BRB No. 96-0362

JEROME PULLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TARTAN TERMINALS, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ADMINISTRATION, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and the Order Denying Motion for Reconsideration of George A. Fath, Administrative Law Judge, United States Department of Labor.

Michael C. Eisenstein, Baltimore, Maryland, for claimant.

Andrew M. Battista, Towson, Maryland, for employer/carrier.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, 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 Granting Benefits and the Order Denying Motion for Reconsideration (94-LHC-2908) of Administrative Law Judge George A. Fath 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).

Claimant, on April 23, 1993, sustained injuries to his ribs, right arm and wrist, and a cervical strain, while working for employer. Subsequent testing revealed pre-existing cervical spine degeneration. CXS 5, 11, 21, 24; EXS 1, 2. Claimant did not return to work, and he retired in December 1994. Employer voluntarily paid claimant temporary total disability compensation from April 23, 1993 to April 7, 1994.

In his Decision and Order, the administrative law judge initially found that employer failed to rebut the presumed causal relationship between his injuries, including his cervical condition, and the April 23, 1993, work-incident. Next, the administrative law judge determined that claimant is incapable of resuming his usual employment duties with employer, and that employer failed to establish the availability of suitable alternate employment. The administrative law judge further denied employer's request for relief pursuant to Section 8(f), 33 U.S.C. §908(f), of the Act. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from April 23, 1993 to December 1, 1994, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 20(a) presumption linking claimant's cervical complaints to his employment, that it failed to establish the availability of suitable alternate employment, and that it is not entitled to Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has also filed a response brief, urging affirmance of the administrative law judge's denial of Section 8(f) relief.[1]

Employer initially challenges the administrative law judge's finding that it failed to meet its burden of establishing the lack of a causal relationship between claimant's cervical condition and his employment. In the instant case, it is uncontroverted that claimant is entitled to invocation of the

[1]Employer objects to the Director's brief as untimely. The Board ordered the Director to respond within ten days of his receipt of the Board's Order dated June 28, 1996. On July 19, 1996, the Board received the Director's brief dated July 17, 1996. The Board looks with disfavor on such untimeliness, but accepts the Director's brief as part of the record notwithstanding employer's objection. 20 C.F.R. §§802.211, 802.217.

presumption at 33 U.S.C. §920(a) that his injury arose out of and in the course of his employment. The burden thus shifted to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). It is employer's burden on rebuttal to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 5554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption. *See Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

Employer's argument has merit. The administrative law judge found that employer submitted no evidence sufficient to rebut the presumed causal link between claimant's cervical complaints and his April 1993 work accident. *See* Decision and Order at 6. This finding is not supported by the record, however, as the opinions of Drs. Weiner and Matz may be sufficient to rebut the presumption. Specifically, both Drs. Matz and Weiner opined that claimant's neck problems are not related to the April 1993 work-incident. *See* EX 1, HT at 45-49, 51-54; EX 2, HT at 163, 171. Accordingly, we vacate the administrative law judge's finding at Section 20(a) and we remand the case for reconsideration. If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine*, 23 BRBS at 279.

Employer next contends that the administrative law judge erred in finding that it failed to establish the availability of suitable alternate employment. We disagree. Where, as in the instant case, it is uncontested that claimant is unable to return to work, the burden shifts to employer to establish the availability of alternate employment which is suitable for claimant given his age, education, work experience, physical limitations and other relevant factors. *See Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT)(4th Cir. 1988). The credible testimony of a vocational rehabilitation specialist is sufficient to meet the burden of showing suitable alternate employment. *See Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

We reject employer's contentions that the administrative law judge erred in failing to credit the testimony of its rehabilitation specialist, Ms. Hassan. In determining that Ms. Hassan's testimony did not establish the availability of suitable alternate employment, the administrative law judge noted that, although Ms. Hassan identified employment positions which she opined were suitable for claimant, she did not consider all of claimant's impairments when conducting her labor market survey. Specifically, the administrative law judge found that Ms. Hassan, when seeking the approval of specific positions from Drs. Kreisberg and Weiner as being within claimant's physical capabilities, listed claimant's diagnosis as "right arm/wrist, right ribs," while ignoring claimant's cervical problems, the effects of his spinal problem on the use of his arm, his complaints of pain and

dizziness, and his impairment due to asbestosis. *See* EXS 6c, 6d. The administrative law judge's decision not to credit Ms. Hassan's testimony is rational and is within his discretionary authority as factfinder. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We therefore affirm the administrative law judge's determination that the testimony of Ms. Hassan is insufficient to establish the availability of suitable alternate employment. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

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 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. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability is due to the combination of the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). It is employer's burden to prove each of the elements necessary for relief under Section 8(f). *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (1982).

In the instant case, the administrative law judge found that employer failed to prove the three elements required in order for Section 8(f) relief to be granted. In this regard, the administrative law judge specifically found that employer had not submitted sufficient evidence to prove a pre-existing permanent partial disability under Section 8(f) or that any prior condition was manifest. Relevant to contribution, the administrative law judge stated that the "medical evidence fails to show that [any of claimant's medical conditions] contributed to increase claimant's disability from the second injury." *See* Decision and Order at 10. The administrative law judge thus concluded that the evidence demonstrated that the second injury was the "sole cause" of claimant's disability. On reconsideration, the administrative law judge stated that Section 8(f) was a "close call," and that all of the criteria favored employer except that there was no evidence that claimant's pre-existing disabilities were manifest.

After review of the record, we affirm the administrative law judge's conclusion that employer is not entitled to Section 8(f) relief. On appeal, employer does not cite any evidence of record which would support a finding that claimant's present total disability is caused by both his April 1993 work injury and his pre-existing asbestosis; there is no evidence that claimant would not be totally disabled but for his asbestosis. *See Dominey*, 30 BRBS at 136. Moreover, the evidence of record establishing the existence of claimant's cervical condition is dated subsequent to April 23, 1993, the date of claimant's work accident; thus, claimant's cervical condition was not manifest to employer prior to claimant's work injury. Accordingly, as the administrative law judge's determination that employer failed to establish the necessary elements for Section 8(f) relief is supported by the record, that finding is affirmed. *See O'Keeffe*, 380 U.S. at 359.

Accordingly, the administrative law judge's determination that claimant's cervical condition is related to his employment is vacated, and the case remanded for further proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Granting Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge