BRB No. 01-0835

WARREN DUFOUR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
FRALEY ASSOCIATES	)	DATE ISSUED: July 25, 2002
	)	
and	)	
	)	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Section 8(f) Relief of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Christopher J. Field (Field, Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Jim C. Gordon, Jr. (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Mark A. Reinhalter, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand Granting Section 8(f) Relief (93-LHC-1598) of Administrative Law Judge Gerald M. Tierney 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).

Claimant, who worked as a dock builder for employer, sustained a work-related injury on August 29, 1986, while carrying a 400-450 pound beam with a co-worker, when the co-worker dropped his end of the beam causing all the weight to rest on claimant's neck and back. Claimant left work and went to see his doctor, who prescribed pain medication, recommended rest, and referred him to a specialist. In November 1986, claimant was diagnosed by Dr. Sawyer, an orthopedic surgeon, as suffering from a bulging disc at the L4-5 level due to degenerative disc disease, a congenitally narrow spinal canal, back strain and right radiculopathy. Dr. Sawyer prescribed physical therapy and, although claimant continued to complain of pain, opined, on December 16, 1986, that claimant had reached maximum repair and was capable of returning to his usual work.

Claimant returned to work on December 26, 1986, but on that day experienced back pain when he attempted to pick up a 70-80 pound ladder. He reported the incident to his supervisor and thereafter sought medical attention. After a negative MRI reading on April 7, 1987, Dr. Sawyer opined on April 10, 1987, that claimant suffered from a simple back strain and rated his impairment at two and one-half percent. Based on claimant's feeling that he was not capable of his former work, Dr. Sawyer suggested that claimant consider another form of employment. Claimant continued to experience symptoms of pain, and by December 1989, he was diagnosed by Dr. Kasper as suffering from chronic lumbar syndrome and spinal stenosis. In October 1990, Dr. Kasper opined that claimant would not be able to perform any manual labor in the future. Employer voluntarily paid claimant temporary total disability compensation from September 9, 1986 through March 27, 1988, temporary partial disability compensation from March 28, 1988 through September 13, 1988, and permanent partial disability compensation from September 14, 1988 and continuing.

In his initial Decision and Order issued on September 2, 1994, the administrative law judge found that claimant was entitled to permanent partial disability compensation commencing on December 1, 1987, the date Dr. Hochberg opined that claimant reached maximum medical improvement, but the administrative law judge did not make a determination as to the compensation rate. With regard to employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), the administrative law judge found that

claimant's second incident on December 26, 1986 was an aggravation of the first injury on August 29, 1986, and therefore constituted a "second injury" under the Act. The administrative law judge next found that employer established that claimant had a manifest, pre-existing permanent partial disability which contributed to a greater degree of permanent impairment. Consequently, he determined that employer was entitled to Section 8(f) relief.

After the administrative law judge's decision was administratively affirmed by the Board, *see* Pub. L. 104-134, 110 Stat. 1321-211, 1321-219 (1996), the Director appealed his decision to the United States Court of Appeals for the Third Circuit. Prior to any disposition, the Director and employer stipulated that the administrative law judge's decision must be vacated as it did not assign a compensation rate, and thus the award under Section 8(c)(21), 33 U.S.C. §908(c)(21), was impossible to determine. Moreover, the parties agreed that the administrative law judge provided an insufficient basis to support an award of Section 8(f) relief; specifically, they agreed that the administrative law judge's finding regarding the aggravation of a pre-existing disability was insufficient as a matter of law to establish the contribution element of Section 8(f) relief. The Third Circuit accepted the parties' agreement and remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge initially accepted the parties' stipulation that claimant is entitled to permanent partial disability benefits at a compensation rate of $430.93 per week. He then determined that claimant's permanent partial disability occurred as a result of the December 1986 accident alone, and therefore denied employer entitlement to Section 8(f) relief.

Employer appealed, challenging the denial of Section 8(f) relief. At this time, both employer and the Director requested that the administrative law judge's decision be vacated and the matter remanded as the decision did not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557 (c)(3)(A) (APA). The Board held that the administrative law judge's decision on remand violated the APA as he did not discuss his prior findings or provide any reasoning for reversing his 1994 factual conclusions, and he did not fully analyze the evidence under the applicable legal standard for determining entitlement to Section 8(f) relief. *Dufour v. Fraley Associates*, BRB No. 99-0387 (Jan. 7, 2000)(unpub.). Consequently, the Board vacated the administrative law judge's 1998 finding that claimant's permanent partial disability is the result of the December 1986 accident alone, and remanded the case for a complete Section 8(f) analysis consistent with the requirements of the APA. *Id.*

On second remand, the administrative law judge initially determined, via application of the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant sustained a second injury as a result of his work accident on December 26, 1986, and thus turned to consideration of employer's entitlement to Section 8(f) relief. The administrative law judge found that Section 8(f) applied because claimant had a pre-existing disability, as a result of his

congenital spinal stenosis and August 29, 1986, work-related back injury, that was manifest to employer and which, combined with the most recent work-related back injury sustained on December 26, 1986, resulted in a greater degree of permanent disability than claimant would have incurred from the last injury alone. Accordingly, the administrative law judge granted employer's request for Section 8(f) relief.

