BRB No. 02-0164

ELTON I. CRUMP	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 29, 2002
	)	
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 of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer.

Peter B. Silvain, Jr. (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-LHC-02497) of Administrative Law Judge Fletcher E. Campbell, 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 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 second time. Claimant, a sheet metal worker, injured his back at work on October 15, 1985. Claimant receives permanent partial disability benefits pursuant to the parties' stipulation. Initially, the administrative law judge denied employer's claim for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), as untimely filed by granting the motion for summary decision filed by the Director, Office of Workers' Compensation Programs (the Director), and denying employer's cross-motion for summary decision.

In *Crump v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 00-0139 (Oct. 3, 2000)(unpub.), the Board vacated the administrative law judge's Order granting the Director's motion for summary decision, and held that employer's application for Section 8(f) relief was timely filed. After vacating the administrative law judge's decision, the Board remanded "the case for a hearing to determine employer's entitlement to Section 8(f) relief." *Crump*, slip op. at 4.

On remand, the administrative law judge did not hold an oral hearing and denied employer Section 8(f) relief, finding that it did not establish the contribution element based on the documentary evidence admitted into the record. On appeal, employer challenges the administrative law judge's failure to hold an oral hearing and his denial of Section 8(f) relief. The Director has filed a response brief.

Employer initially contends that the administrative law judge erred in not conducting an oral hearing on remand as directed by the Board. Generally, a party has a right to an oral hearing where it requests one and does not waive its rights to such hearing. *See* 33 U.S.C. §919(c), (d); 5 U.S.C. §§554(c)(2); 556(d); 20 C.F.R. §702.346. The waiver of the right to an oral hearing must be in writing, and it must be voluntary and intentional.[1] *See Moran v. Carbon Fuel Co.*, 3 BRBS 302, 307

[1]Section 702.346 states,

> If all parties waive their right to appear before the administrative law judge or to present evidence or argument personally or by representative, it shall not be necessary for the administrative law judge to give notice of and conduct an oral hearing. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge. Where such a waiver has been filed by all parties, and they do not appear before the

(1976); 20 C.F.R. §702.346.

> administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant written evidence submitted by the parties, together with any pleadings they may submit with respect to the issues in the case. Such documents shall be considered as all of the evidence in the case and the decision shall be based on them.

20 C.F.R. §702.346.

The procedural history of this case was set out in the Board's previous Decision and Order, and it is necessary to reiterate it to resolve the first issue in this appeal. In 1996, the administrative law judge issued an order waiving the oral hearing upon employer's request that he do so. Dir. Exs. 4, 5. Subsequently, that same year, the administrative law judge remanded the case to the district director upon employer's request. Dir. Exs. 9-15. Employer requested the remand because it was unable to obtain claimant's agreement to certain stipulations concerning the permanent partial disability benefits being paid to claimant. *Id.* On June 10, 1999, employer again requested a referral to the Office of Administrative Law Judges (OALJ) after the district director denied its request for Section 8(f) relief. Dir. Exs. 1, 16. Employer supplemented its Section 8(f) application with the reports of Ms. Edwards and Dr. Garner and submitted its pre-hearing statement identifying six witnesses and five sets of documentary evidence it intended to submit at a proposed one hour hearing where the sole issue for resolution would be its entitlement to Section 8(f) relief.[2] *Id.* On July 13, 1999, the case was referred to the OALJ for a formal hearing. Dir. Ex. 2. Employer posed interrogatories to the Director on July 19, 1999, requesting that the Director identify the witnesses expected to testify and summarize their testimony. Dir. Ex. 18 at 6-7. The Director filed a motion for summary decision on August 18, 1999, asserting that employer's claim for Section 8(f) relief was untimely filed. Employer filed a cross-motion for summary decision on August 25, 1999, asserting that its Section 8(f) application was timely filed, and that it is entitled to Section 8(f) relief because the Director submitted no contrary evidence in response to the opinions of Drs. Garner and Reid, and Ms. Edwards. Subsequent to the administrative law judge's conclusion that employer's Section 8(f) application was untimely filed on October 7, 1999, and the Board's reversal of that conclusion on October 3, 2000, employer renewed its prior motion for summary decision on October 5, 2000, after the Board remanded the case to the administrative law judge. On remand, the administrative law judge did not rule on employer's renewed motion for summary decision and did not hold an oral hearing but did admit employer's documentary evidence into the record. Upon consideration of this evidence, the administrative law judge denied employer Section 8(f) relief on the merits.

We agree with employer that it did not waive its right to an oral hearing.

[2]The witnesses were identified as Drs. Reid and Garner, Ms. Edwards, claimant, his treating physicians, and claimant's supervisor. Dir. Ex. 1. The documentary evidence was identified as records from claimant's treating physicians, employer's medical clinic, and the Office of Workers' Compensation Programs (OWCP), as well as interrogatory answers and depositions, and a surveillance film. *Id.*

Although an oral hearing was waived in writing by employer in 1996 when this case was first before the OALJ, there is no evidence of record to indicate that employer waived its right to an oral hearing when the case was again referred to the OALJ in 1999 or thereafter. Employer's 1999 pre-hearing statement identified witnesses it would have testify and stated that the proposed oral hearing would take one hour. This pre-hearing statement does not demonstrate any intention on the part of employer to waive its right to an oral hearing. Moreover, employer's posing of interrogatories to the Director requesting identification of that party's witnesses and the substance of their testimony also shows no intent on the part of employer to waive its right to an oral hearing. Furthermore, employer did not renew in writing its 1996 request to waive an oral hearing when this case was referred a second time to the OALJ in 1999. Based on these documents, we cannot agree with the Director that employer's waiver in 1996 remained valid, and we hold that employer did not waive its right to an oral hearing on remand as it did not intentionally request such a right in writing in 1999 or thereafter.[3] *See Moran,* 3 BRBS at 307; 33 U.S.C. §919(c), (d); 5 U.S.C. §§554(c)(2); 556(d); 20 C.F.R. §702.346. Consequently, we vacate the administrative law judge's Decision and Order on Remand and remand this case to the administrative law judge to hold an oral hearing in this matter.

Employer also contends that the administrative law judge erred in denying it Section 8(f) relief after finding that it did not establish the contribution element. To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to 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

[3] We, however, reject employer's contention that the Board's Decision and Order remanding the case for " a hearing" mandated that the administrative law judge hold an oral hearing. The Board's decision reversed a grant of summary decision, which was granted based on the pleadings, rather than on any documentary evidence admitted into the record. The Board's decision required only that the administrative law judge "hold a hearing" in the sense that he admit the parties' evidence into the record and base his decision on such evidence.

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); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.* The administrative law judge found that claimant's manifest, pre-existing, permanent partial disabilities were to his right arm and back, but found that they did not materially and substantially exceed the disability resulting from the work injury alone. Thus, the administrative law judge concluded that employer did not establish the contribution element and is not entitled to Section 8(f) relief.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed the contribution standard in several cases. In *Harcum I*, 8 F.3d 175, 27 BRBS 116 (CRT), the Fourth Circuit held that in order to establish contribution in a permanent partial disability case, 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 injury alone. The court stated that a showing of this kind requires quantification of the level of the impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131 (CRT). Subsequently, in *Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT), the Fourth Circuit applied the *Harcum I* holding in the context of an employer's seeking Section 8(f) relief for a permanent partial disability award to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of disability claimant would have suffered from the asbestosis alone, specifically holding that employer failed to meet its burden to quantify the disability that claimant would have suffered absent any pre-existing conditions. The court held that it is not proper simply to calculate the current disability and to subtract from this the disability that resulted from the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55 (CRT). The court stated that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Id.; see also Harcum II*, 131 F.3d 1079, 31 BRBS 164 (CRT).

In the instant case, the administrative law judge properly held that the opinion of Dr. Garner is legally insufficient to establish the contribution element as he does not quantify the disability that would ensue from the work injury alone. *See Carmines*, 138 F.3d at 140, 32 BRBS at 52 (CRT); *Harcum II*, 131 F.3d 1079, 31

BRBS 164 (CRT); *Harcum I*, 8 F.3d 175, 27 BRBS 116 (CRT); Decision and Order on Remand at 6-7; Emp. Ex. 8. Moreover, the administrative law judge rationally found that Dr. Garner's opinion is insufficient to establish the contribution element because his opinion was merely conjectural. *Id.* Dr. Garner stated in relevant part,

> I have reviewed the records in this case and do feel that previous injuries to his back did weaken his back to the point that he was predisposed to ultimately rupturing the disc that required surgery. With one of the injuries, *possibly* the motorcycle accident, he developed mild compression fractures of L1 and L2. Any injury that was severe enough to cause this certainly *could have* damaged the L5-S1 disc as well.

Emp. Ex. 8 (emphasis added). Thus, we reject employer's contention that the administrative law judge's treatment of Dr. Garner's opinion is in error.

The administrative law judge also acted within his discretion in finding that Dr. Reid's opinion is insufficient to establish the contribution element based on his determination that Dr. Reid may have been unclear as to which injury is the work injury, what injuries pre-existed it, and what injuries aggravated it. *See Carmines*, 138 F.3d at 140, 32 BRBS at 52(CRT)(deference is given to the credibility determinations of the administrative law judge who must evaluate the documentation underlying the conclusions of the medical experts); Decision and Order on Remand at 7; Emp. Ex. 6. In summary, Dr. Reid identified claimant's back and right arm injuries as manifest pre-existing permanent partial disabilities, noting claimant's 1979 initial back injury was re-injured on June 11, 1985, and October 15, 1985, and aggravated in 1986 and 1989. He stated that claimant had back surgery on December 10, 1985, and that the injury and surgery rates a minimum five percent permanent disability. Dr. Reid further stated that the manifest pre-existing permanent partial disabilities materially and substantially contribute to claimant's 1985 back disability; that the 1989 back injury was rather minor; and that if claimant had a normal back and no subsequent aggravations, he would have recovered without any permanent disability. Dr. Reid also stated that claimant's current disability is due to both the 1985 injury and subsequent aggravations in 1986 and 1989, and that with his back disability, he can perform light and sedentary work, but because of his right arm disability, he cannot perform fine manipulation assembly work. The administrative law judge rationally found that the credibility and probative value of Dr. Reid's opinion was reduced because the physician repeatedly referred to the 1986 and 1989 aggravations and not to the October 15, 1985, work injury. *See generally Carmines*, 138 F.3d at 170, 32 BRBS at 52(CRT).

Although the administrative law judge rationally found the opinions of Drs. Garner

and Reid insufficient to establish the contribution element of Section 8(f) relief,[4] we agree with employer that he erred in not considering Ms. Edwards's vocational opinion. Her opinion may be sufficient to establish contribution under the standard set forth in the Fourth Circuit; thus, remand is required for the administrative law judge to discuss and weigh Ms. Edwards's opinion to determine if it establishes the contribution element.[5] *See Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT)(9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997); *Harcum II*, 131 F.3d 1079, 31 BRBS 164 (CRT); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated on other grounds on recon.*, 32 BRBS 282 (1998); Emp. Ex. 7. In *Harcum II*, the Fourth Circuit held that the opinion of employer's vocational expert that claimant is unable to perform certain types of sedentary work because of his pre-existing cervical spine injury and would be able to earn $3.80 per hour with and $6 per hour without his pre-existing injury was sufficient to provide the administrative law judge with a basis to award Section 8(f) relief. *Harcum II*, 131 F.3d 1079, 31 BRBS 164 (CRT). In *Farrell*, the Board held that the opinion of employer's vocational expert, that claimant's pre-existing mental impairment caused him to lose post-injury an additional 17 percent of jobs labeled as "generally transferable" and an additional 27-28 percent of jobs labeled as "unskilled," establishes the level of impairment that would ensue from the work injury alone. *Farrell*, 32 BRBS 118. Concluding that the vocational opinion provided the administrative law judge with a basis for determining whether claimant's ultimate permanent partial disability is materially and substantially greater than his disability caused by the work injury alone, the Board remanded the case to the administrative law judge for further consideration. *Id.*

In the instant case, Ms. Edwards opined that claimant would be able to earn $5.50-$8.00 per hour if he merely had his back injury because he could perform tool repair and assembly-line work. However, Ms. Edwards further opined that with the back injury and his pre-existing arm injury, claimant is not able to perform the above work and is able to work only minimum wage jobs at $4.25 per hour. Because Ms. Edwards's opinion in the instant case is similar to the opinion given in *Harcum II*, and because her opinion, if credited, may be sufficient to provide the administrative law judge with a basis to award Section 8(f) relief,

[4]On remand, the administrative law judge may reconsider the opinions of Drs. Garner and Reid based on any new evidence admitted at the hearing.

[5]The Director concedes that remand is required for the administrative law judge to consider Ms. Edwards's opinion. Dir. Br. at 11-12.

we remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must determine whether Ms. Edwards's opinion establishes that claimant's current disability is materially and substantially greater as a result of his pre-existing right arm and back disabilities.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed as to his rejection of the opinions of Drs. Garner and Reid, based on the current record. The administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further consideration of employer's entitlement to Section 8(f) relief consistent with this decision. On remand, the administrative law judge must hold an oral hearing relating to employer's entitlement to Section 8(f) relief.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge