

U.S. Department of Labor

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



BRB No. 21-0004

TOM HORN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
HARNISH GROUP, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	DATE ISSUED: 12/29/2021
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Relief of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Marcin M. Grabowski (Bauer Moynihan & Johnson LLP), Seattle, Washington, for Employer/Carrier.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Denying Section 8(f) Relief (2018-LHC-01083) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act).¹ 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).

Claimant worked for Employer as a marine mechanic from August 1987 to June 12, 2017. He sought medical treatment for back pain from Dr. James Morris, a chiropractor, in March 2017. Emp. 8(f) Exh. 13 at 1. At a medical exam on June 5, 2017, Claimant complained of back pain that now radiated into his legs. Jt. Stip. Exh. 15 at 1. An x-ray showed severe degenerative disc disease (DDD) at L5-S1 and moderate DDD at L3-4, L4-5. Jt. Stip. Exh. 16.1. Claimant stopped working on June 12, 2017 – he complained of worsening back symptoms and was unable to finish his shift. Emp. 8(f) Exh. 1. He underwent lumbar fusion surgery at L4-5 and L5-S1 on July 17, 2017. *Id.* Exh. 6 at 9. Claimant had a functional capacities exam on September 28, 2018, which concluded he could not return to his usual work, but he could perform medium-duty work. *Id.* Exh. 19 at 49.

Following his order approving the parties' stipulations, including their agreement that Claimant is entitled to benefits for a cumulative trauma back injury on June 12, 2017,² Employer sought Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability. The Director, Office of Workers' Compensation Programs (Director) opposed

¹ The Board's processing of this case was substantially delayed due to the COVID-19 pandemic, which impacted the Board's ability to obtain records from the Office of Administrative Law Judges and the Office of Workers' Compensation Programs.

² The parties also stipulated Claimant retained a wage-earning capacity of \$800, and Employer agreed to pay temporary total disability compensation, 33 U.S.C. §908(b), from June 13, 2017 through the date of maximum medical improvement on November 1, 2018, and permanent partial disability compensation, 33 U.S.C. §908(c)(21), based on a loss of wage-earning capacity of \$1,400 and medical benefits. The ALJ approved the stipulations. Order Approving Stipulations at 2-4.

the request. The ALJ found Employer did not establish a pre-existing permanent partial disability (PPPD), a pre-existing disability was manifest to Employer, and the Director conceded the manifest requirement and, even assuming a PPPD, Employer failed to show Claimant's current disability is "materially and substantially greater than that which would have resulted from the June 2017 injury alone." Decision and Order at 8-12.

Employer appeals the denial of Section 8(f) relief. The Director responds, urging affirmance. Because the ALJ did not discuss all relevant evidence to properly address the Section 8(f) criteria under the applicable law and based on Employer's stated grounds for Section 8(f) relief, we vacate his decision and remand for further consideration. *Gelinas v. Electric Board Corp.*, 45 BRBS 69 (2011) (remanded as ALJ did not cite relevant case precedent or discuss relevant evidence); *Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993) (Brown, J., dissenting) (ALJ failed to discuss relevant evidence for establishing contribution under Section 8(f)).

In order for an employer to qualify for relief under Section 8(f) in a case where the claimant is permanently partially disabled, an employer must establish: (1) the claimant had an existing permanent partial disability; (2) the pre-existing partial disability was manifest to the employer; (3) the work injury alone did not cause the claimant's permanent partial disability; and (4) the claimant's ultimate disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone. 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Cutietta v. National Steel and Shipbuilding Co.*, 49 BRBS 37 (2015).

PPPD

Employer contends Claimant's DDD constitutes a PPPD in accordance with the Act, and the ALJ erred in finding otherwise. Employer relies on the June 5, 2012 x-ray, the medical opinions of Drs. John Burns and Mahesh Karandikar, as well as Claimant's reporting to Dr. Morris on March 27, 2017, about "constant discomfort" of his lumbar spine, which was "aggravated by almost any movement" and caused difficulty when "standing and walking ... for more than 3 minutes."³ Jt. Stip. Exhs. 13.1, 16.1; *see also* Jt. Stip. Exhs. 17.1, 19.1; Emp. 8(f) Exhs. 5, 14. Therefore, Employer contends the DDD is a long-standing, serious, pre-existing condition that constitutes a disability under Section 8(f).

³ Claimant received chiropractic treatment from Dr. Morris four times from March 27 to April 3, 2017. CX 3 at 15-19; EXs 13, 14.

The ALJ relied on the absence of medical or “other persuasive” evidence of back complaints before March 2017 to reject Claimant’s testimony of having long-standing chronic back pain.⁴ Decision and Order at 10. The ALJ found Claimant’s back pain “was a precursor to seeing the doctor and the ultimate surgery,” and his DDD does not meet the standard for showing a serious and lasting physical condition. Accordingly, he summarily concluded Employer did not show Claimant had a PPPD.⁵

A PPPD has been defined as “such a serious ... disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of ... compensation liability.” *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); see *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 115(CRT) (1st Cir. 1992); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). The mere existence of a pre-existing condition, however, does not establish the claimant was disabled; rather, there must exist, as a result of that pre-existing condition,

⁴ With regard to Claimant’s back condition, the ALJ stated only:

I am not persuaded that Claimant’s back condition that was never medically treated until March 2017 meets the [PPPD] standard.

Claimant told his treating doctor that he had prior back pain that he occasionally treated with a chiropractor or with over the counter medicine, but the only evidence of treatment was in March 2017, when Claimant saw a chiropractor in Alaska, which eventually led him to seek medical treatment.

Claimant said he had back pain prior to his current treatment, but that was a precursor to seeing the doctor and the ultimate surgery. There were no medical reports or other persuasive evidence of how long Claimant alleged his back hurt or how often and when it was treated by a chiropractor other than March 2017.

Decision and Order at 9-10.

⁵ The ALJ’s decision primarily addressed Employer’s identification of Claimant’s carpal tunnel and hand surgery in 1990 and hernia repair in 1997 as evidence of a PPPD. Employer abandoned its reliance on these injuries in its post-hearing brief. See Emp. Post-Hearing Br. at 8-9.

some serious lasting physical problem. See *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991).

With respect to whether Claimant had a PPPD of his back, the ALJ, as noted above, drew summary conclusions seemingly because there was not a long history of medical treatment. Decision and Order at 9-10. He did not address all the relevant evidence in reaching his conclusion. Although he briefly summarized Dr. Burns's report in his statement of the facts, *id.* at 7, he did not address Dr. Burns's report or deposition testimony in his discussion, which, if credited, supports Employer's assertion that Claimant's DDD was a "serious lasting physical problem" prior to his retirement date.

Dr. Burns examined Claimant at Employer's request on April 23, 2019, and was deposed on May 9, 2019. *Jt. Stip. Exhs. 17.1, 19.1*. He testified DDD has a gradual onset, and Claimant's degree of degenerative changes would take ten years to develop.⁶ *Jt. Stip. Exh. 19.8* at 26-27. As Claimant's lumbar x-ray showed severe DDD at L5-S1 and moderate DDD at L3-4 and L4-5 in June 2017, *Emp. 8(f) Exh. 16* at 1, the record contains unaddressed evidence that could establish a pre-existing, serious, and lasting condition. *Lockhart*, 980 F.2d 74, 26 BRBS 115(CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988) (a condition need not be economically disabling in order to constitute a PPPD).

The ALJ also erred by relying on the brevity of time between the June 5 diagnosis of a pre-existing condition and Claimant's last day of work on June 12 as support for finding the DDD and cumulative trauma injury constitute the same injury. The time between first and second injuries is not determinative for establishing a PPPD.⁷ For example, in *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991), the claimant had intracranial bleeding 10 days before sustaining a stroke, which the Board held constituted two distinct injuries for purposes of Section 8(f) relief, rather than one continuous injury. *Accord Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988) (two work-related back injuries five weeks apart and intimately related are two separate injuries for purposes of Section 8(f) relief). Pursuant to *Ortiz* and *Lockhart*, the ALJ erred by relying on the length

⁶ Dr. Burns's opinion also bolsters Dr. Karandikar's opinion that Claimant's condition is long-standing, which the ALJ rejected as unsupported in his contribution discussion. Decision and Order at 11.

⁷ The Director avers the evidence is insufficient to establish a PPPD because Claimant returned to work after June 5 without restrictions. This fact, however, is offset by Claimant's retirement one week later due to the pain caused by his continuing to work.

of time between when Claimant sought treatment in March and early June 2017 and when he stopped working on June 12, 2017, to find no PPPD. *Ortiz*, 25 BRBS 228; *Lockhart*, 20 BRBS 219.

Because the ALJ did not fully address Dr. Burns's report and deposition testimony, consider Dr. Karandikar's opinion in light of Dr. Burns's opinion, or apply the relevant law to assess whether Claimant's DDD constitutes a PPPD, we vacate his decision and remand the case to him for further consideration. On remand, he must address all relevant evidence. Additionally, he must render his decision with the understanding that Claimant's stopping work on June 12, 2017, one week after being diagnosed with DDD, is not, alone, legally determinative of the issue.

Second Injury and Contribution

Employer also contends the ALJ erred in finding Claimant's pre-existing DDD did not materially and substantially contribute to his current condition. It avers Claimant's DDD was rendered symptomatic by cumulative trauma from his work activities, and disabled him from continued longshore employment. It also asserts Claimant's current disability is materially and substantially greater due to the DDD. For the sake of judicial efficiency, if the ALJ finds there is a PPPD on remand, we address contribution. We agree with Employer that the ALJ's contribution discussion cannot be affirmed.

The ALJ found Employer relied solely on Dr. Karandikar's opinion, which he determined is without supporting evidence and is speculative as it is based merely on Claimant's statements, to show contribution. He concluded Claimant's March 2017 treatment "lead to surgery in July 2017[.]" and there is no evidence establishing a long duration or the extent of Claimant's on-going problems or showing his condition was made materially worse by those pre-existing problems. Decision and Order at 11-12. Therefore, he found Claimant's June 2017 work injury alone caused the permanent injury. *Id.*

The ALJ's contribution discussion contains legal and factual errors.⁸ First, he did not address whether there has been work-related aggravation(s) to Claimant's underlying condition. Cumulative aggravations from a claimant's working conditions can constitute separate injuries and, therefore, can be the "second injury" basis for Section 8(f)

⁸ Within the span of two consecutive paragraphs, the ALJ made contradictory findings. He found, correctly, Claimant first received treatment from Dr. Morris in March 2017, then he incorrectly stated there are no treatment records from Dr. Morris and no evidence that Claimant sought medical treatment for his back prior to June 2017. Decision and Order at 11-12.

relief. *Port of Portland v. Director, OWCP [Ronne II]*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000); *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998); *Director, OWCP v. Todd Shipyards Corp. [Ashley]*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980); *Cutietta*, 49 BRBS 37; *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *Ortiz*, 25 BRBS 228. Next, he did not discuss the law of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises. The Ninth Circuit has held evidence showing the current level of disability is the result of a combination of the pre-existing condition and the work injury may be sufficient to establish the contribution element, making it unnecessary to precisely define the degree of quantification needed to meet the “materially and substantially greater” standard under Section 8(f). *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT); *Coos Head Lumber*, 194 F.3d 1032, 33 BRBS 131(CRT). Finally, he did not address Dr. Burns’s opinion at all, though Employer specifically relied on it.⁹ Emp. Reply Br. at 4-6; Emp. Post-Hearing Br. at 10-12. In light of our conclusion that the ALJ failed to fully discuss, weigh, and make a credibility determination regarding Dr. Burns’s opinion, we also vacate the ALJ’s contribution findings. On remand, he must fully address the relevant evidence under the applicable law.¹⁰

⁹ Dr. Burns testified Claimant’s work duties servicing engines in tight quarters on ships would have aggravated his DDD. Jt. Stip. Exhs. 17.7, 19.8-19.9 at 27-28, 30. Dr. Burns also stated Claimant’s aggravations superimposed on his pre-existing condition, resulting in a greater disability. Jt. Stip. Exh. 19.9-19.10 at 33-34. Additionally, while he found the major contributing factors to Claimant’s condition are his age, genetics, and body habitus, he reported Claimant’s work “precipitated symptoms” and was “a partially contributing factor.” Jt. Stip. Exh. 17.7. Dr. Burns added Claimant would “stay symptomatic” if he continued working for Employer.” Jt. Stip. Exh. 19.8-19.9 at 27-28, 30. Similarly, acknowledging Claimant’s work repairing ships in Alaska, Dr. Karandikar stated Claimant’s work “is more likely than not at least a contributing factor to his underlying back pain.” Emp. 8(f) Exh. 15.

¹⁰ We acknowledge Dr. Burns gave seemingly contradictory testimony regarding whether Claimant’s DDD made his current condition materially and substantially greater. Jt. Stip. Exh. 19.9 at 32-33, 19.9-19.10 at 33-34, 19.20 at 76; *see also* Jt. Stip. Exh. 17.1. The ALJ must reconcile these statements and set forth how he weighs them in his discussion. We also note, however, there is no medical opinion stating Claimant’s condition is the result of his work injury alone.

Accordingly, we vacate the ALJ's Decision and Order Denying Section 8(f) Relief and remand the case for further proceedings in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge