

BRB No. 98-627

ALEXANDER HARRELL)	
)	
Claimant)	DATE ISSUED: _____
)	
v.)	
)	
COOPER/T. SMITH)	
STEVEDORING COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order and the Order Upon Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Bradford C. Jacob (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

LuAnn Kressley (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), 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.

SMITH, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Order Upon Reconsideration (93-LHC-6) of Administrative Law Judge Fletcher E. Campbell, 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).

Claimant sustained head, back and left index finger injuries in a 1991 accident involving a construction vehicle. Claimant and employer agree that claimant is permanently totally disabled, and employer has continued to pay claimant disability benefits under the Act. The sole issue before the administrative law judge in this case was whether employer is entitled relief from continuing liability for compensation pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer filed a petition for such relief based on claimant's pre-existing conditions of degenerative disc disease, spinal stenosis, hypertension and diabetes. The administrative law judge awarded employer Section 8(f) relief based on claimant's manifest pre-existing diabetes which he found combined with claimant's work injury to result in total disability. Decision and Order at 4-5. On reconsideration, the administrative law judge reaffirmed his award, correcting only a typographical error regarding the compensation rate. The Director appeals this award, and employer responds, urging affirmance.

The Director contends employer failed to establish the contribution element necessary for Section 8(f) relief. Specifically, he argues that employer failed to show that "but for" the pre-existing permanent partial disability, claimant would have been only partially disabled by the work injury.¹ In response, employer argues it established that claimant's total disability is due to both the work injury and the pre-existing diabetes. After 104 weeks, Section 8(f) shifts the liability to pay compensation for permanent disability or death 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 totally disabled, if it establishes that the claimant had a manifest pre-existing

¹The Director does not challenge the administrative law judge's determination that claimant's diabetes constitutes a manifest pre-existing permanent partial disability.

permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP [Miller]*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980); see generally *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997).

The Director argues that the United States Court of Appeals for the Fourth Circuit has adopted the "but for" standard and cites *Maryland Shipbuilding and Director, OWCP v. Norfolk Shipbuilding & Dry Dock Corp. [Brite]*, No. 96-2652, 1997 WL 712934 (4th Cir. Nov. 17, 1997) (unpublished), in support of his contention. We reject the Director's argument that "but for" language is required in evidence in order for employer to establish the contribution element under Section 8(f) in a case where claimant is totally disabled. In *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996), the Board stated that "the 'but for' language is simply descriptive of acceptable evidence which will satisfy the statutory mandate."² *Dominey*, 30 BRBS at 136. Thus, it held that the two "versions" of the contribution test, "but for" and "not due solely to," have the same implications, as both require an employer to prove that a claimant's total disability was caused by both the work injury and the pre-existing condition and not just by the work injury alone. *Id.* at 137; see also *Harcum II*, 131 F.3d at 1082, 31 BRBS at 167 (CRT)(rejecting "but for" test in a case where claimant is partially disabled).

²Section 8(f) of the Act specifically states:

In all other cases of total permanent disability or of death, *found not to be due solely to that injury*, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

33 U.S.C. §908(f)(1) (emphasis added).

We now consider the Director's argument that employer has not met the contribution element based on the evidence presented. The sole evidence relied upon by employer to establish entitlement to Section 8(f) relief is Dr. Savit's August 24, 1995 letter, Emp. Ex. 2 at exh. 15, in which he states:

- 1) It is my opinion within a reasonable degree of medical certainty that Mr. Harrell is permanently and totally disabled as a result of a combination of his prior diabetic condition and his back, head and finger injury of November 29th, 1991.
- 2) The ultimate disability that Mr. Harrell now suffers from is materially and substantially greater because of the diabetic condition that [sic] it would have been from the injury alone.

The administrative law judge credited this evidence, stating it is unrebutted, and finding that "Dr. Savit's statement implies that the disability from the latest injury would not, by itself, have been total." Decision and Order at 5.

The Director contends Dr. Savit's letter is insufficient to establish the contribution element because employer has the burden of proving its entitlement to Section 8(f) relief and the Director is not required to present rebuttal evidence, and because the "combination" test has been rejected. We agree with the Director that employer has not satisfied the contribution element necessary for Section 8(f) relief. Initially, as employer has the burden of proof of establishing contribution, *see, e.g., Ceres Marine Terminal v. Director OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91 (CRT) (5th Cir. 1997), it was incorrect for the administrative law judge to credit Dr. Savit's letter merely because there is no evidence to contradict his statement. Further, although Dr. Savit's letter states that claimant's total disability is caused by the *combination* of his pre-existing condition and his work injury, the Director correctly asserts that the "combination" test is no longer embraced by the courts and that more is required of employer. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT). Specifically, under the plain language of Section 8(f), *see n.2, supra*, employer must establish that claimant's work injury alone is not responsible for his total disability, and the mere statement that claimant's overall condition is the result of the combination of two conditions is not enough to show that claimant's work-related injury alone would not result in total disability. *See generally Allred*, 118 F.3d 390, 31 BRBS at 93 (CRT) (explaining how work injury alone may render a claimant unemployable but a pre-existing disability may make the claimant's condition worse by increasing his pain); *Luccitelli*, 964

F.2d at 1303, 26 BRBS at 1 (CRT). As employer has not demonstrated that claimant's work injury alone is not totally disabling, it has failed to satisfy the contribution element and cannot obtain Section 8(f) relief. Therefore, we reverse the administrative law judge's award of Section 8(f) relief.

Accordingly, the administrative law judge's decisions awarding Section 8(f) relief are reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I agree only in the result reached by my colleagues in this case.

REGINA C. McGRANERY
Administrative Appeals Judge