BRB No. 93-0989

CLEAROTTIS BIRGE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
DEPARTMENT OF NAVY, MWR	)	
	)	
and	)	
	)	
ALEXSIS INSURANCE COMPANY	)	
	)	
Employer/Carrier- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

J. Marvin Mullis, Jr., Columbia, South Carolina, for claimant.

R. Jonathan Hart (Lee, Black, Scheer & Hart, P.C.), Savannah, Georgia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (91-LHC-1396) of Administrative Law Judge Thomas M. Burke 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 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 September 3, 1989, while performing civilian employment for the United States Navy in the Panama Canal Zone, claimant sustained a work-related back injury. He was diagnosed by Dr. Bendana as having radiculopathy at the C6-C7 level, secondary to a herniated disc and severe cervical spondylosis with early cervical myelopathy. Claimant continued working in his usual employment in the months following his injury, although he periodically lost time from work when he was hospitalized to receive conservative treatment. On October 21, 1990, claimant retired from his position as recreation director on the advice of his physician, Dr. Bendana. Subsequently, on May 11, 1991, claimant obtained employment at a Kroger's supermarket, where he is currently employed in a light-duty job as a clerk in the store's seafood department. Employer has not paid any disability compensation benefits in this case. Claimant sought permanent total disability compensation under the Act commencing October 21, 1990, his last day of work for employer.

In his Decision and Order, based upon claimant's testimony and the medical opinions of Drs. Bendana and Gregorie, the administrative law judge found that inasmuch as claimant is unable to return to his former employment due to his injury, he established a *prima facie* case of total disability and that claimant's disability is permanent. The administrative law judge further found that employer failed to meet its burden of establishing the availability of suitable alternate employment based on either claimant's post-injury work at Kroger's or the testimony of its vocational expert, Mr. Yuhas, and accordingly awarded claimant permanent total disability compensation commencing October 21, 1990. In addition, the administrative law judge found that employer is not entitled to Section 8(f), 33 U.S.C. §908(f), relief because it did not raise this issue while the case was before district director as required by Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3)(1988).

On appeal, employer challenges the administrative law judge's award of permanent total

disability compensation, contending that the administrative law judge erred in finding employer failed to establish the availability of suitable alternate employment. Employer also challenges the administrative law judge's Section 8(f)(3) determination. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has not responded to employer's appeal.

As it is uncontested that claimant is unable to return to his usual work for employer, claimant has established a *prima facie* case of total disability and the burden shifts to employer to establish the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner,* 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981). In order to meet this burden, employer must show the availability of job opportunities within the geographical area where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

We agree with employer that the administrative law judge's award of permanent total disability compensation cannot be affirmed because his finding that the post-injury work claimant performed at Kroger's constituted sheltered employment provided at Kroger's beneficence fails to comport with applicable law. An award of total disability while claimant is working is the exception rather than the rule and is limited to those situations where claimant works only through extraordinary effort or is provided a position only through employer's beneficence. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Haughton Elevator Co. v. Lewis*, 572 F.2d 477, 7 BRBS 838 (4th Cir. 1978); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Although the administrative law judge relied upon the testimony of claimant's vocational expert, Mr. Bryson, to conclude that the accommodations Kroger's was willing to make for claimant rendered this employment beneficent, a job specifically tailored to claimant's restrictions may nonetheless

constitute suitable alternate employment if claimant is capable of performing the work and the work involved is necessary to employer's operation. *See Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986). In the present case, the record reflects that claimant was able to perform the work at Kroger's an average of 44 hours per week, spread over 7 days, without excruciating pain or extraordinary effort, Tr. at 44-45, 78-79. Moreover, the record reflects that Kroger's employed two other clerks to perform the same work in its seafood department, Tr. at 44, thus indicating that the work claimant was performing was not makeshift, but rather was necessary and profitable for employer. *Everett v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 316, 319 (1989). Accordingly, we reverse the administrative law judge's finding that claimant's post-injury work at Kroger's was sheltered employment and hold that this job was sufficient to meet employer's burden of establishing the availability of suitable alternate employment as a matter of law. *See Jordan*, 19 BRBS at 84. In light of our determination that suitable alternate employment was established based on claimant's post-injury work at Kroger's, the administrative law judge's award of permanent total disability compensation is reversed, and the case is remanded for the administrative law judge to consider claimant's entitlement to permanent partial disability benefits consistent with applicable law. *See id.;* 33 U.S.C. §908(c)(21), (h).

Employer also contends that it established the availability of suitable alternate employment sufficient to establish a higher post-injury wage-earning capacity than claimant's earnings at Kroger's based on the testimony of its vocational expert, Mr. Yuhas. We agree with employer that the administrative law judge erred in discounting Mr. Yuhas's vocational testimony on the basis that he rendered a medical opinion beyond the scope of his expertise when assessing claimant's physical capabilities. Vocational experts can review medical records and voice opinions regarding a person's ability to perform various job duties, consistent with Mr. Yuhas's actions in the present case. *See Davenport v. Daytona Marine and Boat Works*, 16 BRBS 196 at 199-200 (1984). The administrative law judge also stated, however, that he was not accepting Mr Yuhas's testimony

because he found his assumption, that because claimant worked as a clerk at Kroger's he was capable of doing light duty work in general, irrational because Mr. Yuhas had not given adequate consideration to the limitations testified to by claimant. Decision and Order at 13-14. Inasmuch as the administrative law judge provided valid reasons for discrediting Mr. Yuhas's testimony, and credibility determinations are solely within the purview of the administrative law judge, his finding that Mr. Yuhas's testimony is insufficient to establish the availability of other suitable alternate employment is affirmed.[1] *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

We also agree with employer that case should be remanded to the administrative law judge for reconsideration of employer's eligibility for Section 8(f) relief because the administrative law judge erred in raising the Section 8(f)(3) absolute defense *sua sponte*. Section 8(f)(3) provides that employer must raise the issue of Section 8(f) relief while the case is before the district director unless employer could not have reasonably anticipate the liability of the Special Fund at that time. *See also* 20 C.F.R. §702.132. The applicable regulation provides, however, that the applicability of the Section 8(f)(3) absolute defense must be affirmatively raised and pleaded by the Director. 20 C.F.R. §702.321(b)(3); *see Hawthorne v. Ingalls Shipbuilding, Inc.*, 29 BRBS 103 (1995), *modifying on recon.*, 28 BRBS 73 (1994); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992); *Reynolds v. Cooper Stevedoring Co., Inc.*, 25 BRBS 174 (1991). In this case, employer first raised the issue of its entitlement to Section 8(f) relief at the hearing, without notice to the Director, and the administrative law judge *sua sponte* raised the Section 8(f)(3) bar. We, therefore, must vacate the administrative law judge's finding that employer's request for relief from the Special Fund is barred pursuant to Section 8(f)(3). On remand, in order to determine employer's eligibility for Section 8(f) relief, the administrative law judge should consider the applicability of the Section 8(f)(3) bar, if

[1]Claimant's diligence in attempting to secure alternate work is irrelevant on the facts presented. As claimant was actually holding a suitable job at Kroger's, he cannot reasonably assert that he is totally disabled because he diligently tried but was unable to secure alternate work. *See* Resp. Brief at ___.

raised and pleaded by the Director.[2] *See Hawthorne*, 29 BRBS at 103. If the bar is not raised, or is inapplicable, the administrative law judge should consider the merits of employer's entitlement to Section 8(f) relief. *See generally C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT)(11th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order awarding claimant permanent total disability benefits and denying employer Section 8(f) relief are vacated, the case is remanded for further consideration 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

NANCY S. DOLDER
Administrative Appeals Judge

[2]Although claimant argues in his response brief that Section 8(f)(3), 33 U.S.C. §908(f)(3)(1988), bars employer's Section 8(f), 33 U.S.C. §908(f), request, claimant does not have standing to litigate Section 8(f) issues. *See Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988).