BRB No. 04-0110

DAVID BECKWITH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	
	)	
and	)	
	)	
WARD NO. AMERICA, INCORPORATED	)	DATE ISSUED: Sept. 30, 2004
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Anne B. Torkington, Administrative Law Judge, United States Department of Labor.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Brown), San Pedro, California, for employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (02-LHC-1913) of Administrative Law Judge Anne B. Torkington 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 December 7, 1999, claimant, a pipefitter, injured his low back while jumping from one level of a ship to another while carrying a tool bag. Claimant underwent back surgeries on February 21 and March 13, 2000. EXS 15 at 7; 14 at 4. Prior to this work-related injury, claimant strained and twisted his back on January 24, 1995, while carrying a 100-pound manifold up a flight of stairs. CX 13 at 91-92. Claimant received conservative care and returned to work under unspecified work restrictions. Claimant again hurt his back on February 21, 1995, while using a chain saw. Claimant was placed on temporary total disability and began a course of physical therapy. On March 13, 1995, claimant returned to work for three months in a modified capacity and then resumed his regular duties. CX 14 at 98. In her Decision and Order, the administrative law judge awarded claimant temporary total disability compensation for the current injury for the period from December 13, 1999, through December 19, 1999, for the days of December 22, 1999, January 6, 2000, January 19, 2000, and for the period from January 25, 2000, through August 30, 2001, and permanent total disability benefits beginning on August 31, 2001. 33 U.S.C. §908(a), (b). Lastly, the administrative law judge found that while employer established that claimant suffered from a manifest pre-existing permanent partial disability, employer did not establish that claimant's permanent total disability was not due solely to his December 7, 1999, work-related injury. Thus, the administrative law judge denied employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision.

Section 8(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. §§908(f), 944. *Todd Shipyards Corp. v. Director, OWCP [Porras]*, 792 F.2d 1489, 19 BRBS 3(CRT) (9th Cir. 1986). An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *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); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989); *John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93, 12 BRBS 229 (4th Cir. 1980).

After review of the record, we affirm the decision of the administrative law judge, as it is rational, supported by substantial evidence, and in accordance with law. *O'Keeffe*, 380 U.S. 359. In denying employer Section 8(f) relief, the administrative law judge found that employer did not establish the contribution element because there is no evidence that claimant's December 7, 1999, work-related injury alone could not be responsible for the claimant's current level of disability. Decision and Order at 20. On appeal, employer cites a report and testimony of Dr. Dodge which, it avers, is sufficient to satisfy the contribution element. In a letter dated May 10, 2002, in response to employer's counsel, Dr. Dodge wrote that:

> [C]ertainly prior to December 7, 1999 this gentleman had [a] pre-existing disability. This was the result of a herniated disc which caused his symptoms in his back and limitations in his back prior to December 7, 1999. It is my medical opinion that the patient's current disability is materially and substantially greater today as a result of his pre-existent disability prior to December 7, 1999.

EX 8 at 152. Thereafter, during his deposition, Dr. Dodge testified:

> I made [the] determination that [the claimant's] disability was materially and substantially greater because prior to December 7th, 1999 he did not have a normal back . . . . And as a result of the injury of December 7th, 1999 he caused a further injury to his back. So I think his disability is greater because of that pre-existing condition.

EX 16 at 16.

Contrary to employer's contention, and as the administrative law judge found, while Dr. Dodge opined that claimant's back impairment worsened due to the combination of his pre-existing condition and his December 7, 1999, work-injury, such an opinion is insufficient to establish that claimant's total disability is not solely the result of his work injury, as it does not address whether claimant's subsequent injury alone would be totally disabling. Moreover, employer's reliance on the decision of the United States Court of Appeals for the Fifth Circuit in *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997), for the proposition that the administrative law judge should have inferred that claimant's pre-existing permanent partial disability combined with his current employment injury to result in permanent

total disability, is misplaced. In *Ceres Marine*, the court affirmed an award of Section 8(f) relief where there was sufficient evidence for the administrative law judge to infer that claimant's pre-existing "disabilities combined with his employment injury to increase what would otherwise have been a partial disability into a total disability." *Id.*, 118 F.3d at 391, 31 BRBS at 94(CRT). The *Ceres Marine* court did not hold that an award of Section 8(f) relief is proper where the evidence shows only that a claimant suffers from a greater degree of impairment from the combination of his pre-existing permanent partial disability and his subsequent work-related injury than he experiences from the latter injury alone. Such a "combination" test for contribution is legally insufficient since evaluation of the evidence under that standard ends the inquiry without reaching the statutorily mandated question of whether the total disability is due solely to the subsequent injury. *See Luccitelli*, 964 F.2d at 1305, 26 BRBS at 6(CRT); *FMC Corp.*, 886 F.2d at 1186, 23 BRBS at 2(CRT). If claimant's December 7, 1999, work-related injury is sufficient to cause his present permanent total disability, the fact that he might be even more physically limited because of a pre-existing condition is not controlling. Thus, as Dr. Dodge's testimony that claimant's present disability is materially and substantially greater due to his pre-existing disability is insufficient to meet employer's burden, the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record; we therefore affirm that finding and the administrative law judge's subsequent denial of Section 8(f) relief in this case.

Accordingly, the administrative law judge's Decision and Order is 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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REGINA C. McGRANERY
Administrative Appeals Judge