BRB No. 00-0309

HURLEY JONES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Nov. 8 , 2000
	)	
	)	
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 Awarding Benefits to the Claimant and Denying Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C. 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits to the Claimant and Denying Section 8(f) Relief (1999-LHC-1091) 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 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 April 1, 1992, claimant, who has a history of back ailments, sustained a back injury while in the course of his employment for employer. In his Decision and Order, the administrative law judge accepted the parties' stipulations regarding the nature and extent of claimant's disability and accordingly awarded claimant permanent total disability compensation. 33 U.S.C. §908(a). Thus, the only issue in dispute before the administrative law judge was employer's entitlement to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In addressing employer's request for Section 8(f) relief, the administrative law judge found that although the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant's pre-existing back condition had been manifest to employer, employer failed to establish the contribution element necessary for Section 8(f) relief to be granted. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

On appeal, employer argues that the administrative law judge erred in finding that it failed to satisfy the contribution requirement of Section 8(f). The Director responds, agreeing with employer that the administrative law judge erred in his discussion of the contribution element; accordingly, the Director urges the Board to vacate the administrative law judge's decision and remand the case for further fact-finding under the appropriate legal standard.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent total disability is not due solely to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Maryland Shipbuilding &*

Dry Dock Co. v. Director, OWCP, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980). *See also E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993) *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

In challenging the administrative law judge's determination that it did not satisfy the contribution requirement, employer contends, and the Director agrees, that the administrative law judge erred by applying the standard for determining this element in permanent partial disability cases.[1] We agree. In order to establish the contribution element of Section 8(f) in a case involving permanent total disability, employer must show that a claimant's subsequent injury alone would not have caused claimant's permanent total disability. *See Maryland Shipbuilding*, 618 F.2d at 1082, 12 BRBS at 77; *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Thus, a claimant's total disability must have been caused by both the work injury and the pre-existing condition; unless an employer can demonstrate such, it may not receive Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In cases involving permanent partial disability, however, Section 8(f) contains the additional requirement that claimant's ultimate permanent partial disability must be materially and substantially greater than that which would have resulted from the subsequent injury alone. In this case, as both parties assert, the administrative law judge applied the "materially and substantially greater" requirement as explicated by the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998), and *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*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995), in determining that in order to satisfy the contribution requirement, a physician must quantify the claimant's disability due to the last injury alone.[2] As neither Dr. Hall nor Dr. Foer

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[1]The Director acknowledges that he contributed to the administrative law judge's error, as he asserted the incorrect standard below.

[2]Specifically, the Fourth Circuit held that, in order to satisfy this requirement, an employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. The court stated that

> A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in

addressed this question, the administrative law judge concluded that employer failed to meet the criteria required by the Fourth Circuit for a grant of Section 8(f) relief. Decision and Order at 7-8. Thus, because the administrative law judge considered these medical opinions under the "materially and substantially greater" standard, we vacate his finding that employer failed to satisfy the contribution requirement and remand the case for reconsideration of the evidence consistent with the applicable standard for permanent total disability. *See Maryland Shipbuilding,* 618 F.2d at 1082, 12 BRBS at 77.

In rendering this determination, we reject employer's argument that, since the opinions of Drs. Hall and Foer are uncontradicted, the Board should reverse the administrative law judge's decision and award employer relief pursuant to Section 8(f).[3] Determinations regarding the weight accorded to medical evidence are the province of the administrative law judge. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). In this regard, in addressing the administrative law judge's discretionary authority as fact-finder, the Fourth Circuit has stated that an administrative law judge may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based. *See Carmines*, 134 F.3d at 140, 32 BRBS at 52 (CRT). Thus, in *Carmines*, the court rejected employer's argument that its doctor's opinion must be accepted because it was uncontradicted. Employer's argument on appeal is

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> the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Harcum, 8 F.3d at 185, 27 BRBS at 131 (CRT).

[3] Dr. Hall's medical report indicates his opinion that claimant's present medical condition is the result of the totality of his multiple back injuries. *See* EX 4. Dr. Foer subsequently issued a letter agreeing with Dr. Hall's opinion. *See* EX 9.

similarly rejected, as the administrative law judge is not required to credit the opinions of Drs. Hall and Foer. In the instant case, while the administrative law judge summarily stated that the "record does reflect that [claimant's] pre-1992 disability was a major factor in the level of impairment following the injury in April 1992," Decision and Order at 8, he found the opinions of Drs. Hall and Foer to be insufficient to satisfy the contribution element solely on the basis that they did not quantify the level of disability sustained by claimant as a result of his April 1, 1992 injury alone. As the administrative law judge did not specifically evaluate the credibility and reasonableness of Drs. Hall and Foer's opinions he must, on remand, exercise his authority as fact-finder to consider whether employer has submitted "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Richardson v. Perales*, 402 U.S. 389 (1971); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96 (CRT)(4th Cir. 1994).

According, the administrative law judge's Decision and Order is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge