

STEPHEN COX)
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 Claimant)
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 v.)
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 MCDONNELL DOUGLAS/BOEING)
)
 and)
)
 FREMONT COMPENSATION) DATE ISSUED: 01/18/2005
 INSURANCE GROUP)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order Granting Section 8(f) Relief of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Daniel F. Valenzuela (Samuelson, Gonzalez, Valenzuela & Brown), San Pedro, California, for employer/carrier.

Peter B. Silvain, Jr. (Howard M. 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Section 8(f) Relief (2002-LHC-2532) of Administrative Law Judge Richard E. Huddleston 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 repetitive trauma injuries to his right arm and shoulder, which arose out of his employment for employer as an aircraft technician for employer in Saudi Arabia. Claimant's work injuries consist of nerve entrapments of the right carpal tunnel and elbow and a tear of the right rotator cuff. As a result of these injuries, claimant underwent right forearm surgery in September 1995, right shoulder surgery in November 1995, and right elbow and wrist surgery in March 1996. Claimant returned to work for employer in September 1996 but he was restricted to administrative duties. Claimant was placed on medical leave by employer in October 1996 because he was unable to work as an aircraft technician. Claimant and employer stipulated that claimant's right arm and shoulder conditions had reached maximum medical improvement on February 7, 1997, when Dr. Heutel opined that claimant has permanent work restrictions, and that these restrictions preclude claimant from returning to his usual employment. CX 6.

On April 21, 1999, Dr. Kirkpatrick, claimant's treating orthopedic physician, imposed work restrictions of no lifting more than 20 pounds, and no repetitive activity with the right hand, arm, and shoulder.¹ CX 11. In May 2000 claimant received treatment for chronic pain syndrome. CX 19-20. Claimant also began treating with Dr. Isralsky for depression beginning in April 2000. Dr. Isralsky opined that claimant's depression is related to his chronic pain disorder, which is secondary to his work-related injuries. Dr. Isralsky also opined that claimant is capable of working only two to three hours per day because of his pain disorder, medication regimen, depression, and the physical limitations from his work injuries and the lower back injury. CX 21. Although claimant obtained a certificate in micro processing systems and an Associates degree after leaving work for employer, there is no current market for claimant in the computer field, and he has not shown himself capable of gainful employment, in the opinion of Vicki Sadler, a rehabilitation consultant retained for claimant by the Department of Labor set forth in her report of February 2003. CX 38 at 51-52, 65-70.

Claimant and employer stipulated that claimant has a post-injury wage-earning capacity of \$150 per week based on an hourly wage of \$6 times 25 hours per week.

¹ On May 14, 1997, claimant sustained a non work-related disc herniation at L4-5.

Claimant and employer agreed that claimant had an average weekly wage from employer of \$1,610, and that his resulting loss of wage-earning capacity entitles claimant to compensation at the maximum rate of \$760.89 per week, pursuant to Section 8(c)(21), (h). 33 U.S.C. §908(c)(21), (h). Employer agreed to provide medical care for claimant's right shoulder, arm, and hand conditions, chronic pain syndrome, and depression.² The administrative law judge awarded claimant benefits pursuant to the parties' stipulations.

The remaining issue was employer's entitlement to Section 8(f) relief from continuing compensation liability. The administrative law judge found that employer established that claimant had manifest, permanent partial right elbow disabilities of chronic bursitis olecranon, persistent elbow pain, and epicondylitis (tennis elbow) that pre-existed his August 14, 1995, work injuries. Decision and Order at 19-20. The administrative law judge also credited evidence that claimant had a previous cervical discectomy and fusion, and bilateral knee arthroscopies. *Id.* at 21. The administrative law judge found that claimant sustained new work injuries culminating on August 14, 1995. In this regard, the administrative law judge credited Dr. Foster's deposition testimony that claimant's pre-existing epicondylitis and chronic olecranon bursitis were distinct from the nerve entrapment. The administrative law judge also credited the August 17, 1995, report of Dr. Goldberg, wherein he diagnosed three new conditions of radial tunnel syndrome, Wartenburg's syndrome, and an inflamed radial capitellar area. *Id.* at 21. The administrative law judge found that claimant's pre-existing disabilities contribute to his current disability, and that the current disability is materially and substantially greater than that which would have resulted from the August 14, 1995, work injury alone. In this regard, the administrative law judge credited Dr. Foster's evaluation and deposition testimony. The administrative law judge therefore awarded employer Section 8(f) relief.

On appeal, the Director contends that the administrative law judge's granting of employer's claim for Section 8(f) relief must be vacated and the case remanded for additional findings addressing the contribution of claimant's pre-existing permanent partial disability to his current permanent partial disability. Specifically, the Director contends that Dr. Foster's opinion regarding the relative contributions to claimant's current disability cannot satisfy the contribution element. The Director also contends that the administrative law judge failed to address the extent of claimant's loss of wage-earning capacity due to his work injury alone, including the effects of claimant's work-related depression and medication regimen. Employer responds, urging affirmance of the award of Section 8(f) relief.

² Claimant and employer stipulated that treatment for claimant's depression by Dr. Isralsky would terminate on May 1, 2005, and that claimant is not entitled to treatment for his non work-related back condition.

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, if it establishes that the claimant had a manifest pre-existing permanent partial disability, that his current permanent partial disability is not due solely to the subsequent work injury, and that claimant's current disability "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000). In order to establish the contribution element, employer must present medical or other evidence addressing the extent of claimant's permanent partial disability had the pre-existing injury never existed. 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). Such evidence permits the administrative law judge to assess whether the pre-existing conditions made claimant's current disability materially and substantially greater than that which results from the work injury alone. *Ladner*, 125 F.3d at 308, 31 BRBS at 149(CRT).

We agree with the Director that the administrative law judge's decision to grant employer's claim for Section 8(f) relief cannot be affirmed, as the administrative law judge did not apply the proper legal standards in addressing whether claimant's pre-existing permanent partial disability contributes to his current permanent partial disability. The administrative law judge credited Dr. Foster's medical reports and deposition testimony. Dr. Foster opined that claimant has work restrictions limiting him to sedentary work, and prohibiting working with high torque tools, repetitive grasping over 10 pounds, and lifting over 20 pounds.³ EX 24 at 21-22. He stated that these work restrictions apply to all of claimant's diagnosed problems, and that all of claimant's current right upper extremity complaints relate to the work injury. *Id.* at 23, 35. Dr. Foster stated, however, that claimant's disability is materially and substantially greater because of his pre-existing right elbow pathology. He apportioned 80 percent of claimant's current disability to the work injury and 20 percent to the pre-existing right elbow conditions. Dr. Foster stated that the combination of claimant's pre-existing elbow conditions and the work injury lessens claimant's employability. EX 8 at 29; EX 24 at 15-17, 23-24.

Dr. Foster's opinion, however, does not expressly address the extent of claimant's disability due to the subsequent injury alone. In this regard, his opinion does not address the role played by claimant's work-related chronic pain syndrome, depression, and

³ Dr. Foster also opined that claimant has no restrictions from his pre-existing neck surgery and knee arthroscopies. EX 24 at 17-18.

medication regimen, which are related to claimant's August 14, 1995, work injury. The contribution element is not satisfied merely by showing that claimant's physical condition is worse due to the combination of the pre-existing condition and the work injury. *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997). Thus, the fact that Dr. Foster has apportioned the causes of claimant's physical impairment between the pre-existing and work injuries cannot establish that the contribution element is satisfied. Rather, employer must demonstrate that the work injury alone did not cause claimant's loss in wage-earning capacity and that the pre-existing conditions materially and substantially contribute to this disability. *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(CRT)(1995). The parties stipulated that claimant has a \$1,460 weekly loss of wage-earning capacity following his work-related injury.⁴ As the administrative law judge did not address the evidence in terms of the extent of claimant's disability or loss of wage-earning capacity due to the work injury alone, the administrative law judge's finding that the contribution element is satisfied cannot be affirmed. *See generally Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *Louis Dreyfus Corp.*, 125 F.3d 884, 31 BRBS 141(CRT).

Therefore, we grant the relief requested by the Director on appeal, and we remand this case for the administrative law judge to consider the evidence of record under the proper legal standards. On remand, the administrative law judge must determine the

⁴ The joint stipulations base claimant's loss of wage-earning capacity on an hourly wage of \$6 times 25 hours per week. The parties relied on both Dr. Isralsky's opinion that claimant is unable to work full-time due to "the results of his catastrophic injury," and on the labor market survey of Linda Quinn, which identified openings as motel desk clerk and automobile rental clerk paying \$6 to \$7 per hour. Post-Trial Stipulations at 8-9. The parties defined claimant's permanent partial disability as including Dr. Kilpatrick's April 21, 1999, work restrictions of no lifting over 20 pounds and no repetitive activity with the right hand, arm, and shoulder. *Id.* at 7. The stipulations include claimant's inability to type up to 45 words per minute due to increased pain in claimant's right hand, wrist, elbow, and shoulder. The stipulation included claimant's testimony that he has increasing pain in his right hand and arm from writing and that five to ten minutes of writing or keyboarding causes his right hand to become ice cold. Further, the stipulation incorporated claimant's testimony that he has a stabbing pain under his right shoulder blade, tingling sensation in his fingers, stabbing pain in the medial and lateral aspects of the elbow, his biceps occasionally feels as if gripped by a tourniquet while his wrist occasionally feels as if someone is standing on it, and that right hand and wrist pain make it difficult to hold any weight. The stipulation describing claimant's permanent partial disability also included Dr. Brownlow's diagnosis of chronic pain syndrome involving the right upper extremity and shoulder due to multiple surgeries. *Id.* at 8.

extent of claimant's current permanent partial disability due to the work injury alone based on medical or other evidence. *See Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997) (administrative law judge may resolve issue based on inferences regarding severity of pre-existing condition and work injury, and the strength of the relationship between them). The administrative law judge should then determine if claimant's manifest pre-existing disabilities materially and substantially contributed to his current permanent partial disability by assessing their effect on the extent of claimant's current permanent partial disability, pursuant to applicable law.

Accordingly, the administrative law judge's Decision and Order Granting Section 8(f) Relief is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge