BRB No. 99-0402

SUSAN E. CAMPBELL	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: _____
	)	
	)	
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 Granting Director's Motion for Reconsideration and Granting Requested Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Director's Motion for Reconsideration and Granting Requested Relief (88-LHC-2221) of Administrative Law Judge Richard K. Malamphy rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's

findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

This case has a protracted procedural history. Claimant, a pipefitter, sustained a work-related injury to her shoulder and neck on March 11, 1986. The parties stipulated that claimant reached maximum medical improvement on August 10, 1989, and that claimant was passed out from work by employer on March 30, 1989, because employer had no light duty positions within the restrictions imposed after her injury. Employer paid claimant on a voluntary basis through September 22, 1991.

Claimant began part-time work at a veterinary clinic on September 17, 1990. In a decision dated September 23, 1993, the administrative law judge awarded claimant permanent partial disability benefits from September 17, 1990 and continuing.[1] 33 U.S.C. §908(c)(21). The administrative law judge also granted employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing headaches and cervical strain.

[1]Prior to this decision, the administrative law judge issued a Decision and Order denying claimant benefits for an $800 bonus paid to employees in December 1988 who had worked a certain number of hours between June 1987 and December 1988. Claimant was not paid this bonus, as she had not worked the requisite hours due to her injury. The Board affirmed the administrative law judge's denial of benefits, holding that the bonus was properly not included as part of claimant's average weekly wage, and that her right to the bonus had not vested at the time of her injury. *Campbell v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 90-1349 (Oct. 22, 1991).

The Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's Section 8(f) award. BRB No. 94-0240. The case was administratively affirmed by the Board on September 12, 1996, pursuant to Public Law 104-134. Thereafter, the Director appealed this issue to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit remanded the case to the administrative law judge for further findings pursuant to Section 8(f) in light of *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* (*Harcum I)*, 8 F.3d 175 (4th Cir. 1993), *aff'd on other grounds,* 514 U.S. 122 (1995), which the Fourth Circuit decided after the administrative law judge reached his decision in the instant case.[2] *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* No. 96-2625 (Sept. 2, 1997).

In the meantime, claimant filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, contending that she had become permanently totally disabled. On December 30, 1997, the administrative law judge issued an order consolidating claimant's request for modification with the proceedings on remand from the Fourth Circuit. On February 26, 1998, the administrative law judge issued a decision granting claimant's motion for modification and awarding her permanent total disability benefits from September 30, 1993, and continuing. 33 U.S.C. §908(a). The administrative law judge credited claimant's testimony regarding a change in duties in her job at the veterinary clinic that would have required her to perform janitorial duties, including the use of industrial size mops, which claimant stated were outside her restrictions. The administrative law judge noted that employer offered neither evidence to show that the additional duties were within claimant's work restrictions, nor any evidence of other suitable alternate

[2]In order to be entitled to Section 8(f) relief, employer must establish that claimant had a manifest pre-existing permanent partial disability and that claimant's disability is not due solely to the work injury. If claimant is entitled to an award of permanent partial disability, employer must additionally establish that the ultimate disability is materially and substantially greater because of the pre-existing disability than it would be from the work injury alone. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). In *Harcum*, the Fourth Circuit held that in order to establish the "materially and substantially" greater requirement, employer must introduce medical or other evidence quantifying the level of impairment that would result from the work injury alone so that the adjudicator will have a basis by which to determine whether the ultimate disability is materially and substantially greater due to the pre-existing disability. *Harcum*, 8 F.3d at 185-186, 27 BRBS at 130-131(CRT).

employment. Finally, the administrative law judge summarily stated that Section 8(f) is inapplicable based on his award of permanent total disability benefits, and therefore declined to reach any issues raised by the court's remand order.

Employer thereafter sought clarification of the administrative law judge's decision. On May 22, 1998, the administrative law judge issued an Order of Clarification, in which he stated that his previous decision merely meant that the *Harcum* holding is not applicable in a case of permanent total disability, and that therefore his prior grant of Section 8(f) relief remained in force for the permanent total disability benefits awarded claimant from September 30, 1993. The administrative law judge recognized, however, that *Harcum* would apply to the award of permanent partial disability awarded prior to September 30, 1993. Moreover, he noted that the Director had filed a motion for modification alleging a mistake in fact on the issue of whether claimant had a pre-existing permanent partial disability for purposes of Section 8(f) relief.

Following briefing by the parties on the aforementioned issues, the administrative law judge issued on August 18, 1998, a "Decision and Order Denying Section 8(f) Relief from September 17, 1990 to September 30, 1993 and Granting Section 8(f) Relief from October 1, 1993 to the Present and Continuing." In this decision the administrative law judge found that the medical records submitted by employer fail to quantify claimant's disability from the work injury alone, and therefore provide no basis for a determination that claimant's pre-existing conditions render her "materially and substantially greater" than the disability resulting from the work injury alone. *See Harcum*, 8 F.3d at 185-186, 27 BRBS at 130131(CRT). Therefore, he denied Section 8(f) relief on claimant's permanent partial disability award. On the Director's motion for modification, the administrative law judge agreed that claimant's cervical strain was not a pre-existing permanent partial disability within the meaning of Section 8(f), but he rejected the Director's contention that claimant's headaches also did not qualify as such. Moreover, he rejected the Director's contention that the headaches did not contribute to claimant's disability. Thus, Section 8(f) relief was granted on the award of permanent total disability.

The Director thereafter moved for reconsideration of this decision, contending that the administrative law judge erred in finding that employer established that claimant's work injury alone was not the sole cause of her total disability. On December 14, 1998, the administrative law judge issued a decision agreeing with the Director and finding that claimant's work injury alone caused her inability to work at the veterinary clinic. Thus, Section 8(f) relief was denied on the award of permanent total disability benefits.

On appeal, employer challenges solely the administrative law judge's denial of Section 8(f) relief on the award of permanent total disability. In this regard, employer contends that the administrative law judge erred in re-addressing the contribution issue inasmuch as the Board administratively affirmed the award of Section 8(f) relief and the Fourth Circuit's remand for consideration of *Harcum* applied only to the award of permanent partial disability which is no longer at issue. Employer thus avers that the administrative law judge's 1993 award of Section 8(f) relief is the "law of the case." Employer also contends that there was no mistake in fact in the administrative law judge's finding that the contribution element was satisfied, as Dr. Snider stated that claimant's headaches render her incapable of working. The Director has not responded to this appeal.

We reject employer's contention that the administrative law judge's 1993 award of Section 8(f) relief stands as the law of the case merely because *Harcum* addresses the contribution element in a permanent partial disability case and the award is now one for permanent total disability. In his 1993 decision, the administrative law judge found the contribution element satisfied because Dr. Harmon opined that claimant's pre-existing headaches and cervical strain made claimant's overall disability worse than that resulting from the work injury. The Fourth Circuit remanded for reconsideration of the contribution element in light of *Harcum*. Employer disingenuously infers that had the award of benefits at that time been for permanent total disability, the award of Section 8(f) was impliedly affirmed. Not only can this not be inferred, as the court's decision cannot be divorced from the operative facts, but moreover, it would in any event be irrelevant as the procedural posture of the case changed when the case came before the administrative law judge on remand. Claimant sought permanent total disability benefits via Section 22 modification proceedings based on a change in condition, and thereafter the Director sought modification of the Section 8(f) award based on a mistake in fact. At this juncture, doctrines such as law of the case, *res judicata* and collateral estoppel are inapplicable as Section 22 displaces traditional principles of finality. *See generally O'Keeffe v. Aerojet-General Shipyards*, 404 U.S. 254 (1971); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968);*Coats v. Newport News Shipbuilding & Dry Dock Co.,* 21 BRBS 77 (1988). Moreover, modification of an award is not precluded by the fact that the prior award was affirmed on appeal. *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984). The administrative law judge, thus, was required to reconsider the applicability of Section 8(f) based on the motions for modification, *see Coats*, 21 BRBS at 80-81, and, upon subsequently finding that claimant's cervical strain was not a pre-existing permanent partial disability, necessarily had to reconsider the contribution element as Dr. Harmon's

opinion no longer supported the administrative law judge's conclusion.[3] Thus, we hold that the administrative law judge properly re-addressed the contribution issue in the context of the award for permanent total disability.

Employer next contends that the administrative law judge erred in finding that the contribution element is not satisfied. In order to be entitled to Section 8(f) relief, employer must establish that claimant's disability is not due solely to the work injury. 33 U.S.C. §908(f)(1); *see, e.g., Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.,* 30 BRBS 134 (1996). Employer contends Dr. Snider's opinion is sufficient to establish that but for claimant's headaches, she would not be totally disabled.

The administrative law judge found that the 1986 work injury alone caused claimant's total disability as of September 1993. In 1989, claimant was permanently restricted from overhead work, climbing vertical ladders, use of pneumatic tools, and lifting, pushing or pulling over 10 pounds. EX 6 (Feb. 9, 1993). These restrictions caused her inability to perform her usual work. Claimant thereafter was able to perform the sedentary job at the veterinary clinic for several years until she was given increased physical duties outside of her restrictions. Thus, in the absence of other suitable alternate employment, the administrative law judge found claimant to be totally disabled upon her motion for modification.

[3]As noted, the administrative law judge, in his May 1998 Order of Clarification, intended that his award of Section 8(f) relief remain in effect on the award of permanent total disability. Inasmuch, however, as the Director sought modification of that award based on a mistake in fact, he was obliged to reconsider the issue.

In denying the claim for Section 8(f) relief, the administrative law judge noted this sequence of events and concluded that although claimant's headaches may render her more impaired, claimant's inability to perform the job at the veterinary clinic as of September 1993 is due solely to the restrictions resulting from the work injury. This finding is rational, and is supported by the work restrictions and claimant's testimony regarding her inability to perform the additional duties assigned at the veterinary clinic. It is not until February and March 1996 that Dr. Snider first states that claimant's headaches impede her employability, and in fact render her incapable of working. CX 1 (Aug. 26, 1997). That claimant also was totally disabled by headaches as of 1996 does not alter the fact that claimant's total disability as of 1993 is the result of her 1986 work injury alone. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). Employer did not offer any other suitable alternate employment that claimant could have performed with her restrictions from her 1986 injury, if not for her headaches, and therefore failed to establish that the disability is not due solely to the work injury.[4] *See, e.g., Jaffe New York Decorating*, 25 F.3d at 1085-1087, 28 BRBS at 35-39(CRT). Therefore, we affirm the administrative law judge's denial of Section 8(f) relief to employer. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT)(2d Cir. 1993).

[4]Claimant testified that at the time she stopped working at the veterinary clinic the shoulder and neck pain were the predominant problem and that thereafter the headaches grew increasingly worse. Tr. at 15 (Aug. 26, 1997). In 1995, claimant obtained a private investigator's license, which subsequently expired, but she testified she was not able to accept assignments, although she did not definitively state which physical problems prevented her from doing so. *Id.* at 23-26. This evidence does not aid employer's claim for Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order Granting Director's Motion for Reconsideration and Granting Requested Relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge