U.S. Department of Labor

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

BRB No. 23-0490

HORACE McAROY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRAPAC, LLC	)	
	)	**NOT-PUBLISHED**
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD	)	DATE ISSUED: 07/21/2025
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Reconsideration, Vacating Decision and Order Issued July 11, 2023, and Amended Decision and Order Granting Benefits for Permanent Partial Disability of Christopher Larsen, Administrative Law Judge, United States Department of Labor.

William N. Brooks II (Law Offices of William N. Brooks), Long Beach, 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 and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Christopher Larsen's Order Granting Reconsideration, Vacating Decision and Order Issued July 11, 2023, and Amended Decision and Order Granting Benefits for Permanent Partial Disability (2022-LHC-00798) 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 Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Employer as a longshoreman for twenty-two years in Oakland, California. Hearing Transcript (TR) at 71, 83. In 2008, he injured his neck and lower back when a top handler hit the tractor he was driving, resulting in two neck surgeries in 2011 and his inability to work for more than one year thereafter. *Id.* at 75-76. Following this injury, Claimant continuously suffered from pain in his neck, back, arms, and legs for several years. *Id.* at 77, 79-80, 108-109. Employer provided Claimant with temporary total disability benefits for one year between 2008 and 2009, three months in 2011, and five months in 2012. *Id.* at 106. Claimant did not miss work due to his neck and back pain from 2012 to 2017. *Id.* at 77-78. In 2017, Claimant was diagnosed with kidney cancer and had to miss work for more than one month due to treatment. *Id.* at 78. After his kidney procedure, he worked from October 30, 2017, to August 25, 2021, and he received massage and chiropractic treatment for his continued back and neck pains from 2017 to 2021. *Id.* at 79, 81.

On August 26, 2021, Claimant sustained an injury to his neck and lower back when the left rear tire of the top handler he was driving fell off. TR at 88-89. He was "jerked around in the cab" and then "was immediately taken by ambulance to the hospital." *Id.* In the emergency room, he was initially diagnosed with neck, lumbar muscle, and thoracic spine strains, prescribed medications, and discharged. Claimant's Exhibit (CX) 7 at 149-

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injury in 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); 20 C.F.R. §702.201(a).

150, 154. He did not experience immediate pain because he was in shock and "shaking pretty bad[ly]," but later his back and neck were stiff and sore. TR at 89. He continued working for Employer until September 17, 2021, when he experienced additional back pain and neck spasms. Employer's Exhibit (EX) 14 at 77; TR at 91.

On September 15, 2021, Claimant's treating physician, Dr. Michael Hebrard, a physiatrist, diagnosed him with a cervical strain and radiculopathy in the cervical and lumbar regions, and he imposed several work restrictions. CXs 5 at 120-121, 124-125, 6 at 129. Dr. Hebrard opined that Claimant's neck and back conditions were aggravated by his August 2021 injury and had not reached maximum medical improvement. *Id.* at 125. Further, Dr. Hebrard discontinued Claimant's physical therapy treatment because it aggravated his symptoms and referred him to Dr. Robert Rovner, an orthopedic surgeon. CXs 5 at 116, 15 at 478; TR at 92-93.[2] On February 18, 2022, Dr. Rovner opined that Claimant's August 2021, injury "caused aggravation of pre-existing cervical and lumbar spondylosis and stenosis resulting in bilateral upper extremity symptoms . . . and some radicular pain in the legs." CX 15 at 475-478.

On February 24, 2022, Dr. David Atkin, an orthopedic surgeon, examined Claimant on behalf of Employer and determined Claimant had recovered from his August 2021 injury, did not suffer a permanent aggravation of his pre-existing condition, and can return to work at full duty. CX 18 at 31; EX 7 at 44-45A, 8. On October 13, 2022, Dr. Mechel Henry, a physical medicine, rehabilitation, and pain management specialist, examined Claimant and diagnosed him with cervical, thoracic, and lumbar strains, cervical radiculopathy, and peripheral neuropathy attributed to spinal stenosis, all of which was "caused, worsened, aggravated, and contributed" by his "career ending" August 26, 2021 injury. CXs 10 at 432-434, 13 at 471; *see* TR at 39-41.

Procedurally, on August 31, 2021, Claimant filed a claim for benefits under the Act for his neck and back injuries. CX 1 at 2; EX 3. Employer paid Claimant $1,632.70 per week in temporary total disability (TTD) compensation and medical benefits from August 27, 2021, through February 24, 2022, the date of Claimant's medical examination by Dr. Atkins on behalf of Employer. CX 1 at 3; EX 5; CX 3. Employer filed notices of controversion on March 10, 2022, and May 11, 2022, disputing the claim. EX 4. On May 27, 2022, Employer applied for relief under Section 8(f) of the Act, 33 U.S.C. §908(f). EX

[2] Claimant visited Dr. Hebrard again on April 19, 2022, May 31, 2022, July 26, 2022, September 13, 2022, and November 8, 2022, and complained of pain and discomfort in his neck and back; the doctor reiterated his previous findings. CX 5 at 43, 59, 82, 96, 100; EX 13 at 57-58, 61.

6. Unable to reach an agreement on the merits, the case was referred to the Office of Administrative Law Judges (OALJ). The ALJ held a hearing on February 23, 2023.

On July 11, 2023, the ALJ issued an Order Granting Benefits for Permanent Partial Disability. After Claimant filed an unopposed motion for reconsideration on July 17, 2023, the ALJ issued his Order Granting Reconsideration, Vacating Decision and Order Issued July 11, 2023, and Amended Decision and Order Granting Benefits for Permanent Partial Disability (D&O) on August 17, 2023.[3] The ALJ found Claimant sustained a work-related injury and awarded permanent partial disability (PPD) benefits. D&O at 20-22; CX 10 at 437; EXs 7 at 44, 16 at 63. In doing so, he credited Claimant's testimony, as well as the medical opinions of Drs. Hebrard and Henry regarding Claimant's disability over Dr. Atkin's contrary opinion. D&O at 16-20.

Nevertheless, the ALJ credited Drs. Atkin and Henry regarding Claimant's condition having reached maximum medical improvement (MMI) on May 31, 2022. D&O at 22. In response to Employer's request for Section 8(f) relief, the ALJ found Employer successfully proved Claimant had a manifest, pre-existing permanent partial disability (PPPD). *Id.* at 25. However, the ALJ assigned little weight to Dr. Atkin's opinion and found Employer failed to establish the contribution element necessary for Section 8(f) relief. Rather, he found Claimant's current condition is not "materially and substantially greater" because of the PPPD than it would have been from his subsequent injury alone. *Id.* at 26-27. Therefore, the ALJ denied Section 8(f) relief and concluded Employer is responsible for the entirety of Claimant's benefits. *Id.* at 27.

On appeal, Employer challenges the ALJ's Section 8(f) determination on three grounds. It contends he erred by placing an incorrect burden of persuasion on Employer with respect to establishing the contribution element by irrationally weighing uncontradicted evidence and by misapplying the "aggravation doctrine" in his analysis.

[3] On July 17, 2023, Claimant filed an Unopposed Motion for Reconsideration requesting a change to the wording of the Order from "Employer/Carrier must pay Mr. McAroy benefits at a rate of $1,632.70 (plus interest calculated by the District Director of the OWCP) from February 25, 2022 *through the present*" to "Employer/Carrier must pay Mr. McAroy benefits at a rate of $1,632.70 (plus interest calculated by the District Director of the OWCP) from February 25, 2022 *through the present and ongoing*." Cl.'s Mot. for Recon. at 2 (emphasis added). The ALJ granted the motion. D&O at 2.

The Director, Office of Workers' Compensation Programs ("the Director") responds, urging the Board to affirm the ALJ's D&O.[4]

Section 8(f) shifts liability for payment of compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. *See* 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case if a claimant is permanently partially disabled, if it establishes the claimant had a manifest PPPD, and if the claimant's current PPD is not due solely to the subsequent work injury but is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 668 (9th Cir. 2000);[5] *Sproull v. Director, OWCP*, 86 F.3d 895, 900 (9th Cir. 1996). If the employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.* Section 8(f) also is not applicable when the claimant's disability results from the progression of, or is a direct and natural consequence of, the pre-existing disability. *Vlasic v. American President Lines*, 20 BRBS 188 (1987).

Contrary to Employer's contention, the ALJ stated the correct standard for satisfying Section 8(f)'s contribution element. Emp's Brief at 4-6. The ALJ initially indicated an employer may prove the contribution element through medical evidence, "but because the Directors do not submit IMEs [independent medical examinations] or other evidence, the employer will not meet this burden by producing uncontradicted evidence." D&O at 26 (citing *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 449 n.3 (4th Cir. 2003)).[6] He elaborated by explaining he must "examine the logic of

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[4] We affirm as unchallenged on appeal the ALJ's findings that Claimant established a compensable PPD and that Employer satisfied the first two elements necessary for Section 8(f) relief. *Scalio v. Ceres Marine Terminals, Inc*., 41 BRBS 57, 58 (2007); D&O at 22, 25.

[5] The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, declined to express a view regarding the degree of evidence required to support a "materially and substantially greater" finding; therefore, quantification or "precision" of that finding is not necessary. *Quan*, 203 F.3d at 669. At a minimum, the applicable law dictates the employer must offer some proof of the extent of the claimant's ultimate PPD if the pre-existing injury had never been sustained, so the ALJ may determine whether the claimant's PPD is materially and substantially greater due to the pre-existing disability. *See id.*

[6] In *Ward*, the employer claimed the ALJ was obliged to accept its evidence because neither the Director nor the claimant offered any contradictory evidence. *Ward*, 326 F.3d at 449 n.3. The United States Court of Appeals for the Fourth Circuit concluded the ALJ

employer's expert conclusions and evaluate the evidence upon which their conclusions are based." D&O at 26 (citing *Ward*, 326 F.3d at 449 n.4).[7] The rule requires the ALJ to consider and weigh the Section 8(f) evidence, regardless of whether it is uncontradicted; therefore, the ALJ did not place a heightened standard on Employer. Rather, he correctly held Employer to a burden of persuasion for establishing contribution and Section 8(f) relief. D&O at 26.

Employer also contends the ALJ's weighing of the evidence on the Section 8(f) contribution requirement was irrational, unsupported by substantial evidence, and not in accordance with applicable law. Emp's Brief at 7-10. It asserts it satisfied the contribution element, relying on Dr. Atkin's statement that Claimant's "[permanent] restrictions are materially and substantially greater than they would have been had he not suffered from pre-existing conditions in his cervical and lumbar spine."[8] Emp's Brief at 8; *see* EX 7 at 45B. Contrary to Employer's argument, the ALJ reasonably found Dr. Atkin's opinion insufficient to establish the contribution element for Section 8(f) relief.[9]

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and the Board correctly noted it is "irrelevant" that Section 8(f) evidence may be uncontradicted. *Id.* (citing *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 142 (4th Cir. 1998)). The court explained an employer bears the burden of persuasion to establish its entitlement to Section 8(f) relief by credible, sufficient, and reliable evidence, and the evidence supporting such relief is frequently provided by physicians utilized for purposes of litigation. *Ward*, 326 F.3d at 449 n.3.

[7] The court in *Ward* stated an ALJ may not blindly accept the mere assertions of the parties but must "examine the logic" and "evaluate the evidence" underlying those assertions. *Ward*, 326 F.3d at 449 n.4.

[8] When addressing disability, Dr. Atkin opined Claimant's temporary exacerbation due to his work injury had resolved, he has no permanent impairment, and he could return to full-duty work "without difficulty." EX 7 at 44. Nevertheless, with what Dr. Atkin described as Claimant's ongoing issues since 1998 from his pre-existing conditions, Dr. Atkin conditioned this alternate Section 8(f) opinion upon a trier-of-fact concluding Claimant has work restrictions. *Id.* at 45B.

[9] Employer relies on *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 1035-1036 (9th Cir. 1998), to support its assertion that it satisfied the contribution element. In *Coos Head*, the court rejected the Director's assertion that the ALJ did not address the materially and substantially greater requirement. The court stated the ALJ did not use the precise words but, nevertheless, gave it sufficient consideration. Although *Coos Head* sets a very lenient standard for establishing contribution, in *Quan*,

In the ALJ's discussion of the contribution element, he correctly stated Dr. Atkin elaborated on his statement only by commenting that, without Claimant's pre-existing condition, the August 2021 incident would have resulted in "no work restrictions or very minimal work restrictions." D&O at 26 (emphasis added); EX 7 at 45B. While consideration of a claimant's work restrictions could constitute sufficient evidence under Ninth Circuit contribution law, *Quan*, 203 F.3d at 669, a review of Dr. Atkin's report reveals he did not explain his conclusory legal assessment. Dr. Atkin did not otherwise indicate how, medically, Claimant's work injury alone was not the cause of his current disability, and Dr. Atkin failed to compare Claimant's previous and current restrictions or discuss any evidence to support his opinion. EX 7 at 45B; *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).

Also, in addressing the Section 8(f) issue, the ALJ recalled he "did not afford much weight to Dr. Atkin's opinion" on the disability issue. He had explained numerous reasons for giving Dr. Atkin's opinion little weight, and nothing changed in his Section 8(f) discussion.[10] D&O at 19, 27. For example, the ALJ concluded Dr. Atkin "greatly underrepresented" Claimant's degree of pain and relied heavily on the belief that Claimant's condition had returned to "baseline." *Id.* As he found flaws in Dr. Atkin's reasoning based on his review of the medical evidence and his crediting Claimant's testimony, the ALJ also declined to "afford much weight to Dr. Atkin's opinion" about Claimant's pre-existing conditions purportedly rendering his ultimate condition materially and substantially worse. D&O at 27. Additionally, the ALJ stated Dr. Rovner's opinion did not support Section 8(f) relief as the doctor concluded Claimant's work injury aggravated his pre-existing conditions, but the doctor did not address the degree to which each injury contributed to Claimant's ultimate disability. *Id.*

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203 F.3d at 669, the Ninth Circuit affirmed the ALJ's denial of Section 8(f) relief because the evidence did not satisfy the contribution element. Thus, although the bar is not high, there must be some evidence to support that the ultimate condition was "materially and substantially greater."

[10] Previously, the ALJ had found Dr. Atkin's opinion entitled to little weight on the disability issue because, among other reasons, he found it less persuasive than the opinions of Claimant's physicians. He found Dr. Atkin ignored "a wide array of credible evidence," Dr. Atkin did not understand the mechanism of Claimant's injury, and Dr. Atkin misinterpreted Dr. Rovner's opinion as supportive of his own. D&O at 18-19.

Consequently, the ALJ reasonably determined Employer failed to establish the contribution element necessary to obtain Section 8(f) relief, finding Employer did not sufficiently establish Claimant's PPPD combined with his work injury resulted in a materially and substantially greater level of disability than Claimant would have had with his August 2021 injury alone. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d at 668; *Sproull,* 86 F.3d at 900; *Langley*, 676 F.2d at 114-115; *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98, 103 (2005); D&O at 26-27.[11] As the ALJ reasonably found Employer did not establish contribution, and as the Board is not empowered to reweigh the evidence, we affirm the ALJ's denial of Section 8(f) relief.[12] *Ogawa*, 608 F.3d at 648; *Quan*, 203 F.3d at 669; *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1353 (9th Cir. 1993); *see also Duhagon*, 169 F.3d at 618 (Board may not substitute its views for the ALJ's).

[11] The ALJ also accurately explained that even if he credited Dr. Atkin's reasoning that Claimant's disability is due to his prior condition from his 2008 injury rather than his August 2021 injury, Section 8(f) relief is not available when the employee's disability results from the progression or natural consequence of the pre-existing disability. D&O at 26 n.19 (citing *Vlasic v. Am. President Lines*, 20 BRBS 188, 192 (1987)); *see Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 1316 (11th Cir. 1988); *Director, OWCP v. Cooper Assoc.*, 607 F.2d 1385, 1391 (D.C. Cir. 1975).

[12] While Employer correctly argues that aggravation of a pre-existing condition is a prerequisite to Section 8(f) relief, Emp's Brief at 10-11, it is more accurate to say that aggravation of a pre-existing condition can be sufficient to trigger Section 8(f) relief. Nonetheless, we reject its assertion that the ALJ somehow used the aggravation rule to negate its entitlement to Section 8(f) relief. It is axiomatic that under the aggravation rule, unless entitlement to Section 8(f) relief is established, an employer is liable for the entire resulting disability if the claimant's employment-related injury contributed to, combined with, or aggravated a pre-existing or underlying condition. *Quan*, 203 F.3d at 667; *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991) (employment injury may worsen the underlying impairment or may combine in an additive way); *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-815 (9th Cir. 1966). Rather, as the Director states, after finding Employer did not establish entitlement to Section 8(f) relief, the ALJ correctly stated the aggravation rule applies to hold Employer responsible for the entirety of Claimant's benefits. *Quan*, 203 F.3d at 667; *Port of Portland*, 932 F.2d at 839; *O'Leary*, 357 F.2d at 814-815.

Accordingly, we affirm the ALJ's Order Granting Reconsideration, Vacating Decision and Order Issued July 11, 2023, and Amended Decision and Order Granting Benefits for Permanent Partial Disability.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge