BRB No. 03-0111

ARTHUR R. FORD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 09/30/2003
	)	
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 Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Kathleen H. Kim (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting 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.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order (2000-LHC-0950) 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 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back at work on December 20, 1994. Claimant underwent back surgery in 1997. Claimant and employer stipulated that claimant is entitled to ongoing permanent partial disability benefits as a result of his injury. 33 U.S.C. §908(c)(21). The administrative law judge accepted the parties' stipulations, and thus the only issue remaining before the administrative law judge was whether employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law found that employer filed a timely application for Section 8(f) relief on May 24, 2002, because permanency was not at issue while the case was pending before the district director. 33 U.S.C. §908(f)(3). Next, the administrative law judge found that the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant's degenerative disc disease constitutes a pre-existing permanent partial disability which was manifest to employer prior to claimant's 1994 work-related back injury. Nonetheless, the administrative law judge denied employer Section 8(f) relief, finding it did not establish that claimant's ultimate permanent partial disability is not due solely to the 1994 work injury and is materially and substantially greater than the disability that would have resulted from his 1994 work-related injury alone. Therefore, the administrative law judge found that employer failed to establish the element of contribution, and he denied the claim for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in finding that the opinion of Dr. Apostoles is insufficient to establish the element of contribution. The Director responds, urging affirmance of the denial of Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent disability 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, as here, if it affirmatively establishes: 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 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*, 514 U.S. 122, 29 BRBS 87(CRT)(1995).

In order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. *See Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT). In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to show contribution, employer must quantify 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). In *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT), the court explained 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.

The Fourth Circuit recently addressed the contribution element and *Carmines* in two cases involving traumatic injuries.[1] In *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003), the claimant sustained work injuries in 1987, 1992, and 1995. Employer's physician, Dr. Reid, stated that claimant's injury was not caused by his 1995 injury alone, but that his disability was materially contributed to and made substantially worse by his pre-existing chronic back disability. Dr. Reid stated the 1995 injury was rather minor, and that if claimant had had a normal back, his 1995 injury would have resolved with no permanent disability. The Fourth Circuit first affirmed the finding that the 1987 and 1992 injuries were not pre-existing permanent partial disabilities for purposes of Section 8(f). The court nonetheless addressed the contribution element, "because of an error made by the ALJ in that connection." *Cherry*, 326 F.3d at 453, 37 BRBS at 9(CRT). Specifically, the court held that employer did, contrary to the administrative law judge's finding, introduce evidence, Dr. Reid's opinion, of contribution of the type required by *Carmines*. The court held however, that the administrative law judge rationally rejected the opinion as "'pure conjecture.'" *Id.*, 326 F.3d at 454, 37 BRBS at 10(CRT).

In *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003), the claimant injured his back (at L4-5) at work in 1987, had surgery, and returned to light duty. In 1989, claimant injured his back (at L5-S1) at work. It appears claimant remained partially disabled after another surgical procedure. Dr. Reid issued a report stating that the claimant's disability was not due to the 1987 injury alone, but was made materially and substantially worse due to the 1989 injury. Dr. Reid also stated that neither injury alone would have disabled the claimant from performing his

[1] *See also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003) (addressing *Carmines* in the context of occupational disease cases).

shipyard work, that if claimant had had a normal back when he suffered the second injury he would have been able to return to light work at the shipyard, and that the combination and cumulative effect of the two injuries disabled claimant from shipyard work. Citing *Cherry*, the Fourth Circuit stated that Dr. Reid's assessment of claimant's injuries "constitutes the type of evidence that *Harcum I* and *Carmines* deemed relevant to the quantification aspect of the Contribution Element." *Ward*, 326 F.3d at 441, 37 BRBS at 22(CRT). However, the court affirmed the administrative law judge's finding that Dr. Reid's opinion was generalized and conclusory, lacking in supporting explanation. The court stated that Dr. Reid's statements are far different from the "objective quantification" and clear descriptions present in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).[2] *Ward*, 326 F.3d at 442, 37 BRBS at 22(CRT).

On appeal, employer contends that the administrative law judge erred in finding that Dr. Apostoles's opinion does not quantify the respective impairments due to the first and second injuries and in rejecting this opinion because it is cursory and unreasoned. We hold that, in light of the opinions in *Cherry* and *Ward*, which were issued after the administrative law judge decided the instant case, the administrative law judge's denial of Section 8(f) relief must be vacated and the case remanded for reconsideration. Dr. Apostoles reviewed claimant's medical records and he first described claimant's pre-existing degenerative disc disease, the clinical findings with regard to this condition, and the symptoms claimant experienced therefrom prior to the work injury. EX 6. Dr. Apostoles then reviewed claimant's treatment following the work injury, which he stated was a musculoligamentous sprain that aggravated the underlying condition and rendered it "symptomatically worse." *Id.* Dr. Apostoles stated that claimant underwent fusion surgery after the work injury in order to stabilize the joint at the primary site of the degenerative disc disease. With regard to the contribution element, Dr. Apostoles stated that claimant's primary disability is due to the pre-existing degenerative condition and that the work injury was a musculoligamentous sprain that only aggravated the symptomotology. He stated that if claimant did not have the pre-existing degenerative condition, the work injury would have had no permanent effect on his back. Thus, the quantity of claimant's disability due to the pre-existing condition is "extremely high" and the quantity of disability due solely to the work injury is "lesser in nature and extent." *Id*. In view of *Cherry* and *Ward*, in which this type of evidence was found to be sufficient, if credited, to establish the contribution element, the administrative law judge on remand must reconsider the sufficiency of Dr. Apostoles's opinion.

[2] In *Harcum II*, employer presented vocational evidence to support its claim for Section 8(f) relief. The Fourth Circuit held that a vocational rehabilitation specialist's report discussing wage rates available to claimant with and without the pre-existing disability satisfied the quantification criterion, and, thus, established the contribution element of Section 8(f).

With regard to the creditability of Dr. Apostoles's opinion, the administrative law judge addressed only the last substantive paragraph of the opinion and stated that Dr. Apostoles gave a cursory discussion of the nature and degree of claimant's conditions. The administrative law judge also stated that the opinion was insufficient to allow him to examine the logic of Dr. Apostoles's conclusions. Decision and Order at 6. We cannot affirm this finding, as it is not apparent that the administrative law judge considered the totality of Dr. Apostoles's opinion wherein he discussed the permanent and serious nature of the pre-existing degenerative condition to the lumbar spine, as opposed to the work injury which was only a musculoligamentous sprain. Arguably, the logic of Dr. Apostoles's conclusion regarding the relative contributions of the pre-existing and work injuries may be ascertained from a review of the Dr. Apostoles's entire opinion.[3] Therefore, we vacate the administrative law judge's denial of Section 8(f) relief. On remand, the administrative law judge should reconsider whether employer established that claimant's disability is not due solely to the work injury and is materially and substantially worse due to the pre-existing degenerative condition than it would be due to the work injury alone, in light of *Cherry*, *Ward*, and consideration of Dr. Apostoles's entire opinion.

[3] Moreover, the administrative law judge erred in rejecting Dr. Apostoles's opinion because he did not examine claimant, as the physician stated which medical reports he reviewed in rendering his decision, and his opinion is not "totally contradicted" by any other evidence of record. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140 n.5, 32 BRBS 48, 52 n.5(CRT)(4th Cir. 1998), citing *Gordon v. Schweiker*, 725 F.2d 231, 235 (4th Cir. 1984).

Accordingly, the administrative law judge's Decision and Order denying Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to remand this case for reconsideration of Dr. Apostoles's letter. I would reverse the administrative law judge's decision denying Section 8(f) relief.

Dr. Apostoles opined: that claimant's work injury, a back sprain, would have resolved without any permanent effect, absent claimant's pre-existing condition; that the sprain aggravated claimant's pre-existing, degenerative lumbar condition;and that the pre-existing condition bore a far greater responsibility for the permanent disability than did the work injury. As the majority has demonstrated, Dr. Apostoles's opinion is sufficient to satisfy the Fourth Circuit's requirements for the contribution element of Section 8(f) relief. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT)(4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT)(1995) and *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). The only question is whether there is a valid basis on which to reject the doctor's conclusion. I do not think there is.

I believe that the majority's determination to remand the case for the administrative law judge to reconsider Dr. Apostoles's opinion unnecessarily delays resolution of this case because the administrative law judge was correct in stating that Dr.

Apostoles did not explain how the back sprain aggravated the pre-existing degenerative lumbar joint disease. Yet the truth of Dr. Apostoles's opinion on contribution is evident from the facts of the case, which are undisputed. After suffering a back sprain, claimant was totally disabled for three years and permanently partially disabled thereafter. The conclusion is inescapable that the principal cause of claimant's disability is his pre-existing, degenerative back disease. Because Dr. Apostoles's letter provided sufficient information to examine the logic of his conclusion and the evidence offers no basis for an alternative conclusion, *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the doctor's opinion establishes that claimant's ultimate, permanent partial disability is materially and substantially greater than the harm which claimant would have suffered from the work injury alone.[4] *Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT). Accordingly, employer has established entitlement to Section 8(f) relief and the administrative law judge's decision denying Section 8(f) relief should be reversed.

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REGINA C. McGRANERY
Administrative Appeals Judge

[4] Dr. Apostoles stated that the back sprain would not have had any permanent effect on claimant's back, much less, any disabling effect.