BRB No. 89-1552

DAVID JONES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOSS POINT MARINE	)	DATE ISSUED:
	)	
and	)	
	)	
MIDLAND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Granting Benefits and Order Denying Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Travis Buckley, Ellisville, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Karen B. Kracov (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Granting Benefits and Order Denying Motion for Reconsideration (87-LHC-2516) of Administrative Law Judge James W. Kerr, 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 suffered an injury to his back during the course and scope of his employment with employer on July 17, 1981, when he stepped into a hole while carrying welding equipment. He consulted his treating physician, Dr. Wiggins, who diagnosed acute and chronic lumbar strain and released claimant to return to light duty work. However, as employer was unable to provide claimant with light duty work, claimant was terminated.

Thereafter, claimant continued to suffer from lower back pain. On December 1, 1981, and again on January 26, 1982 and February 23, 1982, Dr. Drake injected epidural steroids into claimant's lumbar spine, but these procedures offered claimant no significant relief. A CT scan performed on April 5, 1982 revealed bulging at the L3 and L4 levels, and herniation of the disc material into the lumbosacral interspace level. On May 19, 1982, claimant underwent a percutaneous lumbar discectomy, performed by Dr. Vogel, at the L4-L5 disc space. Dr. Vogel evaluated claimant several times thereafter, and on November 11, 1982, released claimant from his care, advising that claimant should avoid lifting, pulling or pushing 50 pounds or greater, and repeated bending. The physician stated that claimant would not reach maximum medical improvement until one year from the time of his surgery, and that claimant will have incurred a 10-15 percent permanent disability. On September 10, 1983, however, claimant aggravated his back condition when he bent down to pick up groceries at home. On November 13, 1983, Dr. McCloskey performed discectomies at the L4 and L5 levels. On April 29, 1985, after claimant had recently completed a rehabilitation program, Dr. McCloskey stated that claimant had reached maximum medical improvement. While the physician believed claimant remained severely disabled, he opined that claimant could perform sedentary work.

On February 19, 1987, claimant returned to work as a gate guard for Southern Guard Services, earning $3.35 an hour. He worked 40 hours per week until October 30, 1987, when Southern Guard lost a contract; thereafter, claimant worked part-time at 16 hours per week. On April 9, 1988, he began working for Rebel Guard Service at a rate of $3.50 an hour. Between that time and the date of the hearing, April 18, 1988, claimant worked 54 hours.

In his Decision and Order, the administrative law judge first found that the jurisdictional small vessel exception under Section 3(d) of the Act, 33 U.S.C. §903(d)(1988), was not applicable as claimant's injury occurred prior to 1984. The administrative law judge found that the September 10, 1983 incident was not an intervening cause of claimant's disability, but an aggravation of his July

17, 1981 injury. Relying on Dr. McCloskey's opinion, the administrative law judge found that claimant's date of maximum medical improvement was April 29, 1985. Thus, the administrative law judge awarded claimant temporary total disability benefits from July 18, 1981 to April 29, 1985, and permanent partial disability benefits thereafter. The administrative law judge then based claimant's permanent partial disability benefits on a post-injury wage-earning capacity of $134 per week, representing claimant's $3.35 hourly wage-rate at Southern Guard, at 40 hours per week. Lastly, the administrative law judge found that there was no evidence that claimant's pre-existing back injuries constituted a manifest pre-existing permanent partial disability, and thus, denied employer relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f). In an order denying employer's motion for reconsideration, the administrative law judge reaffirmed his findings.

On appeal, employer contends that the administrative law judge erred in finding that claimant did not sustain an independent intervening injury on September 10, 1983. In addition, employer argues that May 19, 1983 should be claimant's date of maximum medical improvement, based on Dr. Vogel's opinion. Employer also argues that the administrative law judge's finding of a $134 per week post-injury wage-earning capacity is in error; specifically, employer asserts that claimant's hourly wage-rate of $3.50 at Rebel Guard should be applied either at 40 hours per week or 54 hours per week. Lastly, employer argues that based on claimant's prior back injuries, as well as injuries to his knees and hands, employer is entitled to Section 8(f) relief.

In his limited response brief, claimant asserts that the administrative law judge properly denied employer Section 8(f) relief. Subsequently, in an order dated August 13, 1991, the Board granted employer's motion to strike and held that it will not consider that portion of claimant's response brief concerning Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), has also filed a response brief in the instant matter, urging affirmance of the administrative law judge's finding that the September 10, 1983 incident was not an intervening event, and his finding regarding claimant's post-injury wage-earning capacity. However, the Director supports employer's assertion that Section 8(f) relief should have been granted.

Employer first argues that because claimant's back injury had improved following his May 1982 surgery, the September 1983 incident constituted a separate injury which was not the natural and unavoidable result of the work-related injury and which thus is not compensable. Employer asserts that the administrative law judge's conclusion that claimant's 1983 incident resulted in an aggravation of his ongoing lower back condition, and therefore that it was not a new injury, is incorrect because an aggravation constitutes an "injury" under the Act. Employer also asserts that the administrative law judge's conclusion that the September 1983 incident was not an intervening cause of claimant's disability is not supported by substantial evidence. We disagree.

In establishing that an injury arises out of the employee's employment, a claimant is aided by the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), which applies to the issue of whether an injury is causally related to employment activities. *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). An employment injury need not be the sole cause of a disability; rather, if the

employment aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). Upon invocation of the presumption, the burden shifts to the employer to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

If there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that claimant's condition was caused by the subsequent non-work-related event; in such a case, employer must additionally establish that the first work-related injury did not cause the second accident. *See James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Employer is liable for the entire disability if the second injury is the natural or unavoidable result of the first injury. Where the second injury is the result of an intervening cause, however, employer is relieved of liability for that portion of disability attributable to the second injury. *See, e.g., Bailey v. Bethlehem Steel Corp.*, 20 BRBS 14 (1987), *aff'd mem.*, No. 89-4803 (5th Cir. April 19, 1990).

In the instant case, while the administrative law judge did not analyze the evidence in terms of the Section 20(a) presumption, we hold that the presumption under Section 20(a) is invoked as a matter of law, inasmuch as the administrative law judge found that it is undisputed that claimant suffered a back injury while working for employer in 1981 and that he suffers ongoing back problems. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Moreover, we hold that any error in not addressing rebuttal of the Section 20(a) presumption is harmless, as the administrative law judge's finding that the September 1983 incident was not an intervening cause of claimant's disability, *i.e.*, that employer did not rebut the Section 20(a) presumption, is supported by substantial evidence. In addressing this incident, the administrative law judge relied heavily on claimant's testimony that the September 1983 incident occurred while he merely bent over to lift groceries, not while actually lifting them, and that there is no evidence of an outside agent involved. Decision and Order at 9; Tr. at 44-45. Contrary to employer's assertion, Dr. McCloskey's testimony supports the administrative law judge's conclusion. That physician emphasized that the injury claimant sustained after the 1983 incident was "not the sort of problem that somebody" with a good back would have.[1] Cl. Ex. 1, McCloskey Dep. at 30. He later testified that this injury was a reflection of claimant's underlying problem.[2] *Id.* at 57.

Moreover, merely because the administrative law judge termed claimant's September 1983 incident an "aggravation" of his ongoing back condition is not dispositive of the issue; an "aggravation" can still be deemed the natural or unavoidable result of the work-related injury. *See Merrill*, 25 BRBS at 145. Accordingly, as the administrative law judge's finding that claimant's

[1] The reports of Drs. Tracy and Levy do not establish that claimant's disability is unrelated to his 1981 work injury, as employer contends. *See* Emp. Ex. 12, 14.

[2] Dr. McCloskey acknowledged that claimant's "underlying problem" was the July 1981 incident and resulting surgery. Cl. Ex. 1, McCloskey Dep. at 57-58.

1983 incident was not an intervening cause of claimant's disability is supported by substantial evidence, we hereby affirm this finding. *Id.*

Next, employer contends that based on the opinion of Dr. Vogel, the date claimant's condition reached maximum medical improvement should be May 19, 1983, not April 29, 1985, as the administrative law judge found. Employer's contention is without merit. An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985), or if claimant's condition has continued for a lengthy time and it appears to be of lasting or indefinite nature, as opposed to a condition which merely awaits a normal healing period. *Watson v. Gulf Stevedores Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). The determination of when maximum medical improvement is reached is primarily a question of fact based on the medical evidence. *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

In the instant case, the administrative law judge found that claimant reached maximum medical improvement on April 29, 1985. In so finding, the administrative law judge relied on the opinion of Dr. McCloskey, and the fact that claimant underwent discectomies at the L4 and L5 levels in November 1983, subsequent to May 19, 1983, the date employer contends should be considered the date of maximum medical improvement. Indeed, Dr. McCloskey noted on December 6, 1984, and again on April 29, 1985, that the surgery performed in November 1983 had improved claimant's back condition. Emp. Ex. 11 at 13, 16. The administrative law judge further found that claimant's condition stabilized after April 24, 1985. *See* Decision and Order at 8.

In the instant case, the administrative law judge rationally credited the opinion of Dr. McCloskey over that of Dr. Vogel in determining that claimant's condition became permanent on April 24, 1985. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the evidence of record establishes that claimant underwent surgery after May 19, 1983, which improved his condition. *See generally Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988), *aff'd*, 877 F.2d 1231, 22 BRBS 83 (CRT)(5th Cir. 1989), *vacated on other grounds on reh'g*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*). Accordingly, the administrative law judge's finding that claimant reached maximum medical improvement, and thus permanency, on April 29, 1985 is affirmed as it is rational and supported by substantial evidence. *See, e.g., Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990)(Lawrence, J., dissenting on other grounds).

Employer next argues that the administrative law judge erred in finding that claimant's post-injury wage-earning capacity is $134 per week. Employer insists that claimant's hourly wage-rate at Rebel Guard, $3.50, should be applied either based on 40 hours per week or 54 hours per week. Again, we reject employer's arguments.

Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that

claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Darcell v. FMC Corp., Marine and Rail Equip. Division*, 14 BRBS 294 (1981); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

In the instant case, the administrative law judge based his computation of claimant's post-injury wage-earning capacity on his earnings while working full-time for Southern Guard from February 19, 1987 until October 30, 1987. (40 hours x $3.35 per hour = $134.) While the administrative law judge did not specifically find that these earnings fairly and reasonably represent his post-injury wage-earning capacity, this finding can be easily inferred from his discussion of the issue of wage-earning capacity.[3] *See* Decision and Order at 9. Furthermore, we hold that any error the administrative law judge committed in not specifically adjusting claimant's post-injury wage-earning capacity to account for inflation, to represent the wages that the post-injury job paid at the time of claimant's injury, is harmless, inasmuch as the federal minimum hourly wage-rate between 1981 and 1987 remained uniform.

Moreover, we reject employer's contention that claimant's post-injury wage-earning capacity should be based on his wage rate at Rebel Guard. Claimant had been working for Rebel Guard for only 10 days at the time of the hearing. He further testified that he works on a "fill in" basis; he fills in for guards who call in sick or do not show up for work. Tr. at 51-52. He stated that he does not know in advance how many days a week he will be working. Tr. at 81. Claimant's testimony was uncontradicted. Since the evidence before the administrative law judge is insufficient to establish the continuousness of this job, we affirm the administrative law judge's finding that claimant's post-injury wage-earning capacity is $134 per week. *See generally Burch v. Superior Oil Co.*, 15 BRBS 423 (1983)(Kalaris, J., dissenting on other grounds).

Lastly, employer contends that the administrative law judge erred in denying relief under Section 8(f) of the Act. Specifically, employer argues that the medical evidence of record confirms that claimant had pre-existing disabilities to his back, hands and knee which were manifest to employer.[4] Employer further asserts that the opinions of Drs. McCloskey and Wiggins establish that

[3] In addition, claimant did not appeal this finding.

[4] Claimant lost the tips of four fingers on one hand and the index finger on the other in two industrial accidents prior to the 1981 injury. He also previously underwent surgery to his knee. Emp. Exs. 21 at 1-3, 22 at 1-3.

claimant's permanent partial disability is due to the combination of his 1981 work-related injury and his pre-existing back problems. Thus, employer contends that it is entitled to Section 8(f) relief. In response, the Director agrees with employer that the administrative law judge's denial of Section 8(f) relief is not supported by substantial evidence. We agree with employer's and the Director's contentions.

Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case where the claimant is permanently partially disabled if the employer proves that the claimant had a manifest pre-existing permanent partial disability, and that the disability is not due solely to the work-related injury and is materially and substantially greater than that which would have resulted from the subsequent injury alone. *See* 33 U.S.C. §908(f); *see also Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989).

In the instant case, the administrative law judge found that employer produced no evidence sufficient to show that claimant's pre-existing back disability, if any, was manifest to employer. The administrative law judge stated that while the evidence shows that claimant *may* have suffered from a pre-existing permanent partial disability that contributed to his present disability, no medical evidence dated before the 1981 injury showed that claimant suffered permanent effects from his previous back injuries. *See* Decision and Order at 11. Rather, the administrative law judge found that these records show that claimant completely recovered from his previous back injuries. *Id*. at 10.

A pre-exiting permanent partial disability for Section 8(f) purposes has been defined as a serious, lasting physical condition such that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *See, e.g., C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988). A medical condition need not cause economic disability to constitute a pre-existing permanent partial disability within the meaning of Section 8(f), but rather the pre-existing injury must produce some serious, lasting physical problem. *See Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41 (1986).

The record reveals that claimant was discharged from the Army in 1973 due to a severe lower lumbar strain. Emp. Exs. 20 at 5; 24, Claimant's Dep. at 20-21. He also sustained several industrial back injuries; at least on one occasion, in 1978, he was hospitalized and missed three days of work. Emp. Exs. 22 at 4-9; Claimant's Dep. at 17-19. Claimant's most recent back injury prior to his July 1981 work-related injury occurred on March 5, 1981 while working for another employer, when he hurt his back after lifting a piece of steel. After complaints of pain for nearly three weeks, claimant was hospitalized from March 23 to April 2, 1981. Claimant was diagnosed by Drs. Warfield and McCloskey as suffering from acute and chronic lumbosacral strain with probable anxiety reaction; x-rays and a myelogram were interpreted as normal. Emp. Ex. 20 at 1-3, 9. In his March 26, 1981 report, Dr. McCloskey recommended rest and physical therapy. Emp. Ex. at 5-6.

Thus, the medical evidence of record demonstrates that claimant had several prior back injuries, and that his back condition may constitute a pre-existing permanent partial disability for Section 8(f) purposes.[5] *See, e.g., Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991). Moreover, the administrative law judge never discussed in detail any of the medical evidence which pre-dated claimant's July 1981 injury in order to determine if the manifest element is satisfied. *See* Emp. Exs. 20-22. Additionally, the administrative law judge did not address Dr. McCloskey's testimony regarding contribution.[6] Cl. Ex. 1, McCloskey Dep. at 50-53. Therefore, we vacate the

[5] Moreover, the administrative law judge cited the April 13, 1988 report of Dr. Wiggins, which stated that claimant's pre-existing chronic lumbar back condition combines with and contributes to the effects of his 1981 injury, making him more disabled than he would have been as a result of the 1981 injury alone. Emp. Ex. 23.

[6] Dr. McCloskey testified that there was plenty of evidence that claimant had a bad back prior to July 17, 1981, and this made him more susceptible to the 1981 injury. The physician agreed that claimant's prior back problems have contributed to his overall current condition. Cl. Ex. 1, McCloskey Dep. at 53.

administrative law judge's denial of Section 8(f) relief and remand the case for the administrative law judge to reconsider the evidence in this regard.[7]

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for reconsideration of whether the evidence establishes entitlement to Section 8(f) relief. The case is further remanded to the administrative law judge for a determination of the date upon which employer first established the availability of suitable alternate employment, and thus the commencement date of claimant's permanent partial disability benefits. In all other respects, the Decision and Order-Granting Benefits and the Order Denying Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7] We note that the administrative law judge awarded claimant temporary total disability benefits from July 18, 1981 until April 29, 1985, and permanent partial disability benefits thereafter, notwithstanding his finding that employer established suitable alternate employment on February 19, 1987, the date claimant began working for Southern Guard. *See* Decision and Order at 9. In *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991), the Board held that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. *See also Director, OWCP v. Bethlehem Steel Corp.*, 949 F.2d 185, 25 BRBS 90 (CRT)(5th Cir. 1991). Accordingly, we hereby remand the case to the administrative law judge for a determination of the date upon which employer established the availability of suitable alternate employment, and thus the commencement date of claimant's permanent partial disability benefits.