On appeal, the Director challenges the administrative law judge's determination that employer is entitled to Section 8(f) relief. Employer responds, urging affirmance.

The Director asserts that the administrative law judge erred in finding that employer satisfied the contribution element for Section 8(f) relief. First, the Director contends that the administrative law judge erred as a matter of law since he failed to separately consider whether the December 26, 1986, alleged second injury alone caused claimant's entire current disability. Second, the Director avers that the administrative law judge's contribution conclusion violates the APA as he did not consider the Director's challenge to Dr. Hochberg's report and instead credited that report without providing any rationale for this decision. The Director also argues that the administrative law judge erroneously invoked the Section 20(a) presumption as a basis for finding that employer established the occurrence of a second injury for purposes of entitlement to Section 8(f) relief. The Director maintains that it is employer's burden, without the aid of the Section 20(a) presumption, to establish all of the elements for Section 8(f) relief, including the fact that claimant sustained a second, work-related injury.

In its prior decision, the Board specifically instructed the administrative law judge that, in determining whether the December 1986 incident constitutes a "second injury" on remand, he must analyze whether this accident constituted an aggravation of a pre-existing permanent partial disability under the pertinent legal standards. *Dufour*, slip op. at 6. If so, he must then determine whether employer demonstrated that claimant's disability is not due solely to the last injury but was made materially and substantially greater by the combination of the last event and the prior condition. *Id.* Thus, the administrative law judge's treatment of the question as to whether claimant sustained a "second injury" must first be addressed.

Section 8(f) shifts liability for payment of compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. *See* 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 claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works*

Corp., [*Johnson*] 129 F.3d 45, 31 BRBS 155(CRT)(1st Cir. 1997); *Louis Dreyfus Corp. v. Director, OWCP* [*Louis Dreyfus*], 125 F.3d 884, 31 BRBS 141(CRT)(5th Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP* [*Two "R" Drilling*], 894 F.2d 748, 23 BRBS 34(CRT)(5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.* Section 8(f) is not applicable when claimant's disability results from the progression of, or is a direct and natural consequence of, the pre-existing disability. *See generally Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT), *reh'g denied*, 859 F.2d 928 (11th Cir. 1988); *Mississippi Coast Marine, Inc. v. Bosarge*, 657 F.2d 885, 13 BRBS 851 (5th Cir. 1981), *modifying* 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981); *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1085 (D.C. Cir. 1979); *Vlasic v. American President Lines*, 20 BRBS 188 (1987). Nevertheless, an employment-related aggravation of a pre-existing disability is a new injury and may form the basis for Section 8(f) relief. *See Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130(CRT)(1st Cir. 1983).

Second Injury

In his decision, the administrative law judge initially found that with regard to the December 26, 1986, work incident claimant established the existence of an injury or harm, *i.e.*, claimant reported experiencing increased pain following the incident, and Dr. Hochberg found that claimant suffered an aggravation of his pre-existing back injury, and that a work-related accident occurred, or that working conditions existed which could have caused the harm in that claimant felt pain when he lifted the ladder. The administrative law judge therefore concluded, pursuant to Section 20(a), that "claimant has met the burden of showing the existence of a second injury and has met the prerequisite to Section 8(f) relief that the employee must suffer a second injury or work-related aggravation of a pre-existing condition." Decision and Order on Remand at 10.

The parties agree that the administrative law judge's application of the Section 20(a) presumption in rendering his finding that claimant sustained a second work-related injury or work-related aggravation of his pre-existing condition as a result of the incident on December 26, 1986, is inappropriate. As noted above, the Director maintains that Section 8(f) is not applicable in this case since claimant's disability results from the progression of, or as a direct and natural consequence of, the disability resulting from the first work injury. The Director thus asserts that a second work-related injury did not occur. Employer, however, maintains that the administrative law judge's error in applying Section 20(a) is harmless as

the administrative law judge properly discussed all of the relevant evidence of record, he was aware of and thus considered the Director's position on this issue, and the record contains only one piece of direct evidence on this issue, *i.e.*, the medical opinion of Dr. Hochberg opining that claimant suffered an aggravation of his pre-existing back injury as a result of the work accident sustained on December 26, 1986.

In the instant case, Dr. Sawyer opined, on December 16, 1986, that claimant reached maximum repair, and that he was capable of returning to his usual work duties. EX 9. In addition, Dr. Sawyer stated that he advised claimant that although he may experience some discomfort, he was not in any danger if he returned to his usual work. Dr. Sawyer further stated that he made it clear to claimant, on December 23, 1986, that he was to return to his work duties and that the doctor reassured claimant that a return to work would not be threatening or dangerous to him given his prior work-related injury. Claimant did, in fact, return to that employment on December 26, 1986; however, in attempting to lift a 70 to 80 pound ladder, claimant experienced back pain. Only the opinions of Dr. Sawyer and Dr. Hochberg make reference to the December 26, 1986, work incident.[1] Following an examination of claimant on December 29, 1986, Dr. Sawyer again opined that claimant's prior back strain had reached maximum repair and that he remains capable of returning to his former work. Dr. Sawyer added, at this time, that if claimant experienced pain during his usual work, he would then qualify for a different form of work which is not so physically demanding. In contrast, Dr. Hochberg explicitly stated that prior to the work accident sustained on December 26, 1986, claimant had a pre-existent permanent partial disability from his prior injuries of 1986, presumably the work accident sustained on August 29, 1986, which was aggravated and made worse by the December 26, 1986, injury. After referring to Section 20(a), the administrative law judge concluded, based on claimant's own reports of increased back pain following the December 26, 1986, work incident and Dr. Hochberg's specific opinion, that claimant sustained a second work-related injury, or more appropriately an aggravation of his pre-existing back condition, as a result of the December 26, 1986, work incident.

The administrative law judge's use of the Section 20(a) presumption to aid employer in showing the existence of a second injury for purposes of establishing its entitlement to

[1]Drs. Allegra, Zaretsky, Ahmed, Kasper, Seslowe, discuss only claimant's condition in terms of the August 29, 1986, work injury. Their post-December 26, 1986, opinions do not, in any way, address the impact, if any, of the December 26, 1986, work incident. Claimant's Exhibits (CXs) 5, 7(B), 8(A), 15(B), 16. The record also contains opinions by Drs. Weinstein, Palmieri, Brustein, Rose, Ginsberg, Sobo, Hess, Fernandez and Wujack, none of whom in any way discuss the issue regarding the cause of claimant's condition. CXs 2, 3, 6, 10, 12, 13, 14, 17.

Section 8(f) relief is erroneous, and as a result, we must vacate his finding that claimant sustained a second injury and remand for reconsideration of this issue. In his decision, the administrative law judge incorrectly stated that "claimant has met the burden of showing the existence of a second injury and has met the prerequisite to Section 8(f) relief that the employee must suffer a second injury or work-related aggravation of pre-existing condition." Decision and Order on Remand at 10. In contrast to the administrative law judge's finding, employer, as the party herein seeking Section 8(f) relief, bears the burden for establishing all of the requisite elements for entitlement to Section 8(f) relief. *See generally Lewis*, 202 F.3d 656, 34 BRBS 55(CRT); *Harcum*, 131 F.3d 1079, 31 BRBS 164(CRT); *Louis Dreyfus*, 125 F.3d 884, 31 BRBS 141(CRT); *Two "R" Drilling*, 894 F.2d 748, 23 BRBS 34(CRT). Thus, employer, and not claimant, bears the burden of showing the existence of a second injury in this case. Moreover, the administrative law judge did not specifically address relevant evidence which may cast doubt on his finding of a second injury. As the Director notes, evidence in the record showing that no other doctor described the December 26, 1986, incident as a subsequent injury, that objective medical evidence demonstrated no change in conditions following the alleged second injury, and that claimant himself did not describe the December 26, 1986, incident as an injury for over five years, could support the finding that claimant's back condition subsequent to the alleged December 26, 1986, incident, was the result of the natural progression of, or the direct and natural consequence of, his pre-existing disability. We, therefore, vacate the administrative law judge's finding that a second injury occurred and remand for reconsideration of this issue. On remand, the administrative law judge must consider whether employer has established the occurrence of a "second injury" without the aid of the Section 20(a) presumption. In making this determination, he must fully consider *all* of the evidence of record, including the evidence cited by the Director.

Contribution

With regard to the contribution element, the administrative law judge observed that Dr. Hochberg's report is the only one which specifically addresses contribution. In particular, he found that Dr. Hochberg's opinion "clearly states" that claimant's degree of disability after the December 26, 1986, injury was "materially and substantially" greater than would have resulted from that subsequent accident alone. In so finding, the administrative law judge relied on Dr. Hochberg's statement that "prior to the second accident of December 26, 1986, he had a pre-existing permanent partial disability . . . which was aggravated and made worse by the December 26, 1986, injury," and his reference to the December 26, 1986, injury as a re-injury or aggravation of the original injury. The administrative law judge also considered claimant's statements that he was experiencing increased pain after the second injury and was unable to return to work after the second injury, as well as the reports of Dr. Kasper and Dr. Palmieri. In his report dated October 30, 1990, Dr. Kasper opined that claimant is "partially disabled for life and will not be able to do any manual labor in the

future." Based on this evidence, the administrative law judge concluded that claimant's current disability is materially and substantially greater than that which would have resulted from the first injury alone and is a consequence of both the first and second injuries in addition to his congenitally narrow spinal canal.

The instant case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, which has not provided specific guidance as to the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f) where claimant is permanently partially disabled following the subsequent injury. *See, e.g., Lewis*, 202 F.3d 656, 34 BRBS 55(CRT). In *Lewis*, a case involving contribution under Section 8(f) where claimant is permanently and totally disabled, the Third Circuit held that to satisfy the contribution element employer must demonstrate that the employee would have been able to continue working after the work injury if he had not already been suffering from a pre-existing permanent partial disability.[2] *Id.* Other circuits, however, have specifically addressed this issue. In particular, the Fourth Circuit has held in permanent partial disability cases that, in order to show that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability, quantification of the level of the impairment that would ensue from the work injury alone is required. *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *see also 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 I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT)(1995). Similarly, the First Circuit requires that employer show the degree of disability attributable to the work-related injury, so that this amount may be compared to the total percentage of the partial disability for which compensation under the Act is sought. *Johnson*, 129 F.3d 45, 31 BRBS 155(CRT). In contrast, the Fifth and Ninth Circuits have declined to express a view about the degree of evidence required to support a "materially and substantially greater" finding. *See generally Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT)(5th Cir. 1997).

[2]Although as a total disability case, *Lewis* does not address the "materially and substantially greater" requirement, it nonetheless provides insight into the case at hand on two points. First, the Third Circuit referred to the Fifth Circuit's list of factors relevant to assessing the relative contribution of injuries, such as the perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them. Second, the Third Circuit stressed the fact that the administrative law judge, as fact-finder, is to weigh the conflicting evidence and make a finding of fact, which shall be affirmed if it is supported by substantial evidence. *Lewis*, 202 F.3d 656, 34 BRBS 55(CRT), citing *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

At a minimum, the applicable law dictates that employer must offer some proof of the extent of claimant's ultimate permanent partial disability had the pre-existing injury never occurred, in order that the administrative law judge may determine if claimant's permanent partial disability is materially and substantially greater due to the pre-existing disability. *See Ladner,* 125 F.3d at 308, 31 BRBS at 149(CRT), *citing Harcum I,* 8 F.3d 175, 185-86, 27 BRBS 116, 130(CRT). The administrative law judge's inquiry may be resolved by inferences based on such factors as perceived severity of pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them. *Ladner,* 125 F.3d at 307, 31 BRBS at 149(CRT); *Ceres Marine*, 118 F.3d at 391, 31 BRBS at 94(CRT).

Based on the foregoing, we must vacate the administrative law judge's finding that employer established the contribution element for purposes of Section 8(f) relief. First, as the Director contends, the administrative law judge did not separately consider whether the alleged second injury alone would have caused claimant's permanent partial disability. Thus, contrary to the Board's remand instructions, the administrative law judge did not apply the correct standard for determining whether employer has established the requisite contribution element for Section 8(f) relief. In addition, while Dr. Hochberg's opinion uses the applicable statutory terminology, *i.e.*, materially and substantially greater, the administrative law judge has not provided any rationale for according greatest weight to Dr. Hochberg's opinion, particularly in light of the other evidence of record, or any analysis explaining why the second injury alone was not the cause of claimant's disability; the administrative law judge, thus, did not, in contrast to the Board's remand instructions, fully analyze the evidence of record or provide any reasoning for reversing his 1994 factual conclusions. *See Dufour, slip op.* at 6. Consequently, we vacate his finding that employer has established contribution for purposes of Section 8(f) relief and remand the case for reconsideration of whether Dr. Hochberg's opinion is sufficient to establish the requisite contribution element for Section 8(f) relief. On remand, the administrative law judge must consider thoroughly all of the relevant evidence of record, and provide a specific rationale for his determinations.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Section 8(f) relief is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge