BRB No. 97-1839

JAMES G. PETERS	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
BETHLEHEM STEEL CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge Lee J. Romero, Jr., United States Department of Labor.

Ed W. Barton, Orange, Texas, for claimant.

David G. Gaultney (Mehaffy & Weber), Beaumont, Texas, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (93-LHC-1028) of Administrative Law Judge Lee J. Romero, Jr., 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).

On June 2, 1988, claimant was injured when, while working as a pipefitter for

employer, he hoisted a stiffener over his shoulder, felt something pull in his back, and fell to the ground. Claimant, who has not returned to work since the date of this incident, subsequently underwent back surgery and presently resides on his own farm where he performs various duties involving the raising of cattle.

In his Decision and Order, the administrative law judge found that claimant could not return to his usual work, that employer failed to establish the availability of suitable alternate employment either through the vocational evidence of record or claimant's post-injury cattle raising activities on his farm. Accordingly, the administrative law judge awarded claimant temporary total disability compensation from June 2, 1988 to April 16, 1994, and permanent total disability benefits thereafter, based on an average weekly wage of $413. 33 U.S.C. §908(a), (b). Lastly, the administrative law judge denied employer's request for relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's determination that it failed to establish the availability of suitable alternate employment. Employer also appeals the administrative law judge's denial of its request for Section 8(f) relief. Claimant responds, urging affirmance.

Employer initially contends that the administrative law judge erred in finding that both its vocational evidence and claimant's subsequent post-injury self-employment failed to establish the availability of suitable alternate employment. Where, as in this case, claimant is incapable of resuming his usual employment duties with his employer, claimant has established a *prima facie* case of total disability; the burden thus shifts to employer to demonstrate the availability of specific jobs within the geographic area which claimant resides which he is, by virtue of his age, education, work experience, and physical restrictions, capable of performing. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 14 BRBS 156 (5th Cir.1981); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986); *cert. denied*, 479 U.S. 826 (1986); *Anderson v. Lockheed Shipbuilding & Const. Co.*, 28 BRBS 290 (1994). Employer may meet this burden by establishing that claimant has engaged in self-employment activities post-injury. *See Sledge v. Sealand Terminal, Inc.,* 14 BRBS 334 (1981).

Initially, we note that employer's mere assertion that "There are light duty jobs available for claimant...", *see* Employer's brief at 2, fails to either address the administrative law judge's decision or identify an error committed by the administrative law judge in addressing the issue of whether employer's vocational evidence is sufficient to satisfy its burden of proof. *See* 20 C.F.R. §802.211(a), (b).

Where a party is represented by counsel, mere assignment of error is not sufficient to invoke Board review. *See Carnegie v. C & P Telephone Co.*, 19 BRBS 57, 59 (1986). Accordingly, the administrative law judge's finding that employer's vocational evidence is insufficient to establish the availability of suitable alternate employment must be affirmed.

Employer next contends that claimant's post-injury self-employment raising cattle on his own farm establishes the availability of suitable alternate employment which claimant is capable of performing and that claimant's earnings from his cattle farm consequently establish a post-injury wage-earning capacity. In support of its assertion, employer relies upon the testimony of claimant. In testifying at the formal hearing, claimant stated that he raised cattle for sale at his farm both before and after his work accident, that his current herd consists of approximately 80 cattle on 48 acres, and that he regularly reports his earnings and losses from this operation on his income tax report. *See* Tr. at 54, 63, 85, 89. Regarding his present cattle-raising operation, claimant testified that, depending on the weather, he regularly drives a tractor to deliver hay to the cattle, but that his wife provides substantial assistance during the evenings and on weekends. *Id.* at 55-57, 70-71, 97. Lastly, claimant acknowledged that, although he works no more than three hours per day on his farm, that work is within the restrictions placed on him by his physician. *Id.* at 69.

In addressing the issue of claimant's post-injury self-employment, the administrative law judge, after setting forth claimant's testimony regarding his cattle raising activities, summarily stated that "I do not consider Employer's argument inferentially that Claimant's cattle raising activities should be considered suitable alternate employment or preclusive of diligent job search to be persuasive." *See* Decision and Order at 23. We hold that the administrative law judge's decision on this issue cannot be affirmed since it fails to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §554. Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981). Failure to do so will violate the APA's requirement for a reasoned analysis. *Ballesteros*, 20 BRBS at 187; *see Williams v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, the administrative law judge did not credit or discredit claimant's testimony regarding his post-injury cattle raising

activities, nor did he set forth his rationale in summarily concluding that employer's contentions regarding this issue are unpersuasive. Accordingly, we vacate the administrative law judge's award of total disability benefits, and we remand this case for a reasoned analysis of the evidence on this issue.[1]

Lastly, employer contends that the administrative law judge erred in finding that claimant's pre-existing back condition did not constitute a pre-existing permanent partial disability, and in consequently denying its request for Section 8(f) relief. Specifically, employer asserts that the record contains evidence of back conditions which claimant, a former rodeo performer, suffered prior to his accident, and that claimant suffered from spurring, a compression fracture at L-1 and possibly L-2, and degenerative changes which were demonstrated on x-rays and medical records prior to his work injury. Moreover, employer avers that Drs. Hayes, Shrontz and Barrash agreed that such pre-existing back conditions may make an individual more susceptible to future back surgery.

Section 8(f) shifts 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 permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *see generally Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141 (CRT) (5th Cir. 1997); *see also Bass v. Broadway Maintenance,* 28 BRBS 11 (1994). Where claimant has a history of injury yet suffered no sign of medical problems or work restrictions, the mere existence of these prior injuries does not establish a pre-existing disability for Section 8(f) purposes because the pre-existing condition must produce some serious lasting physical problem. *Mijangos v. Avondale Shipyards Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). However, a pre-existing disability need not be an economic disability, *see Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting); rather, the pre-existing condition need only have been of sufficient seriousness that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of employment-related

[1]Although employer contends that claimant is not diligently searching for a job due to his duties with the cattle, we note that the duty to diligently seek employment does not arise until employer successfully establishes the availability of suitable alternate employment. *Rogers Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986) *cert. denied*, 479 U.S. 826 (1986); *Manigault v. Stevens Shipping Co.,* 22 BRBS 332 (1989).

accident and compensation liability. *See Dugas v. Durwood Dunn Inc.*, 21 BRBS 277 (1988); *Bickham v. New Orleans Stevedoring*, 18 BRBS 41 (1986). A permanent physical condition which makes a person's back more susceptible to further injury may be sufficient to establish a pre-existing permanent partial disability. *See Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990).

In the instant case, the administrative law judge denied employer's request for Section 8(f) relief, finding that employer failed to establish that claimant suffered from a pre-existing disability or a serious, lasting physical problem based upon his finding that claimant had no lasting restrictions and no medical problems from his prior injuries, and that claimant was never assigned any physical limitations as a result of any pre-existing conditions. He further noted that claimant's pre-existing conditions were essentially asymptomatic and were not so serious as to motivate a cautious employer to discharge or refrain from hiring claimant because of a greatly increased risk of an employment-related accident and compensation liability. *See Kubin v. Pro-Football, Inc.,* 29 BRBS 117 (1995). However, disability is not viewed in an economic context alone. As employer argues, the record does contain evidence which, if credited, could constitute substantial evidence from which the administrative law judge could rationally find that claimant had a serious and lasting permanent partial disability. *See Thompson v. Northwest Enviro Services, Inc.,* 26 BRBS 53 (1992). Specifically, we note that Dr. Barash stated that claimant had a couple of prior episodes that were sufficient to warrant x-raying his back, and that if one part of the back is injured, it shows that there is a possibility that he would be more susceptible to injury. EX-4 at 16-17. Dr. Hayes testified that claimant's pre-existing compression fracture and degenerative disease would be a significant contributing factor to any disability impairment that may exist today. EX-6 at 36. Finally, Dr. Shrontz testified that a compression fracture is the type of injury that possibly could predispose someone to future injury in the back. EX-5 at 20-21. Based upon these physicians' statements, we vacate the administrative law judge's denial of Section 8(f) relief; on remand, the administrative law judge, taking into consideration the testimony of the aforementioned physicians, must reconsider the issue of whether claimant's prior back conditions constituted pre-existing permanent partial disabilities.

Accordingly, the administrative law judge's determinations that claimant is totally disabled and that employer is not entitled to Section 8(f) relief are vacated, and the case is remanded for further findings in accordance 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