BRB No. 04-0390

ROBERT D. KANIA	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 01/18/2005
	)	
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 and Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (2003-LHC-1243) 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 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).

At the time of claimant's work-related back injury on September 18, 2000, claimant had worked for employer for approximately 38 years in its fabrication department. Claimant suffered a series of back injuries, beginning in the 1980's, which resulted in chronic back problems. In 1994, claimant sustained a back injury which caused his treating physician, Dr. Walko, to impose permanent work restrictions which precluded claimant from performing his usual job duties for employer. Employer provided claimant light-duty work within his restrictions in its facility. Claimant was performing this light-duty work on September 18, 2000, when he again sustained injury to his back. Employer voluntarily paid claimant disability benefits. Thereafter, a dispute arose between claimant and employer regarding the nature and extent of claimant's back injury from his 2000 work accident.

Prior to the formal hearing, claimant and employer reached an agreement as to claimant's entitlement to disability benefits. On October 24, 2003, the administrative law judge issued an Order canceling the formal hearing and setting a schedule for the submission of evidence and briefs on the sole remaining issue in dispute, *i.e.*, employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Employer and the Director, Office of Workers' Compensation Programs (the Director), submitted briefs to the administrative law judge; employer also submitted evidentiary exhibits.

In his Decision and Order, the administrative law judge awarded claimant benefits pursuant to the parties' stipulations. The administrative law judge awarded temporary total disability benefits from September 20 to October 9, 2000, and from November 7, 2000, to May 21, 2001; permanent total disability benefits from May 22, 2001 to February 13, 2002; and continuing permanent partial disability benefits from February 14, 2002, based on a residual weekly wage-earning capacity of $206. 33 U.S.C. §908(a), (b), (c)(21). In addressing the issue of employer's entitlement to Section 8(f) relief, the administrative law judge found that the Director conceded that claimant's back and heart conditions constitute pre-existing permanent partial disabilities which were manifest to employer prior to claimant's work-related back injury in 2000. Nonetheless, the administrative law judge denied Section 8(f) relief, finding that employer did not establish that claimant's ultimate permanent partial disability is not due solely to claimant's 2000 work injury and is materially and substantially greater than the disability that would have resulted from his 2000 work-related injury alone. Therefore, the administrative law judge found that employer failed to establish the element of contribution. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in finding that the opinion of Dr. Apostoles is insufficient to establish the element of contribution. The Director responds, urging affirmance of the denial of Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S. C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, as here, if it establishes: 1) that claimant had 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. 33 U.S.C. §908(f)(1); *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); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT)(1995).

In order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, employer must quantify the level of the impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the court explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003).[1]

[1] *See also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003)(addressing *Carmine*s in the context of occupational disease cases).

Prior to the back injury that was the subject of this claim, claimant was working for employer in a light-duty capacity due to a prior injury. Dr. Apostoles reviewed claimant's medical records dating to 1983 and discussed the contents of these records. Dr. Apostoles stated that claimant's disability is a result of his repeat back injuries. He opined that claimant's 2000 back injury aggravated and permanently worsened claimant's condition and resulted in increased work restrictions. Dr. Apostoles stated that claimant's disability

> is not caused by his September 2000 back injury alone, but rather his disability is materially contributed to, and made materially and substantially worse by his weakened back condition and heart problems. Because of his permanent restrictions, [claimant] would be limited in the type of employment he could perform. Even before his current back injury, he had permanent work restrictions which include: minimal bending and stooping, limit lifting to 20 pounds and no vertical ladders secondary to his back condition.

EX 12. The administrative law judge found that this opinion is insufficient to establish contribution because it is conclusory. The administrative law judge found that Dr. Apostoles did not refer to anything in the medical opinions he reviewed which support his conclusion regarding the contribution of claimant's pre-existing condition to his current disability.[2] Order on Recon at 2. The administrative law judge also found that Dr. Apostoles did not quantify the level of disability that would ensue from the work-related injury alone. Decision and Order at 4.

Employer argues that claimant's series of pre-existing back injuries and the actual existence of permanent work restrictions prior to claimant's 2000 work injury establish a foundation for Dr. Apostoles's opinion, contrary to the administrative law judge's finding. Specifically, in this regard, employer argues that the effects of claimant's 2000 back injury were cumulative as they reduced claimant's already existing permanent lifting restrictions from twenty pounds to ten pounds, and added further restrictions prohibiting climbing, crawling, twisting and repetitive bending, and requiring a change of position as needed.[3] Employer argues that while claimant was able to perform light-duty

[2] Although Dr. Apostoles referenced claimant's pre-existing heart condition, there is no evidence of any restrictions due to this condition, and, on appeal, employer does not forward any argument that the heart condition contributes to claimant's current disability.

[3] After the 1992 injury, claimant was restricted from lifting over 50 pounds, and from prolonged bending, crawling, stooping, pulling and working in tight, confined spaces. EX 12 at 13(c). After the 1994 injury, claimant was restricted from lifting over

work at its facility prior to his 2000 work accident, claimant's permanent post-injury restrictions left claimant unable to perform this light-duty work. Claimant's post-injury wage-earning capacity is based on available unarmed security guard positions. *See* EX 10.

We vacate the administrative law judge's denial of Section 8(f) relief, and we remand this case for further consideration. The administrative law judge found Dr. Apostoles's opinion, viewed in isolation, insufficient to establish the contribution element because it is conclusory. The administrative law judge, however, did not address this opinion in the context of other evidence relevant to the contribution issue. For example, the record contains evidence addressing claimant's work restrictions following both the prior injuries and the subsequent 2000 work injury. *See, e.g.*, EX 12 at 16. Moreover, the restrictions following the 1994 injury required that claimant perform light-duty work at employer's facility. Claimant was unable to return to this work following the 2000 injury.

The case law issued by the Fourth Circuit does not require employer to establish the contribution element by way of a single medical opinion. *See generally Ward*, 326 F.3d 434, 37 BRBS 11(CRT). Rather, the administrative law judge should assess the sufficiency of Dr. Apostoles's opinion in view of all the relevant evidence of record. Arguably, the logic of Dr. Apostoles's conclusion can be ascertained from a review of his entire opinion in conjunction with the other medical evidence describing claimant's disability after both the prior and subsequent injuries. *See*, *e.g.*, *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 391, 31 BRBS 91(CRT) (5th Cir. 1997) (administrative law judge may resolve inquiry by inferences regarding "perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them."). On remand, therefore, the administrative law judge should re-evaluate the contribution element in light of the entirety of the relevant evidence of record.

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20 pounds and from climbing vertical ladders; he was limited to minimal bending and stooping. EX 7.

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are vacated with regard to the denial of Section 8(f) relief, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge