *See also* 20 C.F.R. §702.339 (stating that an administrative law judge should conduct his evidentiary inquiry "in such a manner as to best ascertain the rights of the parties"). These regulatory provisions afford the administrative law judge considerable discretion in determinations pertaining to the admissibility of evidence; such determinations may be overturned only if they are arbitrary, capricious or an abuse of discretion. *Olsen,* 25 BRBS at 44. In the instant case, the administrative law judge accepted the Director's post-hearing evidence, *see*

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being sought. On October 25, 1996, the Director filed a motion to admit additional evidence to support his argument that employer's Section 8(f) claim is barred by the absolute defense.

Decision and Order at 2, consisting of documents from the administrative file compiled by the district director. The Board has held that as the Section 8(f)(3) bar is an affirmative defense, it is the Director's burden to come forward with the necessary evidence to support his allegation that employer failed to comply with Section 8(f)(3). *Tennant v. General Dynamics Corp.,* 26 BRBS 103, 109 (1992). As employer has failed to establish that the administrative law judge abused his discretion in accepting the Director's post-hearing evidence, which was necessary to an informed disposition of the Section 8(f)(3) issue, its argument in this regard is rejected.

Employer next avers that the record does not justify application of the Section 8(f)(3) bar. In support of its contention, employer argues that it did not need to assert a claim for Section 8(f) relief during the period in which only a claim for a scheduled award of less than 104 weeks was at issue, inasmuch as it could not have reasonably anticipated the liability of the Special Fund at that time. As noted by the Director in his letter brief, however, the fact that employer was not required to present a request for Section 8(f) relief if all that was at issue was a schedule award for less than 104 weeks is not dispositive of the Section 8(f)(3) issue in the instant case, inasmuch as claimant asserted a claim for permanent total disability benefits on several occasions while the case was before the district director. *See* DX-4; DX-9. Thus, prior to the transfer of the case to the Office of Administrative Law Judges, employer had reasonable grounds to anticipate the Fund's liability due to claimant's assertion of a claim for permanent total disability. *See* DX-4; DX-9. *See generally Cajun Tubing Testors, Inc. v. Hargrave,* 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992); *Container Stevedoring Co. v. Director, OWCP [Gross],* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).[5] Inasmuch as employer had notice that permanent total disability was an issue in dispute prior to referral of the case to the Office of

[5]Contrary to employer's argument on appeal, the district director 's apparent failure to set a deadline for filing a Section 8(f) application after stating that such a deadline would be established did not relieve employer from its obligation to file a Section 8(f) application as soon as it had knowledge of the claim for permanent total disability benefits. *See generally Cajun Tubing Testors, Inc. v. Hargrave,* 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992); *Container Stevedoring Co. v. Director, OWCP [Gross],* 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). In particular, employer failed to take any measures in response to the statement in the district director's February 14, 1995 transmittal letter that Section 8(f) was not at issue until it filed its pre-hearing statement on August 16, 1996, well over a year after referral of the case to Office of Administrative Law Judges. Under these circumstances, employer cannot rely on the previous failure of the district director to set a deadline for requesting Section 8(f) relief.

Administrative Law Judges, we affirm the administrative law judge's determination that employer's claim for Section 8(f) relief is barred by Section 8(f)(3).

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 Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge