BRB No. 98-0391

RICHARD E. TAUZIN	)	
	)	
Claimant	)	DATE ISSUED:
	)	
v.	)	
	)	
GRACE OFFSHORE COMPANY	)	
	)	
and	)	
	)	
CNA INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Thomas J. Smith and Benjamin R. Eustice (Galloway, Johnson, Tompkins & Burr), New Orleans, Louisiana, for employer/carrier.

Samuel J. Oshinsky, Counsel for Longshore (Judith E. Kramer, Deputy Solicitor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-2008) of Administrative Law Judge Clement J. Kennington 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 for employer as a toolpusher/supervisor on platform rigs,[1] suffered injuries to his right and left shoulders on July 20, 1990, during the course of his employment, when he fell while descending a flight of stairs. Claimant underwent surgery to repair a tear in his right rotator cuff on September 25, 1990, and again on December 13, 1990, to repair a tear in his left rotator cuff. Both surgeries were performed by Dr. Leonard. Claimant returned to work for employer as a junior toolpusher on an offshore rig in March 1991, with restrictions placed on him by Dr. Leonard of no lifting in excess of 45 pounds, no climbing and no repetitive overhead activities, though claimant was allowed to perform minimum pushing and pulling activities. When the rig contracted with a different client in November 1992, claimant was assigned to work in employer's company yard where he was given light duty assignments under the supervision of his son, Troy Tauzin. Claimant's responsibilities at the yard included both maintenance work and the loading and unloading of equipment. Claimant testified that there were occasions when this work entailed overhead activities and lifting items which exceeded his weight limitations. Complaining of pain in his shoulders, claimant was examined by Dr. Leonard on January 4, 1993. Dr. Leonard noted that claimant's rotator cuffs had gotten thinner, with developing arthritis in his right shoulder, and restricted claimant to no heavy manual labor and no overhead activities. Thereafter on January 14, 1993, at the suggestion of employer, claimant terminated his employment with employer. Employer voluntarily paid claimant temporary total disability compensation from July 15, 1993 through January 3, 1994, 33 U.S.C. §908(b), permanent total disability compensation from January 3, 1994 through November 2, 1994, 33 U.S.C. §908(a), and permanent partial disability compensation thereafter, 33 U.S.C. §908(c)(21).

[1]Claimant's job as a toolpusher entailed the supervision of drilling rig work crews. Tr. at 18.

The sole issue before the administrative law judge was the applicability of Section 8(f) of the Act, 33 U.S.C. §908(f). Relying on the opinion of Dr. Leonard, the administrative law judge determined that claimant's work, subsequent to November 1992, did not aggravate his degenerative disease in his shoulders, but rather, that claimant's condition is the result of the natural progression of his underlying disease. Thus, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in denying it relief from continuing liability for compensation pursuant to Section 8(f). Specifically, employer argues that the administrative law judge erred in finding that claimant's work subsequent to his transfer to employer's yard in November 1992, did not aggravate his condition. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. For the reasons that follow, we affirm the administrative law judge's decision.

Section 8(f) shifts 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. §§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, 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); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141 (CRT)(5th Cir. 1997); *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.*, 129 F.3d 45, 31 BRBS 155 (CRT)(1st Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 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). Section 8(f) is not applicable, however, when claimant's current 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 (5th 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).

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence in the record, and is in

accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe*, 380 U.S. at 359. In the instant case, employer's argument is based on the premise that claimant's July 20, 1990, work-related injury caused a pre-existing permanent partial disability, that claimant's work in employer's yard subsequent to November 1992 aggravated that disability, and, in conjunction with the pre-existing condition, caused a greater disability. In rendering his decision, however, the administrative law judge credited the opinion of Dr. Leonard over those of Drs. Cobb and Gidman. Dr. Leonard opined that the changes seen in claimant's x-rays taken during the January 4, 1993, examination were to be expected as part of the degenerative process, and could not have developed after a period of six weeks of labor. *See* Emp. Ex. 3 at 33, 82. While Dr. Leonard deposed that claimant's work prior to January 4, 1993, "didn't help" claimant's disability, *id.* at 36, he concluded that claimant's current disability is the result of the natural progression of degeneration in claimant's rotator cuffs caused by the July 1990 injury. *Id.* at 60. Additionally, the administrative law judge relied on Dr. Leonard's post-operative notes which evidenced the progression of claimant's disease.[2]

In contrast, Dr. Cobb stated that claimant's yard work aggravated his existing shoulder condition, *see* Emp. Ex. 1 at 8-9; similarly, Dr. Gidman testified that frequent and repetitive restricted activities could have caused claimant's underlying shoulder condition to deteriorate. Emp. Ex. 2 at 20, 31-32. In crediting the opinion of Dr. Leonard over those of Drs. Cobb and Gidman, the administrative law judge noted that Dr. Leonard treated claimant continuously from the time of the July 1990 accident, while Drs. Cobb and Gidman did not examine claimant until months after he reached his present level of disability. The administrative law judge implicitly found Dr. Gidman's opinion speculative, noting that employer failed to establish the frequency of any potential harmful activities, and moreover, that Dr. Gidman believed that the pain claimant reported to Dr. Leonard in January 1993 was a temporary flare-up of his underlying condition. *See* Decision and Order at 8; Emp. Ex. 2 at 25, 29, 32-33, 37. In fact, Dr. Gidman further testified that he saw nothing that indicated a re-tear or an anatomical structural change of claimant's shoulders. Emp. Ex. at

[2]Prior to January 4, 1993, Dr. Leonard noted that claimant was recovering well from his surgeries, but that his right shoulder evidenced crepitus, or noise, with range of motion. *See* Emp. Ex. 3 at 76-79. On November 4, 1991, claimant reported pain and loss of strength in his left shoulder. *Id.* at 80.

29.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping* Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge's decision to credit the opinion of Dr. Leonard over those of Drs. Cobb and Gidman is rational and within his discretion as the trier-of-fact. *See generally O'Keeffe*, 380 U.S. at 359. Thus, as there is credible evidence which demonstrates that claimant's present disability is the result of the natural progression of his pre-existing condition, the administrative law judge's conclusion that the contribution element of Section 8(f) has not been met must be affirmed.[3] *See generally Jacksonville Shipyards, Inc.,* 851 F.2d at 1314, 21 BRBS at 150 (CRT).

[3]We reject employer's contention that claimant's testimony that his shoulder condition worsened after performing heavy labor in employer's yard is sufficient to entitle it to relief under Section 8(f). The contribution element may be satisfied by reference to "medical or other evidence," including claimant's testimony in an appropriate case, *see Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied,* 117 S.Ct. 1333 (1997). Nevertheless, by weighing only the medical evidence, the administrative law judge rationally determined that the issue of whether claimant's condition was aggravated by his continued employment is a medical question.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge