BRB No. 03-0454

WARREN DUFOUR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
FRALEY ASSOCIATES	)	
	)	
	)	
and	)	
	)	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY	)	DATE ISSUED:MAR 17, 2004
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of Decision and Order on Third Remand Denying Section 8(f) Relief of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Christopher J. Field (Field Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for employer/carrier.

Jim C. Gordon, Jr. (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand Denying Section 8(f) Relief (1993-LHC-1598) of Administrative Law Judge Gerald M. Tierney 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).

This case is before the Board for the fourth time. Claimant, who worked as a dockbuilder for employer, suffered a work-related neck and back injury on August 29, 1986. In November 1986, Dr. Sawyer, an orthopedic surgeon, diagnosed claimant as suffering from a bulging disc at the L4-5 level due to degenerative disc disease, a congenitally narrow spinal canal, back strain, and right radiculopathy. Claimant returned to work on December 26, 1986, but on that day experienced back pain when he attempted to pick up a 70-80 pound ladder. After a negative MRI reading on April 7, 1987, Dr. Sawyer opined that claimant suffered from a simple back strain. Based on claimant's feeling that he was not capable of his former work, Dr. Sawyer suggested that claimant consider another form of employment. Claimant continued to experience symptoms of pain, and by December 1989, he was diagnosed by Dr. Kasper as suffering from chronic lumbar syndrome and spinal stenosis. In October 1990, Dr. Kasper opined that claimant would not be able to perform any manual labor in the future. Employer voluntarily paid claimant temporary total disability compensation from September 9, 1986 through March 27, 1988, temporary partial disability compensation from March 28, 1988 through September 13, 1988, and permanent partial disability compensation from September 14, 1988 and continuing at a rate of $430.93.

In his original Decision and Order, the administrative law judge awarded claimant permanent partial disability compensation under 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). The administrative law judge also awarded employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).[1] The Director, Office

[1] An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that 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); *see 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); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *see also Pennsylvania*

of Workers' Compensation Programs (the Director), appealed this decision, and the administrative law judge's 1994 Decision and Order-Awarding Benefits was administratively affirmed by the Board. *See* Pub.L.104-134, 110 Stat. 1321 (1996). The Director appealed the administrative law judge's decision to the United States Court of Appeals for the Third Circuit, which subsequently remanded the case to the administrative law judge pursuant to the agreement of the Director and employer that the administrative law judge's finding regarding the aggravation of a pre-existing disability was insufficient as a matter of law to establish the contribution element of Section 8(f) relief.

On remand, the administrative law judge found that claimant's permanent partial disability occurred as a result of the December 1986 accident alone, and therefore denied employer Section 8(f) relief. Employer appealed the denial of Section 8(f) relief. Both employer and the Director requested that the administrative law judge's decision be vacated and the matter remanded as the decision did not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). The Board observed that the administrative law did not discuss his prior findings or provide any reasoning for reversing his 1994 factual conclusions, and he did not fully analyze the evidence under the applicable legal standard for determining entitlement to Section 8(f) relief. *Dufour v. Fraley Associates*, BRB No. 99-0387 (Jan. 7, 2000)(unpub.). Consequently, the Board vacated the administrative law judge's 1998 finding that claimant's permanent partial disability is the result of the December 1986 injury alone, and remanded the case.

On second remand, the administrative law judge initially determined, via application of the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant sustained a second injury as a result of his work accident on December 26, 1986. The administrative law judge found that Section 8(f) applied because claimant had a pre-existing disability as a result of his congenital spinal stenosis and August 29, 1986, work-related back injury, that was manifest to employer and which, combined with the most recent work-related back injury sustained on December 26, 1986, resulted in a greater degree of permanent disability than claimant would have incurred from the last injury alone. Accordingly, the administrative law judge granted employer's request for Section 8(f) relief. The Director appealed this decision.

Tidewater Dock Co. v. Director, OWCP, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000).

The Board again remanded the case, first holding that the administrative law judge must determine, without the benefit of the Section 20(a) presumption, whether employer established that a second work-related injury occurred in December 1986, or whether claimant's back condition after December 26, 1986, was the result of the natural progression of claimant's prior back injury. The Board also instructed the administrative law judge to reconsider the contribution element under the proper legal standards. *Dufour v. Fraley Associates,* BRB No. 01-0835 (July 25, 2002) (unpub.).

In his Decision and Order on Third Remand Denying Section 8(f) Relief, the administrative law judge again found that claimant's sustained an injury at work on December 29, 1986, which aggravated his previous back injury. The administrative law judge also found that claimant's August 1986 injury and congenital spinal stenosis resulted in a manifest, pre-existing permanent back disability within the meaning of Section 8(f). Nonetheless, the administrative law judge denied employer Section 8(f) relief, finding that the opinions of Dr. Sawyer and Dr. Hochberg are insufficient to establish the element of contribution.

On appeal, employer presents a challenge only to the administrative law judge's finding that Dr. Hochberg's opinion is insufficient to establish the contribution element for Section 8(f) relief. The Director responds, urging affirmance of the administrative law judge's decision.

In order to establish the contribution element in a case where a claimant is permanently partially disabled, employer must establish that claimant's permanent disability is not due solely to the subsequent work-related injury and is "materially and substantially greater" than that which would have resulted from the subsequent work-related injury alone. 33 U.S.C. §908(f)(1); *see 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); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP,* 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000). Dr. Hochberg stated in an October 29, 1991, report that:

> Prior to the second accident of 12/26/86, [claimant] had a pre-existent permanent partial disability from prior injuries of 1986. This was aggravated and made worse by the 12/26/86 injury, which makes his current disability materially and substantially greater because of the pre-existent permanent partial disability than it would have been from the injury of 12/26/86 alone.

CX 19. The administrative law judge found this opinion to be poorly reasoned, in that Dr. Hochberg does not explain how claimant's congenital spinal stenosis contributed to

his present disability, nor does he explain why the August 1986 injury was not the sole cause of claimant's disability, or how the two work injuries each affected the present disability. Decision and Order at 7, 11. The administrative law judge thus concluded that employer failed to establish that claimant's pre-existing disability "materially and substantially" worsened claimant's present disability.

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and to draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The administrative law judge therefore acted within his discretion in finding Dr. Hochberg's opinion to be insufficiently reasoned. *See Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 427, 37 BRBS 17(CRT)(4th Cir. 2003). Contrary to employer's contention, the administrative law judge is not required to accept an uncontradicted medical opinion. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Furthermore, the administrative law judge rationally found that Dr. Hochberg's opinion is not sufficient to permit him to ascertain whether the pre-existing disability materially and substantially worsened claimant's current disability, and that, therefore, Dr. Hochberg's opinion is legally insufficient to support employer's claim for Section 8(f) relief. *See Ladner*, 125 F.3d 303, 31 BRBS 146(CRT); *see generally Pennsylvania Tidewater Dock*, 202 F.3d 656, 34 BRBS 55(CRT). As the administrative law judge's finding that employer did not establish the contribution element for Section 8(f) relief is rational, supported by substantial evidence, and in accordance with law, it is affirmed.

Accordingly, we affirm the administrative law judge's Decision and Order on Third Remand Denying Section 8(f) Relief.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge