BRB No. 99-0472

WESLEY E. CHERRY	)	
	)	
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 Denying 8(f) Relief of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Joshua T. Gillelan, II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Denying 8(f) Relief (98-LHC-41) of Administrative Law Judge Daniel A. Sarno, Jr., 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a pipefitter, injured his back at work on September 12, 1995. Employer voluntarily paid claimant periods of temporary total, temporary partial, and permanent partial disability benefits. The parties agree that claimant is entitled to ongoing permanent partial disability benefits from January 10, 1997, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). The only issue before the administrative law judge was whether employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied employer such relief, finding it did not establish that claimant has a pre-existing permanent partial disability and that claimant's ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Employer contends that the opinions of Drs. Reid and Magness are sufficient to establish that claimant has a pre-existing permanent partial disability and that claimant's disability is not solely due to his last injury in accordance with the holdings of the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998), *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997), and *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 (1995). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief, to which employer replies.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 1) that claimant has a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. *Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT).

Employer initially contends that the administrative law judge erred in failing to find

that it established that claimant has a pre-existing permanent partial disability. A pre-existing permanent partial disability is a serious lasting physical condition that would motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). In this case, employer sought to establish that claimant suffered from a pre-existing permanent partial disability as a result of his hearing loss and two prior back injuries in 1987 and 1992.

With regard to claimant's hearing loss, the administrative law judge rationally concluded that Dr. Reid's opinion is insufficient to establish a pre-existing permanent partial disability.[1] Decision and Order at 4-5; Emp. Ex. 1B. The administrative law judge found that Dr. Reid misstated the standard for a ratable hearing impairment when he stated that "all values over 25 dB are abnormal" when in fact the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995)(AMA *Guides*) provide that, "If the ***average*** of the hearing levels at 500, 1000, 2000, and 3000 Hz is 25 dB or less, according to 1989 ANSI standards, no impairment is considered to exist in the ability to hear everyday sounds under everyday listening conditions. . . ."[2] AMA *Guides* at 224 (emphasis added). The administrative law judge also found that Dr. Reid erred in describing claimant's hearing loss as "serious" when a 1980 notation of high frequency hearing loss was "mild." Emp. Ex. 1B at Ex. 1. Furthermore, the administrative law judge questioned Dr. Reid's opinion that claimant cannot perform telephone solicitor work since he has no measurable hearing impairment according to the AMA *Guides.*[3] Emp. Ex. 1B.

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[1]Dr. Reid stated, "Since January, 1994 Mr. Cherry has been known to have a permanent and serious bilateral hearing loss - all values over 25 dB are abnormal (Exhibit 7)." Emp. Ex. 1B. Dr. Reid continued, "Indeed, the permanent hearing loss was noted in 1980: 'HFHL' - 'high frequency hearing loss' (Exhibit 1)." *Id.* Dr. Reid also stated, "Even with his bad back, Mr. Cherry can work at light duty and sedentary work. However, his hearing loss would prevent him from working many such available jobs, e.g. telephone solicitor." *Id.* Dr. Reid based his opinion on a review of claimant's shipyard clinic records, as well as outside medical records which are contained in claimant's clinic chart. *Id.* Dr. Reid also treated claimant for his 1995 back injury. *Id.*

[2]The administrative law judge calculated the hearing levels on claimant's most recent audiogram on July 26, 1995, an audiogram with the worst results, and found that the averages for the left and right ears fall well below 25 dB and thus do not constitute an impairment under the AMA *Guides*. Decision and Order at 5; Emp. Ex. 1B at Ex. 7.

[3]Contrary to employer's contention, the administrative law judge did not

With regard to claimant's prior back injuries in 1987 and 1992, the administrative law judge rationally concluded that there was no evidence that these two prior injuries in fact demonstrated a serious lasting physical condition, as work restrictions from these injuries were temporary, the restrictions expired three years before the 1995 injury and there was no evidence that these injuries disabled claimant at all once the restrictions expired.[4] *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); Decision and Order at 6; Emp. Ex. 1B at Exs. 2-6. As the administrative law judge rationally concluded that Dr. Reid's opinion is insufficient to establish that claimant's hearing loss and prior two back injuries are pre-existing permanent partial disabilities, we affirm the administrative law judge's finding that employer did not establish this element of Section 8(f) relief.

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substitute his opinion for that of a physician in determining that claimant has no measurable hearing impairment according to the AMA *Guides*, but was following applicable case law that an audiogram revealing a hearing loss too minimal to be quantified under the AMA *Guides* is insufficient to establish a pre-existing permanent partial disability. *See Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990)(Brown, J., concurring and dissenting).

[4]Dr. Reid stated that the two prior back injuries resulted in a "weakened defective back structure" which materially and substantially worsened claimant's 1995 back injury. Emp. Ex. 1B. After claimant injured his back in 1987, he was put on work restrictions for 10 days. Emp. Ex. 1B at Ex. 3. Claimant also injured his back in 1992 and was put on work restrictions for this injury for two weeks. Emp. Ex. 1B at Ex. 5.

Employer next contends that the administrative law judge erred by failing to find that it established the contribution element. In order to satisfy the contribution element, employer must show that claimant's current disability is not due solely to the last injury, and that the ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted from the work-related injury alone. *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT). In *Harcum II*, the Fourth Circuit held that employer is not limited to medical evidence, but also may submit vocational evidence in an effort to meet its burden to establish the contribution element. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). The evidence must indicate what claimant's current disability is independent of the pre-existing injury; it is not proper simply to calculate the current disability and subtract the disability that resulted from the pre-existing injury. *Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT). In the instant case, the administrative law judge found the opinions of Drs. Reid and Magness legally insufficient to establish the contribution element, stating their opinions are "mere assertions," which are "bereft of supporting data or medical analysis." Decision and Order at 6; Emp. Exs. 1B, 8. Dr. Reid stated in relevant part,

> [Claimant's] disability is not caused by his September 12, 1995 back injury alone, but rather his disability is materially contributed to, and made materially and substantially worse by his pre-existing chronic back disability and hearing loss. [Claimant's] September 12, 1995 injury was rather minor. If he had had a normal back, it would have resolved with no permanent disability. However, his 1995 injury permanently and substantially aggravated and worsened his weakened defective back structure, resulting in his current disability. Even with his bad back, [claimant] can work at light duty and sedentary work. However, his hearing loss would prevent him from working many such available jobs, e.g. telephone solicitor.

Emp. Ex. 1B. Dr. Magness merely checked a line that stated, "I agree with Dr. Reid's opinion," when asked whether he agreed or disagreed with Dr. Reid's opinion that claimant's pre-existing conditions have contributed to his present condition, and that claimant's current disability is not due solely to his September 12, 1995 back injury. Emp. Ex. 8.

The administrative law judge properly found that there is no evidence to quantify the 1995 back injury absent any pre-existing conditions. *Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT). This finding alone is sufficient to preclude entitlement to Section 8(f) relief. Moreover, the administrative law judge found, within his discretion, that there is no reasoned evidence that claimant's ultimate disability was materially and substantially worsened by the pre-existing conditions. *Id.* The administrative law judge found that Dr. Reid's opinion that the 1995 injury worsened an already weakened defective back structure and that claimant's hearing loss precludes telephone work is not based on supporting data or medical analysis.

In addition, the administrative law judge found that Dr. Magness's letter summarily agreeing with Dr. Reid is entitled to no weight.[5] As the administrative law judge properly held that the opinions of Drs. Reid and Magness are insufficient to establish the contribution element, we affirm this finding. Consequently, as employer did not establish the pre-existing permanent partial disability and contribution elements for Section 8(f) relief, we affirm the administrative law judge's denial of such relief.

Accordingly, the administrative law judge's Decision and Order Denying 8(f) Relief is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[5]Employer's reliance on *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Parkman]*, 122 F.3d 1060 (table), 32 BRBS 6 (CRT)(4th Cir. 1997)(unpublished), is misplaced as this case is unpublished and was superseded by *Carmines,* 138 F.3d at 134, 32 BRBS at 48 (CRT).