



BRB No. 15-0462

ERNEST GARCIA)	
)	
Claimant)	
)	
v.)	
)	
YUSEN TERMINALS, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: <u>July 14, 2016</u>
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Regarding Employer's Petition for §8(f) Relief and the Decision and Order Denying Employer's Motion for Reconsideration of William J. King, Administrative Law Judge, United States Department of Labor.

Arthur A. Leonard (Aleccia & Mitani), Long Beach, California, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Regarding Employer's Petition for §8(f) Relief and the Decision and Order Denying Employer's Motion for Reconsideration (2014-LHC-01638) of Administrative Law Judge William J. King 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his right hip, low back, and neck on December 17, 2008, while working for employer as a transtainer operator. EX 1 at 8. Claimant was climbing a ladder when he slipped and tumbled backwards, falling four feet off the ladder and landing on his lower back and right hip. Claimant underwent hip replacement surgery on December 10, 2010. Claimant filed a claim for benefits. *Id.* at 12. While the claim was pending, employer filed an application and a supplemental application for relief pursuant to Section 8(f), 33 U.S.C. §908(f), asserting that claimant's pre-existing conditions contributed to his resulting disability.¹ After the case was referred to the Office of Administrative Law Judges, the parties stipulated to all disputed issues except whether employer is entitled to relief under Section 8(f).²

Administrative Law Judge King (the administrative law judge), addressed the sole remaining issue of whether employer is entitled to Section 8(f) relief. He found, based on the concession of the Director, Office of Workers' Compensation Programs (the Director), that claimant's Parkinson's disease and degenerative right hip condition were pre-existing permanent disabilities that were manifest to employer before the work injury.³ The administrative law judge further found, however, that claimant's pre-

¹ Prior to his work accident, claimant fractured his right hip in a February 1985 car accident, EX A, and underwent hip surgery. EX D. Additionally, claimant was diagnosed with Stage II Parkinson's disease on September 21, 2007. EX G.

² Administrative Law Judge Gee entered an order based on the parties' stipulations, finding claimant is entitled to continuing permanent partial disability benefits of \$1,053 per week. *Garcia v. Yusen Terminals, Inc.*, Case No. 2014-LHC-01638 (Apr. 8, 2015).

³ The administrative law judge also found claimant had pre-existing disabilities of degenerative disc disease of the thoracolumbar spine and cervical spine, which were not manifest to employer. We affirm these findings as they are unchallenged on appeal. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

existing Parkinson's disease did not contribute to claimant's post-injury disability by causing or contributing to the fall from the ladder, and did not "materially and substantially" affect the extent of his post-injury disability, as employer's labor market surveys demonstrated that claimant had the same post-injury wage-earning capacity with or without the restrictions imposed by claimant's Parkinson's disease.⁴ Decision and Order at 6-7. Moreover, as claimant's hip condition resulted in the same limitations as his work-related neck and back condition, EX 1 at 21-22, the administrative law judge found that claimant's pre-existing hip condition did not materially or substantially contribute to claimant's post-injury disability. Decision and Order at 7. Thus, the administrative law judge denied employer's request for Section 8(f) relief. Employer moved for reconsideration, and the administrative law judge denied the motion, reiterating his earlier findings. Employer appeals the administrative law judge's finding that it is not entitled to Section 8(f) relief. The Director responds, urging affirmance. Employer filed a reply brief.

Employer contends the administrative law judge erred in denying it Section 8(f) relief for two reasons. Specifically, employer asserts: 1) evidence establishes that claimant's pre-existing Parkinson's disease caused or contributed to claimant's fall, resulting in his current disability; and, 2) claimant's pre-existing right hip condition was aggravated in the fall, resulting in a worse hip condition than that which would have resulted from the fall alone. The Director responds that substantial evidence supports the administrative law judge's findings that claimant's Parkinson's disease did not cause the fall and that claimant's current permanent partial disability is not materially and substantially greater because of the pre-existing hip condition.

Section 8(f) of the Act, 33 U.S.C. §908(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. §944. In a claim for permanent partial disability benefits, Section 8(f) of the Act limits an employer's liability to 104 weeks if the employer establishes that the claimant suffers from a manifest, pre-existing permanent partial disability, and shows, by medical evidence or otherwise, that, as a result of the pre-existing condition, the claimant's disability is materially and

⁴ Dr. London imposed an additional 15-pound lifting limitation for claimant's pre-existing Parkinson's disease, which reduced the 25-pound lifting restriction caused by claimant's work-related back and neck conditions to 10 pounds. EX 1 at 21-25. Employer offered two labor market surveys: the first survey was based on limitations imposed by claimant's back and neck conditions only; the second was based on the limitations imposed by claimant's pre-existing Parkinson's disease in conjunction with those related to his back and neck conditions. Both surveys demonstrated identical wage-earning capacities. Decision and Order at 7; EX 1 at 50-51, 62-63.

substantially greater than that which would have resulted from the work injury alone. The employer must also establish that the work injury alone did not cause the claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor* [Quan], 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that evidence showing that the current level of disability is the result of a combination of the pre-existing condition and the work injury may be sufficient to establish the contribution element and has found it unnecessary to precisely define the degree of quantification needed to meet the "materially and substantially greater" standard under Section 8(f). *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT); *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998); *compare with Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [Carmines], 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998).

With respect to employer's argument that claimant's pre-existing right hip condition materially and substantially affected claimant's current hip condition, employer accurately points out that Dr. London opined that claimant's work-related hip injury combined with his pre-existing hip disability to make the subsequent hip disability greater than it would have been from the fall alone. However, Dr. London also opined that all of the physical restrictions resulting from claimant's hip disability were also issued for claimant's work-related neck and back injuries. EX 1 at 22, 25, 204. Therefore, the administrative law judge found that employer failed to carry its burden under Section 8(f) of establishing that claimant's disability is not due solely to the work-related neck and back injuries. Decision and Order at 7; Decision and Order on Recon. at 2. In challenging the administrative law judge's finding, employer asserts that the work injury aggravated claimant's pre-existing hip injury and that alone is sufficient to establish its entitlement to Section 8(f) relief. In so arguing, employer asserts that the administrative law judge should not have considered claimant's work-related neck and back disabilities as contributing to claimant's overall disability.

We reject employer's assertion. Well-established law requires that, in order to obtain Section 8(f) relief, an employer must show that the claimant's current disability is materially and substantially greater because of the pre-existing disability than it would have been absent the pre-existing condition. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT). Although the Ninth Circuit does not require specific quantification of the contribution of the pre-existing condition, *id.*, the disability that results from claimant's work injury alone must be considered against the disability that results from the combination of claimant's pre-existing condition and his work injury. Based on Dr. London's opinion, all of the restrictions issued for claimant's cumulative hip disability were also issued as a

result of the work-related back and neck injuries;⁵ therefore, the work-related neck and back injuries were no greater because of the pre-existing hip disability. Accordingly, the administrative law judge did not err in factoring these conditions into his contribution analysis. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT);⁶ *see also Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). As employer does not challenge the administrative law judge's finding that claimant's limitations resulting from his hip condition are identical to the limitations resulting from his work-related neck and back conditions, and as this finding establishes that claimant's pre-existing hip disability had no impact on his disability, we affirm the denial of Section 8(f) relief on this basis.

Employer also contends the administrative law judge erred in finding that claimant's fall from the ladder was not due to his Parkinson's disease. Employer avers that it is entitled to Section 8(f) relief because, but for the Parkinson's disease, claimant would not be disabled.

We reject this contention. The administrative law judge rationally concluded that employer did not establish that Parkinson's disease caused claimant to fall from the ladder. In this respect, the administrative law judge credited contemporaneous medical evidence, which did not definitively state that Parkinson's disease caused the fall, over

⁵ On May 24, 2013, Dr. London opined that claimant's neck, back, and hip conditions reached permanency and that claimant "should be restricted from work that involves prolonged sitting or standing, repeated bending or squatting, lifting, carrying, pushing or pulling loads over ten pounds, work in awkward positions, kneeling crawling, climbing, or stooping." EX 1 at 24-25. On June 11, 2013, Dr. London clarified that claimant's hip condition resulted in restrictions against repeated bending or stooping, work in awkward positions, and kneeling, crawling, climbing, and stooping. EX 1 at 21-22. Dr. London further clarified that claimant's neck and back injuries resulted in the same restrictions plus the restrictions against prolonged sitting or standing, and lifting, carrying, pushing or pulling loads over 25 pounds. *Id.*

⁶ We reject employer's assertion that the Ninth Circuit's decision in *Quan* is irrelevant because the claimant's underlying injury in *Quan* was not aggravated by the work injury. The significance of employer's distinction is unclear given that its establishing an aggravating injury does not necessarily satisfy its burden under Section 8(f) to show that the pre-existing condition contributed to the ultimate disability. *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

the later opinions of Dr. de Salles and Dr. London.⁷ Employer has not established error in the administrative law judge's weighing of the medical evidence and the Board is not entitled to reweigh it. *See generally Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). As the administrative law judge's conclusion is supported by substantial evidence, we affirm the finding that employer did not establish its entitlement to Section 8(f) relief on the basis of claimant's pre-existing Parkinson's disease.⁸

⁷ The emergency room physician, Dr. Melendez, stated Parkinson's disease "may have contributed to the fall," EX 1 at 104, but the administrative law judge noted that there were no clinical observations or references to symptoms of the disease. Two weeks after the fall, on December 30, 2008, claimant was examined by Dr. London, who did not mention claimant's Parkinson's disease. EX 1 at 111. On February 4, 2010, Dr. de Salles suggested that Parkinson's disease caused claimant to fall from the ladder. EX 3 at 149-50. In May 2011, Dr. London stated claimant manifested signs of muscle rigidity due to Parkinson's disease at the December 2008 examination, EX 7 at 177-79, and in April 2015, Dr. London stated it was "probable that claimant's pre-existing Parkinson's disease caused or contributed to the 2008 injury." EX 8 at 202.

⁸ We express no opinion on whether employer would be entitled to Section 8(f) relief if the Parkinson's disease had caused claimant to fall from the ladder at work. Moreover, as employer does not challenge the administrative law judge's finding that claimant's Parkinson's disease had no impact on his post-injury wage-earning capacity, *see n. 4, supra*, we reject its contention that claimant's current disability is materially and substantially greater because of his pre-existing Parkinson's disease. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

Accordingly, the administrative law judge's Decision and Order Regarding Employer's Petition for §8(f) Relief and the Decision and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge