U.S. Department of Labor

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

BRB No. 23-0102

ARNIE R. JOHNSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS INDUSTRIES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 04/09/2024
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of Order Denying Section 8(f) Relief, Order on Reconsideration Denying Section 8(f) Relief, and Decision and Order on Remand of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for Employer/Carrier.

Amanda Torres (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge; BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Order Denying Section 8(f) Relief, Order on Reconsideration Denying Section 8(f) Relief, and Decision and Order on Remand (2018-LHC-00592) 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case is before the Benefits Review Board.[1] Claimant sustained an injury to her neck on November 30, 2012,[2] during the course of her employment with Employer.[3] Following that injury, she did not return to her usual employment as a shipyard worker. Claimant filed a claim for compensation that Employer did not controvert. Employer averred it had paid Claimant compensation and medical benefits due, it was continuing to pay Claimant compensation for permanent total disability (PTD), 33 U.S.C. §908(a), and that the only unresolved issue before the ALJ was its request

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[1] We incorporate by reference the Benefits Review Board's prior decision in *Johnson v. Huntington Ingalls Industries, Inc.*, BRB No. 20-0557 (Feb. 17, 2021) (unpub.). We limit our discussion of the factual and procedural history to those facts relevant to the present appeal.

[2] Prior to her November 30, 2012 injury, Claimant sustained numerous injuries and medical complications during the course of her employment with Employer, including a knee injury in 1982, a neck injury in 1983, arm and back pain in 1989, cervical spondylosis in 1990, and a left shoulder and right knee injury in 2000. EX B, EX 2 at 1, 2, 4, 5-12, 18-19, 21. As a result of these injuries, Employer placed Claimant on permanent work restrictions on September 21, 2000, including no crawling, no kneeling, and no squatting. *Id.* at 25; EX 1 at 1.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant sustained her injury in Newport News, Virginia. 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).

for Section 8(f) relief, 33 U.S.C. §908(f). Hearing Transcript (TR) at 4-5; *see also* Emp. Pre-Hearing Statement/Stipulations (Aug. 20, 2018). A hearing specific to Employer's Section 8(f) application was held in Newport News, Virginia, on September 12, 2018. TR at 1.

In his initial August 13, 2020 Order Denying Section 8(f) Relief (D&O), the ALJ noted Employer and the Director, Office of Workers' Compensation Programs (Director), agreed Claimant had a pre-existing permanent partial disability that was manifest to Employer. He determined, however, Employer did not prove Claimant's current PTD is not solely due to her November 30, 2012 work-related neck injury. D&O at 4. Consequently, he denied Employer's Section 8(f) application. *Id.* at 4-5. The ALJ also denied Employer's motion for reconsideration. Order on Reconsideration Denying Section 8(f) Relief (Recon. Order) at 2-3.

Employer subsequently appealed both orders to the Board, challenging the denial of Section 8(f) relief. The Board declined to address Employer's appeal because the ALJ had not issued a final decision or order on Claimant's claim for benefits. *Johnson v. Huntington Ingalls Industries, Inc.*, BRB No. 20-0557 (Feb. 17, 2021) (unpub.) at 2. The Board vacated the ALJ's Order Denying Section 8(f) Relief and remanded the case for the entry of a specific award or denial of benefits.[4] *Id.* On remand, the ALJ accepted Employer's stipulations, found Claimant permanently disabled from December 10, 2015, to the present and continuing, awarded benefits, and again denied Employer's request for Section 8(f) relief. Decision and Order on Remand (Remand Order) at 2-3.

On appeal, Employer challenges the ALJ's denial of Section 8(f) relief. It contends the ALJ erred in determining Claimant's permanent total disability was based solely on her November 30, 2012 neck injury and in failing to provide a rational basis for rejecting Dr. P. Steven Apostoles's medical opinion. Claimant has not responded to this appeal. The Director responds, urging affirmance. Employer filed a reply brief in support of its appeal.

In order for an employer to qualify for relief under Section 8(f) when the work injury results in permanent total disability, the employer must establish: (1) the claimant had a pre-existing permanent partial disability; (2) the disability was "manifest" to the employer; and (3) the claimant's ultimate permanent total disability is not due solely to the employment injury but is the result of the combination of the pre-existing permanent partial disability and the subsequent work-related injury. 33 U.S.C. §908(f)(1); *Director, OWCP*

[4] The Board also held the ALJ could then address Employer's claim for Section 8(f) relief on remand following entry of a specific award or denial of benefits to Claimant.

v. Newport News Shipbuilding & Dry Dock Co. [Harcum I], 8 F.3d 175, 182-183 (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995).

Under the third element, commonly referred to as the "contribution" requirement, the pre-existing disability must combine with the subsequent disability and contribute to the resulting permanent total disability. *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434 (4th Cir. 2003); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 114-115 (4th Cir. 1982); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). Employer, therefore, has the burden to establish by medical or other evidence that Claimant's current permanent total disability is due to both the subsequent work injury and the pre-existing disability. *Ward*, 326 F.3d at 439. If the employment injury was sufficient, by itself, to cause Claimant's permanent total disability, Section 8(f) relief is unavailable, and Employer is liable for the entire compensation award. *See generally Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 50-51 (1st Cir. 1997) (quoting *Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 390 (5th Cir. 1997)).

Here, both Employer and the Director agree Section 8(f)'s first two elements are met. However, Employer contends the ALJ erred in rejecting Dr. Apostoles's opinion that Claimant's permanent total disability was caused by the cumulation of injuries she suffered that pre-dated her November 30, 2012 work injury in conjunction with her November 30, 2012 work injury. It argues the ALJ used a "hyper-technical grammatical error" to reject Dr. Apostoles's uncontroverted opinion and to determine that the doctor contradicted himself regarding his awareness about whether Claimant underwent a cervical fusion.[5] Consequently, Employer contends the ALJ erred by disregarding uncontroverted medical evidence and substituting his own opinion for that of a medical expert.

We disagree. As the factfinder, the ALJ has the authority to weigh the conflicting evidence in the record and determine whether it establishes that Claimant's pre-existing condition contributed to her present permanent total disability. *Langley*, 676 F.2d at 115. The ALJ found Dr. Apostoles's opinion indicated the physician did not review the entire medical record and speculated about whether Claimant had undergone a cervical fusion. In this regard, the ALJ found Dr. Apostoles's opinion – that "even if the [November 2012

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[5] Employer also asserts the ALJ erred by not finding Dr. Apostoles qualified to give a medical opinion as a board-eligible orthopedist. While the ALJ found Dr. Apostoles's credentials were not in the record in his original Order Denying Section 8(f) Relief, he admitted the doctor's opinion into the record on reconsideration and found him qualified to render the opinions he did. *See* Order on Reconsideration Denying Section 8(f) Relief at 1-2. Thus, we reject Employer's allegations of error and bias.

work] injury had resulted in cervical fusion, many workers return to work following their injury" – did not recognize that on May 27, 2014, Claimant underwent a C2-T2 posterior decompression and fusion performed by Dr. Hilal Kanaan.[6] D&O at 4 (quoting EX A at 4-5). Further, he found Dr. Apostoles's medical report was merely a summary of some of Claimant's medical records followed by a conclusion, without any supporting evidence, that Claimant's November 30, 2012 neck injury, by itself, would not have been totally disabling. Recon. Order at 2.

Substantial evidence supports the ALJ's findings. Dr. Apostoles's report, the primary evidence Employer relies upon in support of its petition for Section 8(f) relief, summarizes Claimant's extensive injury history over the course of her employment with Employer.[7] *See* EX A at 1-3. However, as the ALJ found, Dr. Apostoles's medical report summarily states he believes Claimant's present permanent total disability is attributable to her "previous multiple neck injuries dating to at least 1981 and her permanent degenerative condition" without detailing how her November 30, 2012 neck injury and corresponding 2014 surgical procedure could not have, in isolation, led to her permanent total disability. EX A at 4. The report merely states, "[i]f Ms. Johnson had no pre-existing impairment, and had only incurred the injury of November 30, 2012 to the neck, she would have more probably than not have recovered to return to work at the Shipyard." *Id.* Dr. Apostoles's report does not indicate how Claimant's November 30, 2012 neck injury would not have rendered her permanently and totally disabled absent the pre-existing disability other than stating she would have "probably" recovered. *See generally Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 607 (5th Cir. 2004) (determining Section 8(f) relief should not be granted if an employer does not present evidence to show how an employee's current disability was more disabling because of an earlier injury).

Further, medical records submitted with Employer's Section 8(f) petition referenced a Dr. Kanaan performing a C2-T2 posterior decompression and fusion to treat Claimant's November 30, 2012 neck injury. EX 3 at 39-40. The ALJ permissibly found this evidence, in conjunction with Dr. Kanaan's opinion she should not return to work as of December

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[6] The ALJ and Employer referred to the physician who performed Claimant's fusion as Dr. Kahaan, while medical records from a Dr. Raymundo D. Milano submitted in support of Employer's Section 8(f) application refer to the physician as Dr. Kanaan. *See* D&O at 4, Recon. Order at 2; EX B, EX 3 at 39-40.

[7] Along with its Section 8(f) petition, Employer submitted medical records of Claimant's injuries during the course of her employment with Employer from 1979 through November 30, 2012, and her subsequent treatment. *See generally* EX B, EXs 1-4.

10, 2014,[8] suggests Claimant's November 2012 neck injury could have, by itself, resulted in her present PTD. *See Director, OWCP v. Gen. Dynamics Corp. [Bergeron]*, 982 F.2d 790, 797-798 (2d Cir. 1992) ("if the later injury alone was enough to totally disable [the claimant], it should be irrelevant that his pre-existing injury made his total disability even greater").

As the ALJ permissibly rejected Dr. Apostoles's opinion, *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 453 (4th Cir. 2003), and found the evidence pertaining to Dr. Kanaan's treatment does not support Employer's burden, we affirm his determination that Employer did not establish the contribution element necessary to obtain Section 8(f) relief. *Langley*, 676 F.2d at 114-115; *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98, 103 (2005).

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[8] On its Section 8(f) application, Employer alleged that, "[o]n May 27, 2014, Dr. Kahaan [sic] performed a C2-T2 posterior decompression and fusion, subsequently finding the Claimant should not return to any work activity as of December 10, 2014." EX B at 2. The ALJ rationally inferred, given the absence of any of Dr. Kanaan's treatment records in evidence, the physician's opinion regarding Claimant's inability to return to work is likely based solely on his treatment of Claimant's post-2012 work cervical injury because it is the only condition reflected in the record for which he treated her. D&O at 4.

Accordingly, we affirm the ALJ's Order Denying Section 8(f) Relief, Order on Reconsideration Denying Section 8(f) Relief, and Decision and Order on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge