BRB No. 99-0518

JUAN A. BURNS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
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 on Remand - Denying the Application for Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Melissa R. Link (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Kristin Dadey (Henry L. Solano, Solicitor of Labor; Carol DeDeo, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Denying the Application for Section 8(f) Relief (96-LHC-1179) of Administrative Law Judge Richard K. Malamphy 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).

This case is before the Board for the second time. To briefly recapitulate the facts, claimant sustained an injury to his lower back on May 3, 1985, while working as a crane operator for employer, and as a result underwent three back surgeries. Claimant reached maximum medical improvement as of January 19, 1991. As a result of his work injury, claimant was unable to perform his pre-injury crane operator duties.

In his Decision and Order dated June 5, 1997, the administrative law judge found claimant entitled to permanent partial disability benefits commencing April 3, 1995. The administrative law judge further denied employer's request for relief under Section 8(f), 33 U.S.C. §908(f), of the Act, finding that although the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant's 1980 right knee injury resulted in a manifest, pre-existing permanent partial disability, employer failed to introduce evidence sufficient to establish that claimant's pre-existing knee condition materially and substantially contributed to his overall disability.

On appeal, employer challenged the administrative law judge's denial of Section 8(f) relief, arguing that the administrative law judge erred in failing to find that it satisfied the contribution element of Section 8(f). In its decision, the Board vacated the administrative law judge's denial of Section 8(f) relief, and remanded the case for further consideration of whether claimant's ultimate permanent partial disability is materially and substantially greater than that due solely to the work injury consistent with the standard set forth by the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997). *Burns v. Newport News Shipbuilding & Dry Dock Co.,* BRB Nos. 97-1386 and 97-1386A (July 7, 1998)(unpublished).[1]

[1]In addition, claimant appealed the administrative law judge's denial of permanent total disability benefits, contending that the administrative law judge erred in determining that employer established the availability of suitable alternate employment. The Board

affirmed the administrative law judge's determination that claimant is only partially disabled, and that issue is not before the Board in the present appeal.

On remand, the administrative law judge again denied employer's request for Section 8(f) relief, finding that employer failed to establish that claimant's ultimate permanent partial disability is materially and substantially greater because of his pre-existing knee condition.

On appeal, employer argues that the administrative law judge erred in concluding that it failed to satisfy the contribution element necessary for Section 8(f) relief, asserting that the opinions of Dr. Reid and Mr. Karmolinski, employer's vocational consultant, are sufficient to establish that claimant's ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted from the work injury alone. The Director responds, urging affirmance.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998); *Harcum II*, 131 F.3d at 1081, 31 BRBS at 166 (CRT); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

In order to satisfy the contribution element, an employer must show by medical or other evidence that the ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. We affirm the administrative law judge's conclusion that this standard is not met in this case. Pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, an employer may show that a preexisting disability renders a claimant's overall disability materially and substantially greater by quantifying the disability that ensues from the work injury alone and comparing it to the preexisting disability. *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131 (CRT); *see also Carmines*, 138 F.3d at 143-144, 32 BRBS at 55 (CRT); *Harcum II*, 131 F.3d at 1082-1083, 31 BRBS at 166-167 (CRT); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated in part on other grounds on recon.*, 32 BRBS 283 (1998) ; *Quan v. Marine Power & Equipment*, 31 BRBS 178 (1997), *aff'd sub nom. Marine Power & Equip. v. Dept. of Labor,* F.3d , 2000 WL 95994 (9th Cir. Jan. 31, 2000). Employer is not limited to medical evidence, but may also submit vocational evidence in an effort to meet its burden to establish the contribution element.

Harcum II, 131 F.3d at 1079, 31 BRBS at 164 (CRT).

Employer argues on appeal that the administrative law judge erred on remand in determining that the medical opinion of Dr. Reid and the vocational report of Mr. Karmolinski are insufficient to meet employer's burden to establish the contribution element. We disagree. In reconsidering Dr. Reid's opinion on remand, the administrative law judge found, pursuant to the opinion of the Fourth Circuit in *Carmines,* that this opinion is insufficient to satisfy the contribution element as there is no indication that Dr. Reid has provided medical treatment to claimant. As an initial matter, the Director concedes that the court's opinion in *Carmines* does not compel the automatic rejection of a physician's opinion solely on the basis that he did not treat the claimant.[2] Rather, the court's holding in *Carmines* requires the administrative law judge to determine whether there is a reasoned and documented basis for the medical opinion, and to evaluate such opinion in light of the evidence in the record considered as a whole. *See Carmines,* 138 F.3d at 140-141, 32 BRBS at 52 (CRT). We hold that any error by the administrative law judge in summarily rejecting Dr. Reid's opinion because he did not provide medical treatment to claimant is harmless inasmuch as the basis for Dr. Reid's opinion regarding contribution is contradicted by the credited testimony of employer's vocational expert, Mr. Karmolinski. Specifically, Dr. Reid opined that even with his back disability claimant would have been able to perform light and sedentary work in the open market, but that because of his knee condition, he would not be hired for many such jobs, *e.g.,* security guard where he must "walk a beat." EX-K at 2. Mr. Karmolinski, however, stated that claimant is capable of working as a security guard both when considering the work restrictions for the knee injury alone and when considering the restrictions for the combination of the back and knee injuries. *See* EX-G at 1.[3] As the credited evidence establishes that claimant is capable of working

[2]In *Carmines,* the court held that the opinion of a non-examining, non-treating physician, which was contradicted by the bulk of the medical evidence submitted by both parties, was insufficient as a matter of law to satisfy the Section 8(f) contribution requirement. *Carmines,* 138 F.3d at 140-141, 32 BRBS at 52 (CRT). The court emphasized that an administrative law judge may not merely credulously accept the physician's assertions, but must examine the logic of his conclusions and evaluate the evidence upon which those conclusions are based. *Id.*

[3]The Board previously rejected claimant's contention that Mr. Karmolinski's vocational evidence was deficient in that claimant's knee problems and various other medical conditions were not taken into account in identifying suitable alternate employment. The Board specifically noted, in this regard, that claimant's knee condition was considered in identifying alternate positions inasmuch as Mr. Karmolinski relied upon the physical

as a security guard, we hold that Dr. Reid's opinion regarding the effect of claimant's knee condition on his employability, which is premised on the unsupported assumption that claimant's knee condition precludes his eligibility for security guard work, does not satisfy the contribution requirement. *See generally Carmines,* 138 F.3d at 140-141, 32 BRBS at 52 (CRT).

The administrative law judge additionally found that Mr. Karmolinski's vocational evidence is insufficient to meet the contribution element inasmuch as he did not distinguish how claimant's pre-existing knee impairment caused limitations or restricted earning capacity beyond that of the restrictions due solely to claimant's back injury. Mr. Karmolinski performed a transferable skills analysis to discern what types and percentages of jobs were available to claimant based solely on his pre-existing knee injury, and based on his knee and back injury in combination.[4] He calculated that claimant's pre-existing knee injury resulted in a ten percent loss of access to the labor market and that his knee and back injuries considered in combination resulted in a 67 percent loss of access. Mr. Karmolinski stated, accordingly, that claimant's pre-existing condition significantly increased claimant's disability and the combination of the two injuries made claimant materially and substantially more disabled than if he had had the back injury alone. EX-G at 1.

The Board has recognized that vocational evidence regarding the types or percentages of jobs available to the claimant, first considering the effect of the pre-existing impairment alone and then considering the effect of the second, work-related injury, could, if properly credited, establish "the level of impairment that would ensue from the work-related injury alone," and thereby provide the administrative law judge with a basis to determine if claimant's ultimate permanent partial disability is materially and substantially greater than his disability caused by the work-related injury alone under *Harcum II*. *See Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, 121-122 (1998). In attempting to satisfy the contribution element with this kind of vocational evidence, however, employer must quantify the level of impairment that would ensue from the work-related injury alone, independent of the pre-existing injury. *See Carmines,* 138 F.3d at 139, 143, 32 BRBS at 51, 55 (CRT). The *Carmines* court emphasized that it is not enough to

---

restrictions imposed by claimant's treating neurosurgeon Dr. Garner, who incorporated prior restrictions relating to claimant's knee in his assessment of claimant's physical capacity. *See Burns v. Newport News Shipbuilding & Dry Dock Co.*, BRB Nos. 97-1386 and 97-1386A (July 7, 1998), *slip op.* at 3-4.

[4]Mr. Karmolinski also identified specific types of jobs that would be available to claimant based on his having only the knee injury and his having both the knee and the back injury.

show that the pre-existing condition led to a serious disability if the work-related injury, in and of itself, would have led to the same or greater disability. *Id.,* 138 F.3d at 139, 32 BRBS at 51 (CRT). The court accordingly stated that in quantifying the level of impairment that would ensue from the work-related injury alone, it is not proper simply to calculate the present disability and subtract the disability that resulted from the pre-existing injury. *Id.,* 138 F.3d at 143, 32 BRBS at 55 (CRT).

In *Farrell*, the vocational evidence presented by the employer consisted of a comparison of the claimant's loss in access to the labor market when considering, first, the work-related injury alone and, second, when considering the combination of the pre-existing impairment and the work-related injury. As this evidence showed the level of impairment that would ensue from the work-related injury alone, the Board held that it provided a basis for the determination of whether the claimant's ultimate permanent partial disability was materially and substantially greater than the disability caused by the work-related injury alone. *Farrell*, 32 BRBS at 121.

In the instant case, we hold that the administrative law judge rationally distinguished the vocational evidence in *Farrell,* which showed the level of impairment that would result from the work-related injury alone, from the vocational evidence herein, which provides no basis for discerning the level of claimant's impairment independent of the pre-existing knee injury. The vocational report in the present case compares claimant's loss in access to the labor market when considering his pre-existing knee impairment alone with the loss in access when considering the combination of his knee injury and his work-related back injury. Employer's reliance on the fact that the combination of claimant's knee and back injuries significantly increased his loss of job opportunities, when compared to the loss of opportunities resulting from the knee injury alone, is misplaced in light of the *Carmines* ruling that the level of impairment resulting from the work-related injury alone cannot be calculated by subtracting the disability resulting from the pre-existing condition from the claimant's present disability. *See Carmines,* 138 F.3d at 143, 32 BRBS at 55 (CRT). We therefore affirm the administrative law judge's conclusion that employer has not provided any basis for determining whether claimant's ultimate permanent partial disability is materially and substantially greater than would have ensued from his back injury alone. *Id.*

Accordingly, the administrative law judge's denial of Section 8(f) relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge