BRB No. 00-0651

LEON E. WALKER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 26, 2001
	)	
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 A. Taggi (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-0053) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On January 16, 1996, claimant, who has a history of back ailments, sustained a back

injury while in the course of his employment for employer. In his Decision and Order, the administrative law judge accepted the parties' stipulations regarding the nature and extent of claimant's disability and accordingly awarded claimant permanent total disability compensation. 33 U.S.C. §908(a). The only issue before the administrative law judge was employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In addressing employer's request for Section 8(f) relief, the administrative law judge, without addressing whether claimant's back condition prior to the subject injury constituted a pre-existing partial disability or had been manifest to employer, found that employer failed to establish the contribution element necessary for Section 8(f) relief to be granted. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

On appeal, employer argues that the administrative law judge erred in finding that it failed to satisfy the contribution requirement of Section 8(f). The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent total disability is not due solely to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP,* 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980). *See also E.P. Paup Co. v. Director, OWCP,* 999 F.2d 1341, 27 BRBS 41(CRT)(9th Cir. 1993); *Director, OWCP v. Luccitelli,* 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

In challenging the administrative law judge's determination that it did not satisfy the contribution requirement, employer contends that the administrative law judge erred by applying the standard for determining this element in permanent partial disability cases and in discrediting the opinion of Dr. Reid. We agree. In order to establish the contribution element of Section 8(f) in a case involving permanent total disability, employer must show that a claimant's subsequent injury alone would not have caused claimant's permanent total disability. *See Maryland Shipbuilding,* 618 F.2d 1082, 12 BRBS 77; *Esposito v. Bay Container Repair Co.,* 30 BRBS 67 (1996). Thus, a claimant's total disability must have been caused by both the work injury and the pre-existing condition; unless an employer can demonstrate such, it may not receive Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.,* 30 BRBS 134 (1996). In cases involving permanent partial disability, however, Section 8(f) contains the additional requirement that claimant's ultimate permanent partial disability must

be materially and substantially greater than that which would have resulted from the subsequent injury alone.

In this case, as employer asserts, the administrative law judge applied the "materially and substantially greater" requirement as explicated by 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) and *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 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), in determining that Dr. Reid's opinion failed to provide credible, reasoned and documented medical evidence sufficient to satisfy the contribution requirement. Because the administrative law judge considered the medical opinion of Dr. Reid under the "materially and substantially greater" standard, we vacate his finding that employer failed to satisfy the contribution requirement and remand the case for reconsideration of the evidence consistent with the applicable standard for permanent total disability.[1] *See Maryland Shipbuilding*, 618 F.2d 1082, 12 BRBS 77.

[1]Upon remand, the administrative law judge must also specifically address whether employer has established the other two necessary elements for entitlement to relief under Section 8(f).

We next address employer's contention that the administrative law judge erred in his evaluation of Dr. Reid's testimony. In his decision, the administrative law judge rejected Dr. Reid's opinion because he found that opinion to be conclusory and unsupported by record evidence.[2] Dr. Reid concluded that claimant's 1996 injury was minor and would have resulted in no permanent disability if claimant had a normal back, but that it permanently and substantially aggravated and worsened his underlying weakened back structure, resulting in claimant's current disability. EX 11. In rejecting this opinion, the administrative law judge stated "there is no evidence that Dr. Reid ever reviewed any reports from the claimant's treating physician" and rejected his conclusory opinion, as the "records he allegedly reviewed are not identified and obviously not in the record." Decision and Order at 5. Contrary to the administrative law judge's finding, our review of the record reveals that in rendering his opinion, Dr. Reid specifically based his conclusions on his review of employer's injury records, *see* EX 2, and the records of claimant's long-term treating physician, Dr. McAdam, *see* EXs 3, 5; moreover, Dr. Reid's testimony is supported by objective data such as claimant's CT scan performed March 1, 1989, showing a definite disability at levels L3-4 which had diffuse disc bulge with slight distortion of the cal sac. *See* EXs 4, 5, 11. Thus, the records to which Dr. Reid refers are part of the record which was before the administrative law judge and were listed by that physician in his recitation of the summary of the medical evidence in the record.[3] *See* Decision and Order at 3. Therefore, because the administrative law judge rejected Dr. Reid's opinion for reasons unsupported by the record, he must on remand reconsider the opinion of Dr. Reid and the records upon which that physician's opinion was based under the proper legal standard.

Accordingly, the administrative law judge's Decision and Order denying Section 8(f) relief is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

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[2]In support of employer's application for Section 8(f) relief, Dr. Reid opined that claimant's 1996 work injury was relatively minor in nature and would have resolved with no permanent disability but that it "aggravated and worsened his weakened defective back structure, resulting in his current disability." EX 11.

[3]The administrative law judge stated that three of the documents, possibly physician's notes, are "entirely illegible." EXs 3, 6, 8. While they are indeed difficult to decipher, these exhibits clearly contain physician notes reflecting claimant's back condition over a long period of time from 1989 forward, and thus they cannot be totally discounted. EXs 3, 6, 8.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge