BRB No. 05-0188

DONALD MARTIN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS	)	DATE ISSUED: 10/21/2005
	)	
	)	
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 and the Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

R. John Barrett (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (2004-LHC-0065) of Administrative Law Judge Daniel A. Sarno, Jr., 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began working for employer as a hustler driver in 1977. He sustained work-related injuries to both of his knees in 1985. He was released with permanent light-duty restrictions in 1985 and was assigned a 15 percent impairment rating for each knee. Thereafter, claimant began working as a forklift operator. In 1988, claimant injured his back in a forklift accident. Claimant was treated conservatively for his back and knee injuries by Dr. Neff through August 2002. On August 12, 2002, during the course of his employment, claimant twisted his ankle and fell to the ground. Claimant was examined by Dr. Neff on August 14, who reported that claimant sustained abrasions over both knees, that his right ankle was injured and swollen, and that his right elbow sustained a fracture. Following his examination on September 23, 2002, Dr. Neff noted that claimant's knees had returned to their prior condition but that his back condition was "aggravated by the [current] injury." Emp. Ex. 1. Claimant was treated conservatively for his continued low back pain by Dr. Neff and his colleague, Dr. Wagner. Dr. Wagner assigned permanent restrictions, including no lifting greater than 20 pounds, no ambulation of stairs or ladders, no prolonged bending, stooping or crawling, and no sitting for prolonged periods of time. Emp. Ex. 1.125.

Claimant retired from his position with employer on November 1, 2002, and subsequently began working as a security guard for Eagle Security. The parties agreed that claimant is entitled to permanent partial disability benefits at a compensation rate of $675.50 per week from August 23, 2003, and continuing, and the administrative law judge entered an order based on this stipulation. *See* Errata Order at 2; 33 U.S.C. §908(c)(21). Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his decision, the administrative law judge found that it is not contested that claimant suffered from a manifest pre-existing permanent partial disability affecting his back and knees. However, after reviewing the medical and vocational evidence of record, the administrative law judge found that the evidence submitted by employer does not quantify the extent of claimant's work-related impairment resulting from the 2002 injury alone, and thus does not establish that claimant's current impairment is materially and substantially greater due to the contribution of the pre-existing disabilities. The administrative law judge affirmed this finding in his decision on reconsideration, stating the vocational evidence does not quantify the extent of claimant's disability due to the 2002 injury alone, and thus is insufficient to establish that claimant's pre-existing disabilities materially and substantially contributed to claimant's current permanent partial disability.

On appeal, employer contends that the administrative law judge erred in finding that the evidence is insufficient to establish that claimant's prior injuries contributed to his current permanent partial disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision as it is rational and supported by substantial evidence.

Section 8(f) shifts the liability to pay compensation for permanent disability 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, as here, if it establishes: 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. 33 U.S.C. §908(f)(1); *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), *affd*, 514 U.S. 122, 29 BRBS 87(CRT)(1995).

In the instant case, the administrative law judge found that the Director conceded that claimant had pre-existing disabilities to his back and knees prior to the work injury on August 12, 2002. Moreover, the administrative law judge found that claimant's conditions were manifest to employer due to the contemporaneous medical records. The administrative law judge reviewed the medical and vocational evidence of record and found that employer did not establish that claimant's permanent partial disability was made substantially and materially greater due to the pre-existing back and knee conditions. Specifically, the administrative law judge found that the medical opinions fail to objectively quantify claimant's current disability with reasoned explanations. In addition, the administrative law judge found that the vocational evidence does not establish the loss in wage-earning capacity due to the August 2002 injury alone. The administrative law judge rejected the vocational evidence that relied on the "subtraction" method to establish contribution by showing the number of positions for which claimant was qualified after the previous injuries and the number of positions for which claimant is currently qualified.

We affirm the administrative law judge's finding that employer did not establish that claimant's pre-existing back and knee conditions materially and substantially contribute to claimant's current partial disability. In order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to

the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, employer must quantify the level of the impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the court explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003). The court stated that it is not enough to simply calculate the total current disability and to subtract from it the disability resulting from the pre-existing condition. *Carmines*, 138 F.3d at 142, 32 BRBS at 55(CRT).

In the instant case, Dr. Neff opined that claimant's pre-existing back and knee conditions materially and substantially contributed to his present impairment and that, if claimant had suffered the current injury without the pre-existing conditions, his injury would have resolved with few or no permanent restrictions. The administrative law judge found that Dr. Neff's opinion is not supported by medical evidence and lacks a rationale as to how the last back strain, which was "likely to have resolved with no permanent disability," aggravated claimant's pre-existing back condition to the point where claimant was assigned greater work restrictions. Decision and Order at 7. Claimant was restricted from lifting more than 50 pounds following his previous injuries, but this restriction was increased to lifting no more than 20 pounds following the injury in August 2002. The administrative law judge found that Dr. Neff failed to explain how claimant's prior knee injuries compounded the ankle problems claimant had from the last injury. The administrative law judge found that Dr. Neff did not offer an explanation as to the extent of claimant's impairment due to the current injury alone except to answer affirmatively when asked if claimant did not have the pre-existing back problems would the injury in August 2002 have resolved with no permanent disability. Emp. Ex. 13. Moreover, the administrative law judge found that in his report in August 2003, Dr. Neff did not adequately quantify the level of impairment caused by claimant's second injury, *see* Emp. Ex. 1.126, and thus his opinion cannot establish that claimant's pre-existing injury materially and substantially contributed to his overall impairment. We affirm the administrative law judge's rejection of Dr. Neff's opinion as it is rational, supported by substantial evidence, and in accordance with law. *See Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT); *see also Ward*, 326 F.3d 434, 37 BRBS 17(CRT).

Employer also contends that the vocational evidence of record is sufficient to establish that claimant's pre-existing disability substantially and materially contributed to

his current permanent partial disability. Employer submitted the reports of Barbara Byers, a vocational counselor, who determined that without any physical restrictions, claimant was qualified for 741 occupational job titles. Emp. Ex. 3. Ms. Byers then determined that with the restrictions due to the pre-existing conditions, claimant was qualified for 487 occupational titles, which represented a 33 percent loss in job titles. *Id*. Finally, Ms. Byers stated that with his current restrictions, claimant is currently qualified for 334 occupational titles, which represents a total loss in job titles of 55 percent. *Id*. The administrative law judge found that Ms. Byers did not, however, identify the number of jobs for which claimant would be qualified given the impairment from the current injury alone. Specifically, the administrative law judge found on reconsideration that there was no way to determine whether the August 2002 injury, absent the pre-existing disability, would not have led to the same loss in available jobs. Order Denying Motion for Reconsideration at 3. The administrative law judge contrasted the evidence presented here with that in *Harcum II*, in which the employer provided evidence of the wages the claimant could have earned if he had only the work injury. *Harcum II*, 131 F.3d at 1081, 31 BRBS at 166(CRT); Decision and Order at 8. Moreover, the administrative law judge noted that Ms. Byers's method of subtracting from the labor market available to claimant with his pre-existing injuries the jobs available to claimant in his current condition runs afoul of *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT). Therefore, as there is no evidence of the degree of claimant's impairment due to the current injury alone, and the Fourth Circuit has rejected the "subtraction" method of quantification to establish the contribution element, *see id.*, we affirm the administrative law judge's finding that the vocational evidence is insufficient to establish that the job options available to claimant following his August 2002 injury are materially and substantially fewer than would have been available in the absence of his pre-existing disabilities. Consequently, we hold that the administrative law judge rationally determined that employer did not meet its burden of establishing the element of contribution, and we affirm the denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration denying employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge