U.S. Department of Labor

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

BRB No. 20-0127

GIUSEPPE CUTIETTA	)	
	)	
Claimant	)	
	)	
v.	)	
	)	DATE ISSUED: 09/18/2020
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Special Fund Relief on Second Remand of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Roy D. Axelrod (Law Office of Roy D. Axelrod), San Diego, California, for Self-Insured Employer.

Ann Marie Scarpino (Kate S. O'Scannlain, 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 Paul C. Johnson, Jr.'s Decision and Order Denying Special Fund Relief on Second Remand (2011-LHC-00473) rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (Act). We must affirm the administrative law judge'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 third time this case is before the Benefits Review Board.[1] Claimant sustained a cumulative trauma lower back injury, in the form of symptomatic, severe degenerative disc disease, over the course of his employment with Employer from 1989 through September 29, 2003.[2] He did not return to his usual work as a shipwright after this date. In his initial decision, the administrative law judge found Claimant's condition achieved maximum medical improvement on November 17, 2004, and awarded Claimant periods of total disability benefits and ongoing permanent partial disability benefits as of March 1, 2005.

Employer claimed relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Although the administrative law judge found Employer established Claimant's pre-existing congenital L5 transverse process and degenerative disc disease were manifest, pre-existing permanently disabling conditions for purposes of Section 8(f) relief, he denied relief based on Claimant's congenital condition only. In so doing, he credited Dr. Cleary's opinion, attributing Claimant's current disability solely to his 25-year history of work stresses and apportioning zero percent to his pre-existing congenital spinal anomaly, over Dr. Adsit's opinion, apportioning 74 percent of Claimant's overall disability to genetic and hereditary factors and 26 percent to occupational exposures. The administrative law judge explained, Dr. Cleary "grounded his opinion in specific and objective medical findings," whereas Dr. Adsit "excessively relied" on general principles elicited from a scholarly article and failed to analyze it in conjunction with Claimant's specific medical and occupational situation.

[1] We incorporate by reference the Benefit Review Board's prior decisions in *Cutietta v. Nat'l Steel & Shipbuilding Co. [Cutietta I]*, 49 BRBS 37 (2015), *aff'd on recon.* (Nov. 16, 2015) (unpub. Order), and *Cutietta v. Nat'l Steel & Shipbuilding Co. [Cutietta II]*, BRB No. 17-0289 (Feb. 6, 2018) (unpub.). We limit our discussion of the procedural history to those facts relevant to the present appeal.

[2] Claimant testified he first began working for Employer around 1973 and his work could be intermittent. He might have worked 26 or 27 years total for Employer, but Employer credited him with 25 years towards his pension after counting for the breaks in his employment. Tr. at 27.

2014 Decision and Order at 53. The Board affirmed this finding as supported by substantial evidence and affirmed the denial of Employer's claim for Section 8(f) relief due to Claimant's pre-existing congenital condition. However, as the administrative law judge did not address Employer's assertion that Claimant's 2003 economically disabling, severe degenerative disc disease constituted an aggravation of his underlying degenerative disc disease, which Employer alleged was due to cumulative work traumas through November 21, 2000, the Board remanded the case for consideration of this theory of entitlement to Section 8(f) relief.[3] *Cutietta v. Nat'l Steel & Shipbuilding Co. [Cutietta I]*, 49 BRBS 37 (2015), *aff'd on recon.* (Nov. 16, 2015) (unpub. Order); Emp. Pet. for Rev. at 20-24 (Aug. 11, 2014).

On remand, the administrative law judge assessed whether Claimant's prior incidents of back pain evidenced a pre-existing permanent partial disability separate from his compensable cumulative trauma injury. Decision and Order on Remand at 8. Specifically, the administrative law judge twice emphasized the parties stipulated to a cumulative trauma injury over the course of Claimant's entire employment. He also emphasized Claimant listed the date of injury on his claim form as "1980 – 9/29/03," and found: Claimant's treatment records indicated the pain for which he was treated in 1995 and 2000 resulted from cumulative trauma, not a specific incident at work; and Claimant returned to full-duty work following the incidents. *Id*. at 10. The administrative law judge denied the claim for Section 8(f) relief, stating there was "no prior specific injury during Claimant's career with Employer" and "no indication any prior injury resulted in a permanently disabling impairment." *Id.* Pursuant to Employer's appeal, the Board again vacated the administrative law judge's denial of Section 8(f) relief, explaining he "too narrowly focused on whether the evidence establishes that [C]laimant sustained a prior

[3] Addressing Employer's alternative basis for Section 8(f) relief, the Board stated: (1) a work-related condition may constitute a manifest, pre-existing, permanent partial disability for purposes of Section 8(f); (2) an employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the course of employment with the same employer; and (3) the record contains evidence that Claimant had a series of low back pain complaints and/or sustained back injuries over the course of his work for employer. The Board thus instructed the administrative law judge to address Employer's alternative theory for entitlement to Section 8(f) relief, stating that, under its theory, Employer must "establish that [C]laimant sustained a 'second' injury, i.e., [that the September 2003 injury is] an aggravation [as opposed to the natural progression of a prior injury]; that [C]laimant's disability is not due solely to that second injury; and that [C]laimant's disability is materially and substantially greater due to the pre-existing disability." *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37, 44 (2015).

specific injury during his career with [E]mployer."[4] *Cutietta v. Nat'l Steel & Shipbuilding Co. [Cutietta II]*, BRB No. 17-0289, slip op. at 5 (Feb. 6, 2018) (unpub.). The Board stated, for purposes of Section 8(f), pre-existing permanent disabilities are not limited to distinct work injuries. Rather, existing non-economically disabling conditions that put a claimant at risk for further and more extensive injuries, such as asymptomatic conditions or symptomatic conditions resulting in continuing problems after a claimant returns to work, may constitute pre-existing permanent partial disabilities under Section 8(f). *Id*. Thus, the Board again remanded the case for the administrative law judge to address Employer's assertion that Claimant's symptomatic, moderate degenerative disc disease, which resulted in continuing problems requiring treatment prior to September 2003,[5] is a serious, lasting physical condition that satisfies the pre-existing permanent partial disability element of Section 8(f) under the "cautious employer" test. *Id*.

On second remand, the administrative law judge again limited his Section 8(f) analysis to whether Employer established Claimant sustained a discrete work injury prior to, and separate from, his compensable cumulative trauma injury. Specifically, he found Claimant suffered the following back injuries at work: low back soreness on April 5, 1989; mild lumbosacral sprain/spasm on May 17, 1991; mild paraspinal muscle sprain on August 27, 1992; slight cervical strain and moderate lumbosacral strain on July 21, 1995; low back and neck soreness on July 25, 1998; and low back strain in the beginning of November 2000. He further found Claimant's underlying degenerative disc disease was a serious and lasting physical problem following his November 2000 strain injury; however, each discrete sprain/strain injury resolved.[6] Decision and Order on Second Remand at 11. Although Dr. Adsit opined Claimant's 2003 disability is not due solely to his 2003 injury

[4] The Board acknowledged "[t]he administrative law judge correctly noted that the mere existence of a prior injury alone does not establish the pre-existing permanent partial disability element, and his finding that [C]laimant returned to his usual work after each reported incident of back pain is supported by substantial evidence." *Cutietta II*, slip op. at 4 (internal citations omitted).

[5] Employer alleged Claimant sustained aggravations/cumulative trauma injuries at work on the following dates: April 4, 1989; May 17, 1991; July 21, 1995; July 25, 1998; and November 21, 2000. Emp. Pet. for Rev. at 20 (Apr. 13, 2017) (dates corrected to match those in records cited).

[6] Specifically, the administrative law judge observed Claimant "continued to experience low back pain, required additional treatment, and was arguably treated as disabled by his employer and colleagues after returning to full duty work." Decision and Order on Second Remand at 11.

and is "materially and substantially greater" due to his degenerative disc disease as manifest in November 2000, JX 70 at 1014, the administrative law judge found this opinion was not probative of Employer's entitlement to Section 8(f) relief because the only "pre-existing" condition it referred to was Claimant's "congenital anomaly." In so doing, he explained he previously found Claimant's congenital anomaly does not contribute to his disability,[7] and Dr. Adsit's opinion does not otherwise concern a "prior injur[y]" or "'pre-existing condition'" separate and apart from his 1989-2003 cumulative trauma injury. Decision and Order on Second Remand at 11, 12, 14. Further finding the record contained no other evidence supporting Employer's entitlement to Section 8(f) relief, the administrative law judge found Employer failed to establish Claimant's disability is not due solely to his 1989-2003 cumulative trauma injury. Accordingly, he again denied Employer's request for Section 8(f) relief.[8]

On appeal, Employer again challenges the administrative law judge's denial of Section 8(f) relief. Employer contends the administrative law judge erred in conflating Claimant's pre-existing degenerative disc disease with his congenital spinal condition and in failing to find his November 2000 degenerative disc disease materially and substantially contributes to his ultimate disability. Employer asks the Board to reverse the administrative law judge's denial of Section 8(f) relief or vacate his finding and remand the case to a different administrative law judge. The Director, Office of Workers' Compensation Programs (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) 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*

[7] The administrative law judge "mad[d]e explicit that which was implicit in the [2014] Decision and Order," and stated "Claimant's [pre-existing] degenerative disc disease was secondary to the congenital abnormalities." Decision and Order on Second Remand at 6, n. 6.

[8] The administrative law judge additionally awarded Claimant's counsel $104,446.00 in attorney's fees and costs. Claimant withdrew his cross-appeal on this issue. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, BRB Nos. 20-0127/A (May 15, 2020) (unpub. Order).

[*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).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has not found it necessary to precisely define the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f), *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT), but has found 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. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). The employer also must establish the current disability is not due solely to the work injury. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

We agree with Employer: the administrative law judge erred in failing to address whether Claimant's degenerative disc disease as it existed in November 2000 materially and substantially contributed to Claimant's ultimate permanent disability, entitling it to Section 8(f) relief.[9] As the administrative law judge previously found Claimant's congenital anomaly does not contribute to his ultimate disability, it logically follows that any degenerative disc disease caused solely by his congenital anomaly also does not contribute to Claimant's disability. However, the administrative law judge erred in

[9] In urging the Board to affirm the denial of Section 8(f) relief, the Director states the administrative law judge considered Claimant's recurring back issues as a whole and found they do not establish Claimant's pre-existing degenerative disc disease is a "pre-existing permanent partial disability." Dir. Br. at 9-10. In so stating, the Director ignores that the administrative law judge introduced his discussion and analysis by listing the date of each reported back injury and stating he would "analyze whether any individual injury constitutes a pre-existing permanent partial disability under the 'cautious employer' test." Decision and Order on Second Remand at 6 (emphasis added). The Director's statement similarly ignores the administrative law judge's findings that Claimant's degenerative disc disease is: (1) a serious and lasting physical problem as of his November 2000 strain incident, *Id*. at 11; and, (2) a pre-existing permanent partial disability that a 1987 x-ray made manifest to Employer. 2014 Decision and Order at 52. In reply to the Director's brief, Employer asserts the administrative law judge improperly failed to consider whether Claimant's recurring back injuries as a whole establish his degenerative disc disease is a pre-existing permanent partial disability under the cautious employer test. Emp. Reply at 1. As the administrative law judge found Claimant's November 2000 degenerative disc disease is a pre-existing permanent partial disability under the cautious employer test, and as Employer mischaracterizes his findings in stating otherwise, we decline to address, as moot, its appeal of this issue. *See* discussion, *infra.*

concluding Claimant's congenital abnormality at his L5 disc is the only cause of his pre-existing degenerative disc disease. Decision and Order on Second Remand at 6 n.6.

The uncontradicted medical evidence of record indicates Claimant's degenerative disc disease as it existed in November 2000 was due, at least in part, to cumulative work trauma.[10] *See* EX 9 at 66-67; EX 53 at 523; EX 59 at 598. As such, it is a separate and distinct condition from Claimant's congenital anomaly, and the administrative law judge's prior contribution findings do not subsume a finding as to Claimant's November 2000 degenerative disc disease.

The administrative law judge further erred in defining Claimant's "pre-existing degenerative disc disease" as limited to that which pre-dated his initial cumulative work trauma. In so doing, he erroneously constrained his Section 8(f) analysis to conditions independent of Claimant's 1989-2003 cumulative trauma injury. As the Board previously stated, however, a pre-existing permanent partial disability need not be a discrete injury and need not be economically disabling in and of itself. *Cutietta II*, slip op. at 5. Thus, for purposes of Employer's entitlement to Section 8(f) relief, Claimant's "pre-existing degenerative disc disease" is what existed prior to his final work-related trauma on September 29, 2003; Claimant's November 2000 degenerative disc disease may form the basis of Employer's entitlement to Section 8(f) relief if Employer is able to satisfy each element of entitlement. *Cutietta I*, 49 BRBS at 44; *see also Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990); *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989). As the Board twice remanded this case for the administrative law judge to fully consider this issue, and as he twice denied Section 8(f) relief on remand without fully addressing it, we now reverse his denial of Section 8(f) relief for the reasons that follow.

The administrative law judge previously found Claimant's degenerative disc disease is a pre-existing permanent partial disability that a 1987 x-ray made manifest to Employer,

[10] The record contains the following interpretations of imaging evidence: a November 1987 x-ray showing moderate degenerative changes on the L3, L4 and L5 discs, EX 50 at 506; an August 1995 x-ray showing expected degenerative lumbar changes for Claimant's age, EX 51 at 510; a September 1995 MRI showing early disc degeneration and minimal bulging, EX 51 at 516; a November 29, 2000 x-ray showing degenerative disc disease as manifested by spurring and diminished disc height from L3-S1, most pronounced at L4-5, EX 52 at 518; a November 6, 2003 MRI showing 2-3 mm disc protrusion at L3-4 and L4-5, EX 57 at 569; a February 9, 2004 EMG showing L5 and S1 nerve root impingement, EX 9 at 61; and a May 24, 2004 x-ray showing advanced degenerative disc disease at L4-5 and L5-S1, EX 9 at 61.

2014 Decision and Order at 52; he additionally found, on second remand, this condition was "a serious and lasting physical problem" as of November 2000. Decision and Order on Second Remand at 11.[11] Thus, with regard to Employer's entitlement to Section 8(f) relief, the issue is whether Employer established: (1) Claimant's disability is not due solely to his September 2003 cumulative trauma injury; and (2) the pre-existing November 2000 degenerative disc disease made Claimant's disability materially and substantially greater than what would have resulted from his September 2003 cumulative trauma injury alone. *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT); *Coos Head*, 194 F.3d at 1035-1036, 33 BRBS at 133(CRT). Relevant to this issue, Dr. Adsit opined: Claimant's moderate and chronically symptomatic degenerative disc disease was an objectively determinable disability as of November 2000;[12] Claimant's subsequent work activities contributed to the progression of degeneration demonstrated on his November 6, 2003 MRI; and, Claimant's current disability is not due to his September 2003 injury alone; rather, it is the result of a combination of his degenerative disc disease as it existed in November 2000 and his September 2003 cumulative trauma injury.[13] EX 59 at 598; EX 70 at 1014. Contrary to the administrative law judge's finding, this opinion is probative of Employer's entitlement to Section 8(f) relief as it addresses the existence of Claimant's subsequent injury and the material and substantial contribution standard the Ninth Circuit enunciated in *Coos Head*, 194 F.3d at 1035-1036, 33 BRBS at 133(CRT).

Further, the uncontradicted medical evidence of record supports Dr. Adsit's opinion as to the work-related progression of Claimant's degenerative disc disease between his November 2000 and September 2003 injuries, *see* n. 10, 12, *supra*; EX 9 at 66-67; EX 59

[11] The administrative law judge stated, "[The evidence] suggests the degenerative disc disease was the serious and lasting physical problem" and not Claimant's back strains. Decision and Order on Second Remand at 11. As discussed, however, he erred in finding Claimant's degenerative disc disease was due only to the progression of his congenital abnormality at L5. *See* pp. 6-7 and n. 10, *supra*; Decision and Order on Second Remand at 6 n.6.

[12] Both Drs. Adsit and Mooney attributed the level of degenerative disc disease seen on Claimant's November 29, 2000 x-ray, in part, to Claimant's cumulative work activities. EX 53 at 523; EX 59 at 598.

[13] This opinion is consistent with Dr. Previte's December 1, 2004 opinion, stating Claimant's medical records demonstrate "a pattern of progression of degenerative change" between his November 2000 and September 2003 injuries, and apportioning 10 percent of Claimant's disability to pre-existing degenerative changes and 90 percent to his 2003 cumulative trauma injury. EX 9 at 66, 67.

at 598, and the administrative law judge previously found Claimant's 2003 disabling degenerative disc disease was due to his 25-year history of cumulative work trauma.[14] 2014 Decision and Order at 52-54. Moreover, there is no evidence to the contrary. Thus, the record establishes Claimant's condition was aggravated by his work after November 2000. *See Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988).

Consequently, we reverse the denial of Section 8(f) relief. Employer has established Claimant's permanent disability is not due solely to Claimant's cumulative "subsequent injury" occurring between November 2000 and September 2003, but was materially and substantially contributed to by his pre-existing degenerative disc disease that was manifest by November 2000. *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT); *Coos Head*, 194 F.3d at 1035-1036, 33 BRBS at 133(CRT).

Accordingly, we reverse the administrative law judge's Decision and Order on Second Remand denying Section 8(f) relief. Employer is liable for the first 104 weeks Claimant's permanent disability. The Special Fund is liable for Claimant's ongoing permanent disability benefits thereafter. 33 U.S.C. §§908(f)(1), 944.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[14] This encompasses the period of Claimant's employment between his November 2000 and September 2003 injuries.