U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 24-0095

STEVE A. PEDROSO Claimant v. CONTINENTAL MARITIME OF SAN DIEGO, INCORPORATED and AMTRUST NORTH AMERICA Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	**PUBLISHED** DATE ISSUED: 09/16/2025 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

John T. Marin (Laughlin Falbo Levy & Moresi, LLP), Sacramento, California, for Employer and its Carrier.

Victoria Yee (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Christopher Larsen's Decision and Order Granting Benefits (2022-LHC-00539) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act). We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer as a boilermaker from 1991 through January 2017. Hearing Transcript (Tr.) at 30. He suffered a work-related back injury in 2004 which required surgery and prevented him from working for several years. *Id.* at 41. Subsequently, he returned to regular-duty work for Employer as a boilermaker foreman and continued to experience back pain, for which he sought treatment, but he did not miss any additional work because of his lumbar spine injury. *Id.* at 42-43.

In November 2016, Claimant reported bilateral knee pain as a result of a cumulative work-related trauma. Joint Exhibit (JX) 1 at 1. In January 2017, he came under the care of orthopedic surgeon Dr. Richard Santore, who diagnosed Claimant with work-related advanced arthritis in both knees, took him off work, and recommended surgery. JX 7 at 98. Employer's defense medical examiner, Dr. Richard Greenfield, also evaluated Claimant and agreed with Dr. Santore's recommendations. JX 10 at 227-234. Dr. Santore subsequently performed total knee replacement surgery on both of Claimant's knees. JX 7 at 135; JX 16.

Claimant filed a claim for benefits alleging cumulative work-related traumatic injuries to both knees; he later amended his claim to include a work-related cumulative traumatic back injury, for which he sought treatment from Dr. Larry Dodge. JX 2 at 2; JX 14. Although Employer initially disputed Claimant's claims (*see* JX 3), Employer voluntarily paid temporary total disability (TTD) benefits from February 23, 2018, to April 1, 2019. JX 17 at 425-426. The parties agreed Claimant's condition reached maximum medical improvement (MMI) on April 2, 2019, at which time Employer began paying

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained injuries in San Diego, California. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510 (4th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003); 20 C.F.R. §702.201(a).

permanent partial disability (PPD) benefits. ALJ Exhibit (ALJX) 1; Tr. at 12-14. However, the parties disputed the nature and extent of Claimant's disability, and Employer sought relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The claim proceeded to a formal hearing on July 26, 2023.

On November 14, 2023, the ALJ issued a Decision and Order Granting Benefits (D&O). In addition to awarding TTD benefits from January 4, 2017, to March 22, 2018, the ALJ found Claimant to be permanently and totally disabled beginning April 2, 2019, through the present and continuing, and he awarded permanent total disability (PTD) benefits. D&O at 21. He denied Employer's request for Special Fund Relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In doing so, the ALJ found Claimant suffered from pre-existing permanent partial disabilities to his knees and back which were manifest to Employer. D&O at 27-28. However, the ALJ found Employer failed to show Claimant's pre-existing knee and lumbar conditions contributed to his ultimate disability and therefore denied Employer's request for Special Fund relief. *Id.* at 31-32. Employer appeals[2] and the Acting Director, Office of Workers' Compensation Programs (Director), responds, urging affirmance. Claimant has not responded to this appeal.

To qualify for relief under Section 8(f) when the claimant ultimately has a PTD, an employer must establish: (1) the claimant had a pre-existing permanent partial disability (PPPD); (2) the disability was "manifest" to the employer; and (3) the claimant's ultimate PTD is not due solely to the employment injury but is the result of the combination of the PPPD and the subsequent work-related injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Cargill, Inc.*, 709 F.2d 616, 619 (9th Cir. 1983); *Beumer v. Navy Pers. Command/MWR*, 39 BRBS 98, 102 (2005). In this case, both Employer and the Director agree Section 8(f)'s first two elements are met. But Employer contends the ALJ applied an incorrect standard when determining whether it satisfied the contribution element. Employer's Petition for Review and Brief (ER Br.) at 4-6.

Under the third element of the Section 8(f) inquiry, the "contribution" requirement, the pre-existing disability must combine with the subsequent disability and contribute to the resulting PTD. *Beumer*, 39 BRBS at 103; *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134, 136 (1996). Significantly, it is not sufficient for the employer to prove only that the claimant's PPPD combined with the work injury to result in a greater degree of disability; rather, the employer must specifically prove the work injury alone did not cause the claimant's ultimate disability, irrespective of the PPPD. *E.P. Paup Co. v. Director, OWCP*,

[2] Employer's appeal is limited to the ALJ's denial of Section 8(f) relief. Consequently, the remainder of the ALJ's D&O is affirmed as unchallenged. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57, 58 (2007).

999 F.2d 1341, 1353 (9th Cir. 1993); *Roush v. Bath Iron Works*, 49 BRBS 5, 6-7 (2015); *Dominey*, 30 BRBS at 136. While a work-related aggravation of a pre-existing condition may satisfy the contribution element in a case where the claimant is totally disabled, it is not sufficient if the evidence indicates only that the claimant's two injuries created a greater disability than the second injury alone. *E.P. Paup Co.*, 999 F.2d at 1353; *Beumer*, 39 BRBS at 103. The employer must establish, through medical or other relevant evidence, that the claimant's total disability or death was not solely due to the work injury. *Sproull v. Director, OWCP*, 86 F.3d 895, 900 (9th Cir. 1996); *Dominey*, 30 BRBS at 137. Thus, Employer must show Claimant's current PTD is due to *both* the subsequent work injury and the pre-existing disability. *Beumer*, 39 BRBS at 103; *Dominey*, 30 BRBS at 137.

Employer alleges the ALJ erred because he required it to prove Claimant would have been able to continue working if he had sustained only the work-related cumulative trauma injuries. ER Br. at 4. Employer asserts this standard is incorrect because the Ninth Circuit's holding in *FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989), requires it to show the work-related injuries, on their own, did not cause Claimant's ultimate disability and it offered sufficient proof to satisfy this burden.[3] *Id.* at 4-5.

For both Claimant's knee and back injuries, the ALJ found Employer was not entitled to Section 8(f) relief because it failed to meet the "high burden" of showing Claimant "would have been able to continue working if he only suffered the work injury and had no pre-existing conditions." D&O at 31-32. While we agree with Employer that this language re-frames an employer's burden in establishing Section 8(f) relief, any error in the ALJ's wording is harmless and insufficient to justify remand because the ALJ applied the appropriate standard in substance and substantial evidence supports his conclusion. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 1035-1036 (9th Cir. 1999).

The ALJ first evaluated the evidence regarding Claimant's bilateral knee condition, finding Dr. Greenfield opined "the physical demands" of Claimant's employment worsened his pre-existing degenerative condition, that his work "significantly contributed" to his underlying progressive osteoarthritis, and that his pre-existing condition combined with employment-related mechanical stress to result in advanced arthritis. D&O at 30; *see* JX 10 at 232. He further found Dr. Greenfield apportioned Claimant's ultimate permanent disability equally between his pre-existing osteoarthritis and his cumulative traumatic work-related injury. *Id.*; *see* JX 10 at 233. Similarly, the ALJ found Dr. Santore opined

[3] Despite reciting the Section 8(f) contribution standard for PTD situations in its opening Petition for Review, Employer repeatedly recites a different standard – the one for permanent partial disability situations – in its supporting brief. ER Br. at 15-16, 20.

Claimant's work history was a "primary trigger" for his knee arthritis and that he would not suffer from his current condition absent his heavy work history. *Id.*; JX 7 at 98. Dr. Santore also opined Claimant's pre-existing knee conditions would not have resulted in "advanced arthritis of his type absent his heavy work history." JX 7 at 98.

While the ALJ concluded these medical opinions unequivocally established Claimant's pre-existing knee arthritis combined with his cumulative work trauma to result in a greater degree of disability, he reasonably determined this was insufficient to relieve Employer of liability under Section 8(f)'s contribution standard. D&O at 30; *see FMC Corp.*, 886 F.2d at 1186. Rather, because neither physician excluded Claimant's work-related cumulative trauma (the second injury) from being the sole cause of his current PTD, the ALJ rationally and permissibly found Employer did not satisfy the contribution element and is not entitled to Section 8(f) relief for Claimant's bilateral knee condition. *Id.* at 30-31.

The ALJ next addressed Claimant's lumbar spine condition. D&O at 31. He found Dr. Greenfield attributed Claimant's current back pain to a combination of his 2004 lumbar injury, the need for surgery, and subsequent natural progression of that injury. *Id.*; *see* JX 10 at 243. He found Dr. Dodge opined Claimant's employment aggravated his underlying degenerative disc disease and the doctor apportioned 85% of Claimant's overall impairment to cumulative trauma from his employment, with the remaining 15% caused by nonindustrial factors such as natural progression of degenerative disc disease and degenerative arthritis. *Id.* at 31; *see* JX 14 at 391, 398.

While the ALJ acknowledged Dr. Dodge identified two separate causes of Claimant's current lumbar spine impairment, he found the doctor failed to address whether Claimant would be disabled absent the "nonindustrial" factors. D&O at 31-32. The ALJ rationally found Dr. Dodge's apportionment of Claimant's PTD between work-related trauma (the second injury) and his PPPD was not sufficient to establish the contribution element because it merely identified two causes but failed to demonstrate Claimant would not have been totally disabled absent the 15% PPPD impairment. *Id.* As the Ninth Circuit explained, "[i]f the later injury was enough to totally disable [Claimant], it is not relevant that his pre-existing [] injury made his total disability even greater." *E.P. Paup Co.*, 999 F.2d at 1353; *see also Fenske v. Serv. Emps. Int'l, Inc.*, 835 F.3d 978, 981 (9th Cir. 2016) (because the Act is meant to compensate injured employees for wage loss, a claimant cannot receive benefits exceeding those he would recover for total disability); *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27, 28 (2011) ("[A] claimant cannot receive compensation greater than that for total disability."). Employer must show the work-related cumulative trauma to Claimant's lumbar spine *alone* did not result in total disability, irrespective of his PPPD, and the ALJ again rationally concluded it failed to

carry this burden. D&O at 32; *see E.P. Paup Co.*, 999 F.2d at 1353-1354; *Roush*, 49 BRBS at 7.

As the ALJ applied the correct legal standard in evaluating the evidence, and as substantial evidence supports his conclusion, we affirm his denial of Employer's request for Special Fund relief under Section 8(f) of the Act.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge