BRB No. 97-438

LARRY E. HEMPHILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL OIL AND GAS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
RELIANCE NATIONAL INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Ed W. Barton, Orange, Texas, for claimant.

Dixie Smith and Rick L. Rambo (Fulbright and Jaworski), Arlington, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (95-LHC-2858) of Administrative Law Judge Daniel L. Stewart 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), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 (the Lands 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).

Claimant sustained an injury to his back on June 3, 1991, while working for employer as an offshore electrician. He has not returned to gainful employment since that time. Prior to the June 1993 back injury, claimant had a heart attack at work in 1988 and underwent two angioplasty procedures. Employer voluntarily paid claimant temporary total disability compensation from July 8, 1991, to September 28, 1992, and permanent partial disability compensation from September 29, 1992, to April 8, 1996. Claimant sought temporary total disability benefits from the time of his injury until June 8, 1992, when Dr. Weil, his treating neurosurgeon, found that his back condition had reached maximum medical improvement, and permanent total disability benefits thereafter.

The administrative law judge awarded claimant the compensation sought, finding that claimant established a *prima facie* case of total disability based on the vocational and medical evidence, as well as his own testimony, and that employer failed to establish the availability of suitable alternate employment. The administrative law judge further found that employer was not entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's alleged spondylolisthesis and osteoarthritis of the lumbar spine, because it did not establish that these conditions were manifest prior to the work-related back injury.[1] The administrative law judge also determined that employer was not entitled to Section 8(f) relief based on claimant's prior 1988 heart attack and angioplasties because claimant's work-related back injury was itself totally disabling. [2] Accordingly, he denied employer Section 8(f) relief. This appeal followed.

[1]Employer does not challenge this finding.

[2]The administrative law judge stated that he made this finding on the assumption, but without deciding, that claimant met the other two elements for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief based on claimant's pre-existing heart problems, arguing that in finding employer failed to establish that claimant's pre-existing heart condition contributed to his disability, the administrative law judge erred in viewing disability under Section 8(f) as essentially an economic concept when in fact it has both medical and economic components . Employer further argues that despite overwhelming evidence that claimant's total disability is due to the combination of his severely disabling coronary artery disease and the 15 percent impairment of his back due to the June 1991 back injury, the administrative law judge erroneously found that the back injury alone caused his total disability. The Director, Office of Workers' Compensation Programs (the Director) has not responded to employer's appeal.[3]

Section 8(f) shifts the liability to pay compensation 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 claimant is permanently totally disabled if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Ceres Marine Terminal v. Director, OWCP [Allred]*, F.3d , 1997 U.S. App. Lexis 19809, No. 96-60716 (5th Cir. July 31, 1997); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1306, 26 BRBS 1, 7 (CRT) (2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP,* 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990). In demonstrating that claimant's permanent total disability is not due solely to the work injury, employer must present medical or other evidence sufficient to establish that claimant's total disability results from the combination of the work-related injury and the pre-existing permanent partial disability. *See Dominey v. ARCO Oil and Gas Co.*, 30 BRBS 134 (1996).

Employer's arguments in this case have merit. In determining that employer failed to satisfy the contribution requirement of Section 8(f), the administrative law judge found

[3]Claimant filed a response brief, stating that while he is not addressing Section 8(f), he asserts his entitlement to permanent total disability based on either the work injury alone or the combination of that injury and pre-existing conditions in the event the Board interprets employer's position as a challenge to his award. Claimant's entitlement to permanent total disability benefits is not raised by employer on appeal. *See* Petition for Review at 10. Accordingly, the arguments claimant raises in his response brief need not be addressed.

that claimant's June 1991 work injury alone caused his total disability because his determination that claimant was totally disabled was based solely on claimant's work restrictions due to his back injury without regard to any work restrictions caused by claimant's heart problems. *See* Decision and Order at 19, 26-27. As employer asserts in its brief, the basis for this conclusion appears to stem from the administrative law judge's erroneous determination that no evidence had been presented that the work-related accident had any aggravating effect on claimant's pre-existing heart problems and, accordingly, it would be inappropriate for him to consider any work restrictions based on claimant's heart condition in assessing the extent of claimant's disability. Decision and Order at 19, n.7. Contrary to the administrative law judge's determination, Dr. Weil, claimant's treating neurosurgeon, opined that because claimant had become deconditioned due to a lack of exercise following his back injury, his already limited cardiovascular condition was aggravated to the point that he was experiencing heaviness and fatigue which prevented or hampered him from engaging in physical therapy, work hardening, and physical activity in general. EX-8 at 22-23. In addition, claimant provided similar testimony. Tr. at 109-110, 112-117, 135-136. Although the administrative law judge cited this testimony in his recitation of the relevant evidence, he ignored it in finding that the record contained no evidence regarding the aggravating effect of claimant's back injury on his cardiac condition when he assessed the extent of claimant's disability.

Most importantly, however, while the administrative law judge stated that he had factored out claimant's restrictions due to his prior heart condition from those due to his back injury in determining that claimant was totally disabled, he did not in fact do so. In evaluating employer's evidence of suitable alternate employment, the administrative law judge relied on Dr. Haig's assessment of claimant's work restrictions, which were based on both claimant's back and his cardiac condition.[4] Tr. at 32-35; CX-4; Decision and Order

[4]Dr. Haig testified that it is important that claimant walk due to his cardiac status and ststed that he should not lift over 10 to 15 pounds repetitively, although he could lift 25 pounds occasionally. Moreover, Dr. Haig testified that claimant should have a job where he wasn't required to stand or walk more than 30 minutes at a time, where he was only required to bend or twist at the waist occasionally, and where his overall walking and standing was limited to 4 hours or less. In addition, Dr. Haig testified that claimant should avoid a job which involves a great deal of mental stress and extreme temperature changes

at 19. Inasmuch as the administrative law judge's finding that employer did not establish that claimant's pre-existing condition contributed to his disability is inconsistent with Dr. Haig's restrictions, as well as other record evidence discussed *infra*, it is not supported by substantial evidence and cannot be affirmed.

Employer points to additional evidence which appears to be relevant to the contribution issue and which the administrative law judge did not address. Dr. Weil, claimant's treating neurosurgeon, deposed that on June 22, 1992, he released claimant to return to work with restrictions based on claimant's back condition. EX-8 at 32. He added: "My feeling was that the only limiting factor was going to be what would happen with his heart. From the standpoint of his back, I felt that he was certainly employable at that level." *Id.* Dr. Weil assessed claimant's back impairment at nine percent under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1992). EX-8 at 35, 64, 66. Dr. Haig, upon whom the administrative law judge primarily relied in determining that claimant was totally disabled, stated in a March 27, 1996, report that claimant's heart condition is more disabling than the 15 percent impairment he assessed for claimant's back injury. In addition, Dr. Haig opined that the permanent disability attributable to claimant's heart disease substantially increases claimant's disability above the 15 percent impairment attributable to the back injury. Tr. at 48. Moreover, Mr. Kramberg, claimant's vocational counselor, listed claimant's "multiplicity" of problems, including his cardiac condition, when considering his potential for work, and opined that the overlay of all of claimant's problems would make him less employable than his back problem alone, noting in particular that claimant's stamina was affected by his heart problems. CX-6 at 3; Tr. at 235, 246, 249. Inasmuch as the administrative law judge did not weigh all of the relevant evidence in addressing contribution, we vacate his denial of Section 8(f) relief and remand the case for him to consider whether employer has established, through medical evidence or otherwise, that claimant's total disability is not due solely to his work-related back injury. On remand, if the administrative law judge finds that employer has met its burden of establishing contribution under Section 8(f), he should determine whether claimant's heart condition satisfies the remaining two elements of Section 8(f) entitlement; in his initial Decision and Order the administrative law judge assumed, without deciding, that claimant's heart condition was a pre-existing permanent partial disability which was manifest to employer.

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because of the negative impact such a job would have on his cardiac function. Tr. at 32-36. In his March 29, 1995, report, Dr. Haig opined that even if claimant had not had a cardiac condition, his back condition would still preclude him from performing extremely heavy work. CX-4.

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge