BRB Nos. 92-2098

JAMES E. JONES	)	
	)	
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 Denying Petition for Relief Under Section 8(f) of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason, Newport News, Virginia, for the self-insured employer.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Petition for Relief Under Section 8(f) (89-LHC-3204) of Administrative Law Judge Michael P. Lesniak 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 which 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 14, 1984, claimant fell down a flight of stairs while working for employer as a sheet metal specialist, injuring his lower back. As a result of the injury, claimant underwent three

separate laminectomies. Employer voluntarily paid claimant temporary total disability and temporary partial disability compensation for various periods. Claimant sought permanent total disability compensation and payment of medical expenses under the Act. Prior to the formal hearing, employer agreed to pay claimant permanent total disability compensation based upon an average weekly wage of $472.95 commencing September 24, 1991, and medical benefits. The only issue pending for adjudication before the administrative law judge was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.

In his Decision and Order, the administrative law judge denied employer Section 8(f) relief. Employer alleged Section 8(f) entitlement based on four pre-existing conditions -- a 1983 back injury, degenerative arthritis, hearing loss, and hypertension. The administrative law judge found, however, that only the latter two conditions constituted pre-existing permanent partial disabilities[1] for Section 8(f) purposes and that these conditions were manifest to employer via its clinic records. Rejecting the medical opinion of Dr. Harmon that claimant's hypertension and hearing loss would prevent him from performing several jobs in the labor market as conclusory in favor of work capacity evaluations performed by two vocational services, the administrative law judge found, however, that employer did not meet its burden of establishing that these conditions contributed to claimant's ultimate disability and he denied Section 8(f) relief. Employer appeals the denial of Section 8(f) relief. Director responds, urging affirmance.

Section 8(f) relief is available to employer if it establishes: 1) that the claimant suffered from a pre-existing permanent partial disability; 2) that the pre-existing permanent partial disability was manifest to the employer; and 3) that the claimant's ultimate permanent disability is not due solely to the last injury, but results from a combination of that injury and the prior permanent partial disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd on other grounds*, 63 U.S.L.W. 4213 (U.S. March 21, 1995); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984).

On appeal, employer initially challenges the administrative law judge's finding that claimant's 1983 back injury and degenerative arthritis did not result in a pre-existing permanent partial disability for Section 8(f) purposes. With regard to the 1983 back injury, employer specifically avers that the administrative law judge ignored a statement made by claimant in his affidavit which indicated that he has suffered from continual back problems since the June 1983, back injury, thereby establishing that this injury was "serious and lasting." Emp. Ex. 1. Employer further contends that the administrative law judge erred in failing to credit Dr. Harmon's "uncontested" opinion that claimant's 1983 back injury was permanent and serious. With regard to claimant's degenerative arthritis, employer asserts that claimant's testimony, indicating that his degenerative arthritis pre-existed the subject work injury and that severe work restrictions were imposed on him due to his back condition and degenerative arthritis, is sufficient to establish that

[1]The administrative law judge noted that the Director conceded that these two conditions met the criteria.

this condition was also a pre-existing permanent partial disability under Section 8(f).

After review of the Decision and Order in light of the record evidence, we affirm the administrative law judge's finding that claimant's 1983 lower back injury did not result in a pre-existing permanent partial disability under Section 8(f). A pre-existing permanent partial disability for purposes of Section 8(f) must be a serious, lasting physical condition such that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability. *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see also Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992). In concluding that claimant's 1983 back injury did not result in a pre-existing permanent partial disability, the administrative law judge found that the only evidence that claimant suffered a lower back condition prior to his final injury were chart notes indicating that claimant injured his back when he fell in June 1983.[2] The administrative law judge further noted that although claimant sought medical attention for his back on one occasion immediately following the 1983 injury, he was able to continue working, and there was no indication that he sought further treatment. The administrative law judge thus concluded that as claimant's 1983 back injury did not produce any serious lasting physical problems, it was not a pre-existing permanent partial disability under Section 8(f). Although employer correctly asserts that the administrative law judge did not discuss Dr. Harmon's opinion that claimant 1983 back condition was permanent and serious in making this finding, any error is harmless, as the administrative law judge repeatedly discredited Dr. Harmon's opinion as conclusory in his decision. Inasmuch as the administrative law judge's finding that claimant's back injury did not establish entitlement to Section 8(f) relief is rational and supported by the record, it is affirmed. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

Employer's argument that the administrative law judge erred in finding that claimant's degenerative arthritis was not a pre-existing permanent partial disability is also rejected. The administrative law judge initially determined that although employer alleged that claimant had degenerative arthritis which pre-existed his 1984 injury, no medical evidence was presented which indicated the presence of degenerative arthritis prior to Dr. McCarthy's May 30, 1985, report. The administrative law judge then discredited the March 9, 1990, report of Dr. Harmon, the shipyard medical director, which stated that claimant's arthritis clearly pre-existed the 1984 work injury, finding it conclusory and unsupported by sufficient medical evidence as Dr. Harcum, in fact, cited Dr. McCarthy's 1985 report as the basis for his opinion.[3]

We affirm the administrative law judge's finding. The administrative law judge acted within his discretion in discrediting Dr. Harmon's opinion as conclusory, and this opinion is the only

[2]The medical records relating to the June 1983 back injury refer only passingly to the fact that claimant strained his lower back and left elbow after becoming dizzy and falling down. Emp. Ex. 2

[3]Dr. McCarthy's opinion reflected his diagnosis of degenerative arthritis, but did not discuss how long it had been present. Emp. Ex. 4.

medical evidence that claimant's pre-existing degenerative condition resulted in any serious lasting physical problem prior to the last injury. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Because the administrative law judge reasonably discredited this evidence, his finding that employer did not establish that this condition was a pre-existing permanent partial disability under Section 8(f) is affirmed. *See generally Director OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *Shrout v. General Dynamics Corp.*, 27 BRBS 160, 164 (1993). Contrary to employer's assertion, the statement in claimant's affidavit that he had severe work restrictions placed on him because of both his lower back condition and his degenerative arthritis, *see* Emp. Ex. 1(c), does not mandate a contrary finding, as it refers to the combined effects of claimant's degenerative arthritis and the subject injury on his ability to work post-injury and is silent regarding the severity of claimant's degenerative arthritis prior to his injury.

Employer also contends that the administrative law judge erred in failing to find that it established the contribution element of Section 8(f) with regard to claimant's pre-existing hypertension and hearing loss. In order to establish contribution, employer must demonstrate that the subsequent work injury alone was not the sole cause of claimant's permanent total disability. *See Harcum*, 8 F.3d at 185, 27 BRBS at 131 (CRT); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT) (9th Cir. 1993). If the later injury alone is sufficient to render claimant permanent totally disabled, the fact that his pre-existing condition may have made his total disability even greater is not dispositive. *See Director, OWCP v. Luccittelli*, 965 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir.1992); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT)(9th Cir. 1989); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1989).

In analyzing the contribution requirement in this case, the administrative law judge found Dr. Harmon's statement that claimant's hypertension and hearing loss would preclude claimant from performing jobs in the labor market such as telephone solicitor outweighed by reports from two vocational experts at the Sheltering Arms Vocational Industrial Services and the Riverside Rehabilitation Institute. The administrative law judge noted that both vocational reports attributed claimant's disability to his work injury and resultant surgeries and both indicated that claimant had no difficulty hearing, understanding directions, or otherwise performing in the workplace. *See* Emp. Exs. 7, 8. The administrative law judge also referenced an unpublished opinion of the United States Court of Appeals for the Fourth Circuit, *Newport News Shipbuilding & Dry Dock Co. v. Roughton*, No. 90-2157 (4th Cir. 1991) (unpubl.), in which the court affirmed another administrative law judge's finding that Dr. Harmon's conclusory opinion was insufficient to meet employer's burden of proof with regard to causation, and he found this result also appropriate here.

Employer argues on appeal that the administrative law judge erred in failing to consider the uncontradicted statement claimant made in his affidavit that his disability was not due totally to his work injury but was made materially worse by his pre-existing back injury, degenerative arthritis, hypertension, and hearing loss. Emp. Ex. 1(d). Employer further maintains that as the vocational experts also noted difficulties with claimant's following directions and requiring frequent cuing, Emp. Ex. 7, the administrative law judge erred in discounting Dr. Harmon's opinion based on the

vocational experts' opinions because they also indicate a significant hearing disability. Finally, employer asserts that the administrative law judge improperly focused on an unpublished Fourth Circuit decision which is not binding precedent.

The administrative law judge's finding that employer failed to establish contribution is affirmed. Initially, Dr. Harmon's opinion does not address whether the work-related injury was itself totally disabling, and is thus insufficient to support a finding of contribution as a matter of law. *Harcum*, 8 F.3d at 185, 27 BRBS at 131 (CRT). We thus need not address employer's specific contentions regarding the administrative law judge's treatment of Dr. Harmon's opinion. Contrary to employer's assertions, the vocational expert at Sheltering Arms noted that claimant had no difficulty following directions and the statement regarding claimant's requiring cuing, also contained in the Sheltering Arms report, was made in reference to claimant's body mechanics in lifting and not in regard to claimant's hearing. *See* Emp. Ex. 7(c). While employer correctly asserts that the administrative law judge neglected to discuss claimant's affidavit statement, we agree with the Director that this conclusory statement alone is insufficient to meet employer's burden. As the administrative law judge committed no reversible error in evaluating the evidence in this case, his determination that employer did not establish the contribution element in this case is affirmed. *See CNA Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). Consequently, the denial of Section 8(f) relief is also affirmed, as it is supported by substantial evidence.

Accordingly, the Decision and Order Denying Petition for Relief Under Section 8(f) of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge