BRB No. 09-0588

GEORGE W. SANDERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAKER OIL TOOLS	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	DATE ISSUED: 01/19/2010
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

R.A. Osborn, Jr. (Osborn & Osborn), Harvey, Louisiana, for claimant.

Charles A. Mouton (Mahtook & LaFleur), Lafayette, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Benefits (2008-LHC-1271) of Administrative Law Judge Clement J. Kennington 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 if they 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 worked for employer as a fishing tool supervisor on four separate occasions over the course of a 20-year period. Prior to each period of employment, claimant was required to take and pass a physical examination. For his most recent period of work for employer, claimant underwent a pre-employment examination with Dr. Cousin on November 4, 2003. Dr. Cousin diagnosed claimant, who had previously undergone cardiac bypass surgery on October 20, 2002, with conditions relating to coronary artery disease, diabetes mellitus, and hypertension, all of which Dr. Cousin stated were presently "stable," and he opined that claimant was fit for offshore supervisory duties with no restrictions. In light of this, employer rehired claimant on November 20, 2003, to work as a fishing tool supervisor. While working in this position, claimant, on April 5, 2004, injured his neck picking up a heavy object. Claimant continued to try and work for two more months within the "land work" restriction initially imposed by Dr. Reveill after the injury, but claimant stated that he no longer could do that work. On September 7, 2004, Dr. Aswell restricted claimant from working at all due to a combination of his worsening neck problems (radiculopathy), diabetes, and coronary disease. Claimant sought treatment for his neck pain, which culminated in surgery performed by Dr. Williams in January 2007. Dr. Williams stated, on January 10, 2008, that claimant was capable of sedentary to light-duty work, and subsequently opined, on January 22, 2008, that claimant had reached maximum medical improvement. Employer voluntarily paid claimant temporary total disability benefits from June 2004, and medical benefits. Claimant sought an award of permanent disability benefits, prompting employer to file its application for Section 8(f) relief, 33 U.S.C. §908(f), based on claimant's pre-existing cardiac and diabetic conditions.

In his decision, the administrative law judge found that claimant's April 5, 2004, neck injury alone resulted in claimant's current sedentary to light-duty work restrictions, and thus, that neither claimant's pre-existing heart nor diabetic conditions rendered claimant more disabled than he would have been from the neck injury alone. Additionally, the administrative law judge found that claimant's pre-2004 medical records did not show that claimant had a permanent physical impairment. The administrative law judge thus concluded that employer did not meet the requirements for entitlement to Section 8(f) relief. Accordingly, employer's request for Section 8(f) relief was denied.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's decision.[1] The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

Employer argues that the administrative law judge erred by denying its request for Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in finding that claimant's cardiac and diabetic conditions do not constitute manifest pre-existing permanent partial disabilities for purposes of Section 8(f), and, additionally, that these conditions do not contribute to claimant's disability.

In this case, the administrative law judge denied Section 8(f) relief on the ground that employer did not establish that claimant had a manifest pre-existing permanent partial disability which rendered him more disabled than he would have been from his work-related neck injury alone. Initially, we cannot properly evaluate employer's arguments regarding Section 8(f) as the administrative law judge failed to determine claimant's entitlement to benefits or enter an award.[2] The Board has held that Section 8(f) relief cannot be granted if there is no award for permanent disability or death benefits in excess of 104 weeks. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94, 96 (1999); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). It is therefore essential for the administrative law judge to enter an award on the compensation claim before addressing an employer's entitlement to Section 8(f) relief. *See Gupton*, 33 BRBS 94. Consequently, we must remand this case to the administrative law judge for entry of an order reflecting claimant's entitlement to such benefits. *Id.* In the interest of judicial economy, however, we will review the administrative law judge's Section 8(f) findings in light of employer's contentions.

Section 8(f) shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the

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[1] The Board has held that claimant possesses no cognizable interest in the disposition of employer's request for Section 8(f) relief. *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988). Thus, claimant's contentions will not be considered.

[2] The administrative law judge acknowledged the parties' stipulations that claimant reached maximum medical improvement with regard to his work-related neck injury as of January 22, 2008, with a resulting 14 percent whole body impairment, and listed the only unresolved issues as Section 8(f) and attorney fees, but did not enter an award of benefits. Decision and Order at 3.

Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes: (1) that the employee had a pre-existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that his permanent total disability is not due solely to the second injury.[3] *See* 33 U.S.C. §908(f)(1); *Ceres Marine Terminal v. Director, OWCP* [*Allred*], 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

Employer first contends that the administrative law judge erred in finding that claimant did not have any pre-existing permanent partial disabilities. In addressing Section 8(f) relief, the administrative law judge initially found that claimant's cardiac and diabetic conditions are not pre-existing permanent partial disabilities for purposes of Section 8(f). In this regard, the administrative law judge found that "claimant's pre-2004 medical records do not show unambiguously and objectively that claimant had a permanent physical impairment" at the time he sustained his work-related neck injury. Decision and Order at 8. A pre-existing disability need not result in economic harm, *see Equitable Equipment Co. v. Hardy*, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977), and has been defined as "such a serious physical disability in fact that a cautious employer . . . would [be] motivated 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, 513, 6 BRBS 399, 415 (D.C. Cir. 1977). The mere existence of a prior condition is not sufficient to satisfy this element. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). However, a medical condition that is controlled or asymptomatic, such as hypertension or diabetes, may be a pre-existing disability if it is serious and lasting. *Director, OWCP v. General Dynamics Corp.*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986).

In this case, claimant had been attempting to control his high blood pressure and borderline diabetes through medication and diet from, at the very least, the time of his September 10, 1997, pre-employment examination by Dr. Fournet. CX 7. Claimant's

[3] If claimant is only permanently partially disabled, then employer must additionally establish that claimant's disability is materially and substantially greater due to the contribution of the pre-existing disability than it would be from the second injury alone. *See Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997).

cardiac condition, however, grew progressively worse over time to the point that he required coronary bypass surgery in October 2002, and routine monitoring thereafter by his cardiologist, Dr. Shaw. Similarly, claimant's diabetic condition progressed to Type II diabetes by the time he saw Dr. Aswell on January 10, 2002. EX 22. It is apparent therefore that claimant's cardiac and diabetic conditions are of such a serious and lasting nature that they constitute pre-existing permanent partial disabilities for purposes of Section 8(f) relief.[4] *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989) (Board reversed the administrative law judge's finding that claimant's diabetes and hypertension did not constitute pre-existing permanent partial disabilities); *Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (claimant's long-standing lung condition consisting of chronic obstructive lung disease, bronchitis and pneumonia constituted a pre-existing permanent partial disability); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988) (the disability need only be a serious, lasting physical condition).

Employer also contends that the administrative law judge erred in finding that the contribution element was not met. The administrative law judge found that claimant's April 5, 2004, work-related neck injury alone resulted in claimant's current sedentary to light work restrictions, such that neither claimant's pre-existing heart nor diabetic condition rendered him more disabled than he would have been from the neck injury alone. In reaching this conclusion, the administrative law judge accorded diminished weight to Dr. Aswell's assessment that claimant was unemployable as a result of the combination of his pre-existing cardiac and diabetic conditions and his work-related neck injury, because that assessment was contradicted by Dr. Shaw, who opined that claimant had no cardiac restrictions, and Dr. Williams, who opined that claimant was, based on his work-related neck injury, capable of performing sedentary to light work.

While the administrative law judge may properly accord diminished weight to the opinion of Dr. Aswell, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), we must remand this case for the administrative law judge to apply the correct legal standards for establishing the contribution element for Section 8(f) relief. The administrative law judge stated that the contribution element requires that employer

[4] Furthermore, these medical records as well as the November 4, 2003, pre-employment physical examination of claimant by Dr. Cousin, wherein the physician diagnosed claimant's coronary artery disease and diabetes mellitus, are sufficient to satisfy the manifest requirement for purposes of Section 8(f) relief. *See generally Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Allred*, 118 F.3d 387, 31 BRBS 91(CRT).

establish that claimant's current disability is materially and substantially greater than that which would have resulted from the second injury alone. Decision and Order at 7. While this statement of the contribution element applies in cases of permanent partial disability, it is not relevant to cases where claimant is permanently totally disabled.[5] *See Louis Dreyfus Corp.*, 125 F.3d 884, 31 BRBS 141(CRT). In order to establish the contribution element of Section 8(f) in cases of permanent total disability (as well as permanent partial disability) employer must show, by medical or other evidence, that claimant's subsequent injury alone would not have caused his permanent total disability. *See Two "R" Drilling Co.*, 894 F.2d at 750, 23 BRBS at 35(CRT); *see also Allred*, 118 F.3d at 389-90, 31 BRBS at 93(CRT); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992).

Employer asserts that claimant is not totally disabled due to his neck injury alone, as that injury restricted him to sedentary or light duty work and employer established that security guard and other light duty positions were available. It asserts these jobs were unavailable because of the combined effects of claimant's pre-existing conditions and his neck injury. In this regard the record contains evidence relevant to the contribution element that the administrative law judge did not address. Dr. Williams opined, as of January 10, 2008, that based on restrictions relating to claimant's neck injury, he was capable of performing sedentary to light work. EX 14-15. Mr. Francois stated that claimant is capable of working as a security guard and/or at other light duty positions. HT at 42, 43, 48-50. An employer may rely on vocational as well as medical evidence to establish the contribution element. *Marine Power & Equip. v. Dep't of Labor*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [*Harcum II*], 132 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997). Therefore, on remand, the administrative law judge should determine the restrictions imposed by claimant's work-related neck condition and then determine whether those restrictions preclude all of the jobs shown in the vocational evidence such that employer established that claimant's disability is not due solely to the work injury. *Harcum II*, 132 F.3d 1079, 31 BRBS 164(CRT). Consequently, as the administrative law judge did not address all of the relevant evidence of record in accordance with the applicable legal standards, we vacate the denial of Section 8(f) relief and remand the case for reconsideration. *Allred*, 118 F.3d 387, 31 BRBS 9(CRT).

[5] In addition, it is insufficient to prove only that claimant's existing permanent partial disability combined with the work injury to result in a greater degree of disability. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

Accordingly, the administrative law judge's Decision and Order Denying Section 8(f) Relief is vacated. The case is remanded for the entry of an award of benefits to claimant and for further consideration of employer's entitlement to Section 8(f) relief consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge