

BRB No. 98-1392

EMILE J. MATHERNE)
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 Claimant-Respondent)
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 v.)
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 SGS CONTROL SERVICES) DATE ISSUED: July 21, 1999
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 and)
)
 CNA INSURANCE COMPANIES)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Relief of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Thomas J. Smith and J. McCaleb Builbro (Galloway, Johnson, Tompkins & Burr), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Relief (97-LHC-1167) of Administrative Law Judge James W. Kerr, Jr., 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 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a ship inspector, suffered a work-related injury on July 10, 1994, when he slipped while descending a ladder; as a result of this work-incident, claimant suffered a shoulder strain with secondary adhesive capsulitis. The parties thereafter agreed that claimant is entitled to permanent partial disability compensation and medical benefits. See 33 U.S.C. §§908(c)(21), 907. Thus, before the administrative law judge, the only issue presented for adjudication was whether employer is entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge initially found that claimant's coronary heart disease constituted a manifest, pre-existing permanent partial disability for Section 8(f) purposes. The administrative law judge next concluded, however, that any permanent disability claimant suffered as a result of his July 1994 work accident was subsumed into the pre-existing disability caused by his heart condition, and, therefore, employer failed to establish the contribution element necessary for relief from the Special Fund. Accordingly, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in denying it relief from continuing liability for compensation pursuant to Section 8(f). Specifically, employer asserts that the administrative law judge erred in concluding that it failed to establish the contribution element necessary for such relief.

Section 8(f) shifts the liability to pay 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 partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141 (CRT)(5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146 (CRT)(5th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 31 BRBS 155 (CRT)(1st Cir. 1997); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*,

459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996).

For the reasons that follow, we hold that the administrative law judge's decision must be vacated, and the case remanded, as the decision is not in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe*, 380 U.S. at 359. In support of its application for Section 8(f) relief, employer relied upon the testimony and opinions of Drs. Garoutte and Bhansali. In summarizing the medical evidence of record, the administrative law judge initially found that

Dr. Garoutte noted that he would agree that the combination that results from the shoulder and heart condition would be greater than if Claimant just suffered from the shoulder condition if he were to take into account that Dr. Bhansali restricted Claimant to sedentary work in relation to his heart condition. Based on Dr. Bhansali's records and his examination, Dr. Garoutte admitted that Claimant's current disability is not due solely to his shoulder condition but to a combination of his heart and shoulder condition. Dr. Bhansali indicated that Claimant's current disability is materially and substantially greater than that which would have resulted from the shoulder injury alone assuming Dr. Bhansali has assigned the added restrictions above.

Decision and Order at 6. Thereafter, in specifically addressing the contribution element of Section 8(f), the administrative law judge concluded that claimant's July 1994 work-related shoulder injury created no greater disability than that already resulting from claimant's pre-existing condition, *i.e.*, claimant's shoulder condition did not combine with his heart condition to create a greater disability. Specifically, the administrative law judge relied upon the testimony of Dr. Bhansali, who opined that claimant's heart condition was as disabling now as when he first examined and imposed greater physical restrictions upon claimant based on his heart condition than those resulting from his shoulder injury. RX 2; Decision and Order at 8. Based upon the conclusion that in essence, the heart condition was more disabling than the subsequent work-related injury, the administrative law judge thus found that employer failed to establish the contribution element.

Contrary to the administrative law judge's rationale, however, in order to establish the Section 8(f) contribution element in cases involving permanent partial disability, employer must demonstrate that claimant's compensable disability was

made materially and substantially greater as a result of his *prior* disability, in this case claimant's heart condition, than was due to his shoulder injury alone. *Two R Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990). Evidence that the shoulder injury resulted in lesser restrictions, *i.e.*, light duty work, than the prior heart condition, *i.e.*, sedentary work, is relevant and, if credited, would be sufficient to meet this standard. The administrative law judge erred here in reversing the inquiry and focusing on whether claimant's July 1994 work injury materially and substantially increased his disability above that due to his pre-existing heart condition. The relevant inquiry involves determining the degree of disability which would be due to the second injury alone and then determining whether that disability is materially and substantially increased by a prior condition to result in claimant's ultimate disability. We accordingly vacate the administrative law judge's determination that employer is not entitled to Section 8(f) relief since his consideration of this issue was not in accordance with the applicable legal standard for establishing contribution in cases involving a permanent partial disability. The case is remanded for the administrative law judge to determine whether employer has established that claimant's compensable disability due to his shoulder was made materially and substantially greater as a result of his prior disabling heart condition. *Ladner*, 125 F.3d at 303, 31 BRBS at 146 (CRT).

Accordingly, the administrative law judge's Decision and Order is vacated and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge