

ELIJAH PLOWDEN)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>March 12, 2001</u>
AND DRY DOCK COMPANY)	
)	
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 of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick and Lexine D. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Laura Stomski (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1998-LHC-1537) 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.* (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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a fitter, sustained an injury to his back during the course of his employment for employer on February 13, 1989. Prior to the formal hearing before the administrative law judge, claimant and employer submitted stipulations regarding, *inter alia*, the nature and extent of claimant's work-related disability and claimant's average weekly wage. Additionally, claimant and employer stipulated that, as a result of claimant's pre-existing hypertension, claimant's current partial disability is materially and substantially greater than that which would have resulted from his February 13, 1989 injury. Lastly, claimant and employer informed the administrative law judge that the only issue remaining in dispute was employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In a Decision and Order dated September 21, 1998, the administrative law judge initially stated that the issue of employer's entitlement to Section 8(f) relief would be decided separately; he then accepted the stipulations and awarded benefits to claimant in the amount agreed to by the parties. Following the issuance of this decision, the Director, Office of Workers' Compensation Programs (the Director), informed the administrative law judge of his continued opposition to employer's application for Section 8(f) relief. Thereafter, in a Decision and Order issued on March 2, 2000, the administrative law judge once again accepted the previously submitted stipulations and denied employer's request for Section 8(f) relief, finding that employer failed to establish that claimant's present permanent partial disability is materially and substantially greater because of his pre-existing hypertension.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief; specifically, employer contends that the administrative law judge erred by failing to bind the Director, as the representative of the Special Fund, by the stipulations agreed to by employer and claimant. The Director responds, urging affirmance of the administrative law judge's decision.

We reject employer's argument that the Director should be bound by the same stipulations which the administrative law judge held bound employer and claimant. It is well-established that stipulations between employer and claimant affecting the liability of the Special Fund are not binding on the Special Fund, absent the participation of the Director. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985); *see also Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032 (9th Cir. 1998). In this regard, the Board has held that an administrative law judge may find stipulations binding as between claimant and employer, but reject them with regard to the claim for Section 8(f) relief, which is essentially a separate case involving employer and the Special Fund. *Id.*; *see*

also *Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987). We thus reject employer's argument that the administrative law judge committed error in rejecting the stipulations agreed to by claimant and employer in determining employer's request for Section 8(f) relief, after accepting those same stipulations in determining claimant's entitlement. The administrative law judge's decision is not, as employer asserts, illogical and schizophrenic; rather, it reflects well-settled case law holding that employer cannot rely on stipulations with claimant to establish Section 8(f) relief.¹ *See, e.g., Cabe v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 1144 (1981).

¹The stipulation at issue on appeal is that claimant's condition is materially and substantially worsened by a prior condition. This stipulation thus goes directly to establishing a necessary element of Section 8(f) relief, *see n.2, infra*, as opposed to one which addresses extent of disability and impacts liability by affecting the amount of the Fund's payments. In such cases, the Board has permitted the administrative law judge to accept a stipulation if supported by evidence. *See, e.g., Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). Such a finding on claimant's entitlement does not, however, relieve employer of the obligation to prove each element of a Section 8(f) claim.

Thus, after accepting claimant's and employer's stipulations in establishing claimant's entitlement, the administrative law judge properly addressed employer's request for relief from the Special Fund by specifically considering the evidence of record submitted by employer in support of its request.² Specifically, the administrative law judge concluded that the opinions of Drs. Hall and Magness are insufficient to establish the contribution element necessary for Section 8(f) relief, in accordance with the holding of the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT)(4th Cir.1998). As the administrative law judge's finding on this issue is not challenged on appeal, we affirm the administrative law judge's denial of Section 8(f) relief to employer.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

²To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 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. *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 on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995).

REGINA C. McGRANERY
Administrative Appeals Judge