BRB Nos. 97-0873
and 97-0873A

ROBERT E. HANSEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Order upon Motions for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fees, and Decision on Director's Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Patrick B. Streb (Law Offices of Philip R. Weltin), San Francisco, California, for claimant.

Frank B. Hugg (Law Offices of Frank B. Hugg, Esq.), San Francisco, California, for self-insured employer.

Janet R. Dunlop, Counsel for Longshore and Joshua T. Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor); Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and the Director, Office of Workers' Compensation Programs (the Director) cross-appeals, the Decision and Order Awarding Benefits, Order upon Motions for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fees, and the Decision on Director's Motion for Reconsideration (96-LHC-1771) of Administrative Law Judge Alfred Lindeman 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). The Board held oral argument in this case on September 15, 1997, in San Francisco, California. We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a longshoreman, seeks compensation for a permanent total pulmonary disability, alleging an aggravation of his underlying bronchial asthmatic condition as a result of his exposure to harmful workplace stimuli during the course of his employment with employer. Claimant ceased working for employer on December 15, 1987. At that time, claimant suffered orthopedic problems arising out of unrelated work accidents sustained while working for a different employer, Marine Terminals, at a different facility.[1] Claimant received temporary total disability compensation for his orthopedic injuries from December 15, 1987, through June 23, 1989. Claimant and Marine Terminals entered into a settlement for permanent partial disability for the orthopedic injuries in August 1991.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant's bronchial condition was aggravated by his exposure to injurious stimuli on his last day of work for employer and that, accordingly, claimant was entitled to permanent total disability compensation under Section 8(a), 33 U.S.C. §908(a) of the Act, commencing December 16, 1987, and continuing, based on an average weekly wage of $585.52, determined under Section 10(c), 33 U.S.C. §910(c), medical benefits, and an attorney's fee; additionally, the administrative law judge found employer entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Order upon Motions for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge reaffirmed his prior findings relating to claimant's entitlement to permanent total disability compensation based on his pulmonary condition. However, the administrative law judge modified his first decision to

[1]The record reflects that while working for Marine Terminals, claimant suffered injuries to his left shoulder on September 20, 1985, an exacerbation of that injury on May 4, 1986, and an injury to his right knee on July 31, 1987. *See* SSX 11, CSX 8, CSX 9.

prevent claimant's receiving a double recovery from December 15, 1987, through June 23, 1989, during which time claimant was also receiving temporary total disability compensation for his orthopedic conditions from Marine Terminals. He further noted that the parties mutually agreed that claimant's attorney was entitled to a fee of $21,000, plus costs of $3,672.80.

In his Decision on Director's Motion for Reconsideration, the administrative law judge concluded that the Special Fund would assume liability for claimant's awarded benefits upon the expiration of the 104 week period following December 15, 1987, regardless of whether employer or Marine Terminals paid claimant compensation during this period.

Employer now appeals, contending that the administrative law judge erred in awarding claimant permanent total disability compensation for his occupational pulmonary injury under Section 8(a), asserting that claimant was a voluntary retiree and thus limited to benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23). Employer also asserts that the administrative law judge erred in allowing claimant to receive a double recovery between May 14, 1991, and August 16, 1991, during which time claimant allegedly received disability compensation payments from Marine Terminals for his work-related orthopedic condition. Finally, employer argues that the administrative law judge erred by excluding from the record employer's evidence regarding the availability of suitable alternate employment to claimant. The Director cross-appeals, contending that the administrative law judge erred in his determination of the date on which Special Fund relief would relieve employer of liability for the payment of claimant's benefits. Claimant responds, urging affirmance of the administrative law judge's decisions.

Voluntary versus Involuntary Retirement

In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation pursuant to Section 8(a) of the Act, commencing December 16, 1987, based on Dr. Dew's conclusion that it was in claimant's best interest to stop working at that time; the administrative law judge noted that this conclusion was consistent with claimant's testimony. Thereafter, on reconsideration, the administrative law judge addressed employer's argument that claimant retired in December 1987 due to his orthopedic problems and concluded that, references to claimant's orthopedic problems notwithstanding, claimant should have and did retire, at least in part, because of his pulmonary condition. Accordingly, the administrative law judge found that claimant was not a voluntary retiree, but he was entitled to benefits under Section 8(a). *See* Order on Reconsideration at 3. On appeal, employer challenges the administrative law judge's finding on this issue, arguing that claimant withdrew from the workforce for orthopedic, not pulmonary, reasons and, therefore, is a voluntary retiree, entitled only to compensation pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1994), for his pulmonary condition.

Retirement is defined as a situation wherein a claimant has voluntarily withdrawn from the workforce with no realistic expectation of return. *See* 20 C.F.R. §702.601(c). Under the Act as amended in 1984, when an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability based on the extent of medical impairment under American Medical Association (AMA) guidelines and is not based on economic factors. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2) (1994); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *McLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988). Claimant is a voluntary retiree if he withdraws from the workforce for reasons other than the condition which is the subject of the claim. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990). Claimant may be considered a voluntary retiree and receive benefits under Section 8(c)(23) even if a medical condition or other factor provided the impetus for his retirement as long as the occupational disease for which benefits are sought did not cause claimant's withdrawal from the workforce. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

Where, however, a claimant's retirement is due, at least in part, to his occupational disease, claimant is not a voluntary retiree and the post-injury provisions at Sections 2(10), 8(c)(23) and 10(d)(2) do not apply. *See Pryor v. James McHugh Const. Co.*, 18 BRBS 273 (1986); *McDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). In such cases, where claimant establishes he is unable to perform his prior job due in part to an occupational disease, he has established a *prima facie* case of disability. Under these circumstances, claimant is entitled to an award based on his loss of wage-earning capacity and may therefore be entitled to permanent total disability compensation pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a). *See generally Smith v. Ingalls Shipbuilding Div./Litton Systems Inc.*, 22 BRBS 46 (1989); *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987). Consequently, in the instant case, determining the proper award of benefits under Section 8 depends upon whether the administrative law judge's finding that claimant left work due, at least in part, to his pulmonary problems is supported by substantial evidence. *See Frawley v. Savannah Shipyards Co.*, 22 BRBS 328 (1989).

On appeal, employer acknowledges an administrative law judge's prerogative to credit a claimant's testimony, but contends that the administrative law judge's determination that claimant retired at least in part due to his pulmonary condition ignores, if not contravenes, the medical evidence that claimant left work on December 15, 1987, due to his orthopedic problems and the extensive narcotics taken by claimant to relieve the pain associated with these problems. Employer also asserts it neglects to account for the disability payments received by claimant from Marine Terminals for these conditions, social security records, and the lack of contemporaneous medical records reflecting that claimant was disabled by his pulmonary condition at that time. It is employer's contention that the evidence demonstrates that claimant retired due to his orthopedic problems on December 15, 1987, and that claimant's entitlement to benefits for his pulmonary condition must be determined under Section 8(c)(23). We reject employer's contentions, as the administrative law judge's decision is supported by substantial evidence.

Initially, the administrative law judge credited claimant's testimony. Claimant testified that without the presence of his pulmonary condition he would have returned to light duty work. *See* Tr. at 169. Moreover, claimant testified that, regarding his last day of employment, he felt "completely rotten and tired and just like I couldn't make it any more." *See id.* at 249. Claimant's description of his pulmonary condition when he left work in December 1987 is supported by the testimony of Dr. Dew, who treated claimant's pulmonary condition throughout this period and testified that he was relieved that claimant left the workforce at that time. Dr. Dew stated that he would have given claimant a total disability rating prior to December 1987, but that claimant wished to continue working. *See* CX 18. The determination that claimant's pulmonary condition was a cause of his leaving the workforce is further supported by Dr. Bernini's release of claimant to return to light duty work from an orthopedic standpoint in June 1989. *See* SSA 4. The settlement agreement for claimant's orthopedic conditions specifically states that claimant is permanently partially disabled by these conditions. *See* CSX 8. Thus, the administrative law judge's conclusion that claimant retired, at least in part, due to his pulmonary condition is supported by substantial evidence of record.[2] Accordingly, the administrative law judge's conclusion that claimant is not a voluntary retiree is affirmed. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978) *cert. denied*, 440 U.S. 911 (1979). Because claimant established he could not return to his former work at least in part due to the pulmonary condition which is the subject of this claim, he established a *prima facie* case for an award for permanent total disability compensation under Section 8(a) of the Act.

Concurrent Awards

[2]Employer's contention that Dr. Dew's opinion was not contemporaneous with claimant's leaving work in December 1987 is not a basis for a different result. As Dr. Dew was claimant's treating physician, the administrative law judge could properly credit his opinion regarding claimant's pulmonary condition in 1987. Moreover, even if claimant initially stopped working due to his orthopedic condition, no finding was made that those injuries alone were permanently totally disabling; the orthopedic claim was settled based on permanent partial disability. Employer, moreover, was not held liable for benefits until June 1989, when the temporary total disability for his orthopedic problems ended. Thus, the actual date of onset for permanent total disability benefits due to claimant's pulmonary condition was June 1989.

In his initial decision, the administrative law judge awarded claimant permanent total disability compensation commencing December 16, 1987, at which time claimant was also receiving compensation from Marine Terminals for his orthopedic condition. On reconsideration, the administrative law judge modified his initial award to reflect that claimant was not entitled to receive benefits from employer until June 23, 1989, the date on which Marine Terminals initially ceased making payments to claimant for temporary total disability for his orthopedic injuries; claimant does not dispute this determination. Employer contends on appeal that the administrative law judge erred by failing to similarly address an alleged double recovery received by claimant from May 4 through August 16, 1991. Claimant responds, asserting that these payments from Marine Terminals constituted an advance on his settlement award.[3]

It is axiomatic that a claimant may not be more than totally disabled. *See Rupert v. Todd Shipyards Corp.*, 239 F.2d 272 (9th Cir. 1956); *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989). In the instant case, employer argues that from May 4 through August 16, 1991, claimant was not only receiving total disability compensation for his pulmonary condition but also permanent partial disability benefits for his orthopedic condition, and that the total of these awards exceeds the statutory maximum under Section 6(a), 33 U.S.C. §906(a). *See Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995)[*Anderson*].

Where a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in a permanent total disability, he may receive concurrent awards for the two disabilities. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). The concurrent awards combined cannot exceed the 66 2/3 percent of average weekly wage maximum of Section 8(a). *Anderson*, 58 F.3d at 420, 29 BRBS at 102 (CRT). In the instant case, it appears that claimant received, from May 14 to August 16, 1991, $340.13 per week for his orthopedic injuries from Marine Terminals and $390.53 per week for his pulmonary injury from this employer resulting in a total of $730.66 per week, which employer alleges is $113.70 per week in excess of the statutory maximum.

[3]We note that claimant further argues that employer is precluded from raising this argument on appeal because it failed to raise it before the administrative law judge. Employer, however, did raise the issue of concurrent awards that may have resulted in claimant's receiving benefits in excess of those mandated under the Act. Accordingly, this issue is properly before us on appeal.

Claimant, in response to employer's assertions on appeal, avers that the payments received from Marine Terminals during this period of time were advances on the settlement agreement even though they were paid prior to the finalization of the agreement and Marine Terminals labeled them as permanent partial disability compensation payments on its LS-108.[4] As the administrative law judge did not address the conflicting evidence regarding this period of time, the instant case is remanded to the administrative law judge to consider the amount of compensation due during this period consistent with *Anderson*.

Exclusion of Evidence

Employer next contends that the administrative law judge erred in refusing to admit its evidence regarding the availability of suitable alternate employment into the record.[5] Specifically, the administrative law judge did not admit the testimony and report of Mr. Hang, a certified rehabilitation counselor. At the hearing, claimant presented a motion *in limine* objecting to employer's submission of evidence regarding the availability of suitable alternate employment based on employer's failure to answer interrogatories. In presenting his motion, claimant conceded that employer's witness had been timely identified within the 20-day period provided in the pre-trial order and the proffered report had been timely

[4]The settlement between claimant and Marine Terminals under Section 8(i) of the Act, 33 U.S.C. §908(i), was finalized in August 1991.

[5]Where, as in the instant case, a claimant establishes that he is unable to perform his usual employment, he has established a *prima facie* case of total disability and the burden shifts to employer to demonstrate the availability of suitable alternate employment. 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 Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp*., 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988).

served within the 10-day period allowed for the exchange of exhibits, Tr. at 140, and that he had made no motion for an order compelling response to his interrogatories under 20 C.F.R. §18.21.

The administrative law judge granted claimant's motion to deny admission of employer's evidence on the issue of suitable alternate employment because, even though disclosure of the witness was timely under the pre-trial order, employer's failure to respond to claimant's interrogatories, which included a request about evidence on residual wage-earning capacity, resulted in an "unfair and unnecessary shortening of time available for and actions to be taken by the claimant in preparation." Tr. at 148.

Section 702.338, 20 C.F.R. §702.338, provides that the administrative law judge has a duty to inquire fully into matters at issue and receive into evidence all relevant and material testimony and documents. Section 702.339, 20 C.F.R. §702.339, provides that administrative law judges are not bound by common law or statutory rules of evidence. The Board has interpreted these provisions as affording administrative law judges considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See Olsen v. Triple A Machine Shop, Inc.* 25 BRBS 40 (1991), *aff'd,* 996 F.2d 1226 (9th Cir. 1993)(table); *Wayland v. Moore Dry Dock,* 22 BRBS 177 (1988); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). Because the admission of evidence is discretionary, the Board may overturn such a determination only if it is arbitrary, capricious, or an abuse of discretion. *See generally Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990) *aff'd in pertinent part sub nom. Chavez v. Director, OWCP,* 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

In the instant case, employer complied with the time limits set in the pre-trial orders. Moreover, claimant was or should have been aware as early as 1988 that the availability of suitable alternate employment was at issue. Specifically, claimant's contention that he was unaware that any party believed he had a residual wage-earning capacity until receiving the pre-trial statement is unsupported by the record which contains evidence that the nature and extent of claimant's disability, which encompasses the issue of residual wage-earning capacity, if any, had been in dispute as early as employer's filing of its LS-207 on March 3, 1988. CEX 4. The administrative law judge's ruling thus effectively prohibited employer from presenting evidence specifically addressing a controverted issue. The administrative law judge's refusal to admit this evidence, which is essential to one of the central issues of the case, was an extreme sanction which is not warranted by the offense; if the administrative law judge believed that the interrogatories were crucial, the Act provides a means of enforcing an administrative law judge's orders. *See* 33 U.S.C. §927. Accordingly, the decision to exclude this evidence is reversed, as it is an abuse of discretion in violation of Section 702.338. *See Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). Accordingly, on remand, the administrative law judge must admit into the record and consider employer's evidence regarding the nature and extent of claimant's disability, and any evidence claimant offers in response.

Special Fund Relief

Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for a permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, if employer establishes:

> (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that the current disability is not due solely to the most recent injury.

Todd Pacific Shipyards Corp. v. Director, OWCP, 913 F.2d 1426, 1429, 24 BRBS 25, 28 (CRT)(9th Cir. 1990); *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993).

In his initial Decision and Order, the administrative law judge, noted that the Director stipulated to employer's entitlement to Section 8(f) relief should claimant establish his entitlement to permanent disability benefits and thus awarded employer such relief. In so doing, the administrative law judge limited employer's liability to claimant for permanent total disability compensation to 104 weeks commencing December 16, 1987. In his subsequent Decision on Director's Motion for Reconsideration following his conclusion that employer was not liable for payments until June 1989, the administrative law judge nonetheless reaffirmed this period of employer's liability. In support of his determination that employer was liable only for 104 weeks from December 16, 1987, the administrative law judge found that the statutory language refers to "an employer's liability," not "actual payment," and that, therefore, liability for claimant's benefits would transfer to the Special Fund upon the expiration of 104 weeks from December 16, 1987, regardless of whether employer actually paid compensation for less than 104 weeks. *See* Decision on Director's Motion for Reconsideration.

In his cross-appeal, the Director challenges the administrative law judge's decision to shift liability for claimant's benefits from employer to the Special Fund after employer paid benefits for six months, rather than the 104 weeks specified by the Act. In support of his position, the Director maintains that the language of the statute referred to by the administrative law judge is not contained in Section 8(f); rather, the Director maintains that Section 8(f) states that an employer must provide compensation for 104 weeks before its liability may be transferred to the Special Fund. We agree.

Section 8(f)(1) provides in pertinent part:

> In any case in which an employee having an existing permanent partial disability suffers injury, the employer **shall provide compensation** for such disability . . .
>
> If following an injury falling within the provisions of subsection

> (c)(1)-(20) of this section, the employee is totally and permanently disabled, and the disability is found not to be due solely to that injury, the employer **shall provide compensation** for the applicable prescribed period of weeks . . . .
>
> In all other cases of total permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer **shall provide compensation** payments or death benefits for one hundred and four weeks only. If following an injury falling within the provisions of subsection (c)(1)-(20) of this section, the employee has a permanent partial disability, ...
>
> The employer **shall provide compensation** for the applicable period of weeks provided for in that section for the subsequent injury, or for one hundred and four weeks, whichever is the greater, except that, in the case of an injury falling within the provisions of subsection (c)(13) of this section, the employer **shall provide compensation** for the lesser of such periods.

See 33 U.S.C. §908(f)(1).

Moreover, Section 8(f)(2) of the Act states in relevant part that:

> After cessation of the **payments** for the period of weeks provided for herein, the employee or his survivor entitled to benefits shall be paid the remainder of the compensation that would be due out of the special fund established in Section 944 of this title. . . .

See 33 U.S.C. §908(f)(2).

Thus, contrary to the statements rendered by the administrative law judge, Section 8(f)(1) and (2) of the Act do not refer to "an employer's liability;" rather, the Act unequivocally states that an employer **shall provide compensation** for a determined period of time. When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa,* 490 U.S. 296 (1989); *see Vinson v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 220 (1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Accordingly, inasmuch as Section 8(f) does not provide for the assumption of liability for a claimant's permanent disability benefits by the Special Fund after 104 weeks of an employer's liability but, rather, provides for such a transfer of

liability after employer provides compensation to claimant for the applicable number of weeks, we reverse the administrative law judge's decision to limit employer's liability to 104 weeks commencing December 16, 1987. Pursuant to the plain meaning of the words of Section 8(f), the administrative law judge's decision is modified to reflect that the Special Fund will assume liability for claimant's permanent disability benefits after employer has paid claimant 104 weeks of those benefits.

Attorney Fees

Finally, claimant's attorney has filed a request for an attorney's fee for services rendered in defense of this claim before the Board. Given our disposition of this case, an award of an attorney's fee for this work is premature. Claimant's counsel may refile his petition if the administrative law judge awards benefits on remand.

Accordingly, the administrative law judge's decision to exclude employer's evidence regarding suitable alternate employment is reversed, and the case is remanded for consideration of this issue consistent with this opinion. The case is also remanded for consideration of claimant's entitlement to benefits from May 4 through August 16, 1991, consistent with this opinion. The award of Section 8(f) relief is modified in accordance with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge