

JERRY TERRY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
RYAN-WALSH STEVEDORING	)	
COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED:_____
CRAWFORD AND COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT OF	)	
LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Orders Denying Motion for Reconsideration of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

B. Ralph Bailey, Metairie, Louisiana, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Orders Denying Motion for Reconsideration (90-LHC-2180) of Administrative Law Judge Ben H. Walley 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

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On February 18, 1987, during the course of his employment, claimant dislocated his right shoulder while lifting a 65-pound drum of salad oil. In May 1987, he underwent corrective surgery. Once claimant's condition reached maximum medical improvement, Dr. Mimeles, who performed the surgery, determined that claimant is unable to return to longshore work due to a 20 percent permanent partial disability to his shoulder. See March 21, 1988, and July 19, 1989, letters.

Claimant filed a claim for compensation under the Act, and the parties stipulated to all issues except employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f). Decision and Order at 1-3. After employer and the Director, Office of Workers' Compensation Programs (the Director), agreed, the administrative law judge decided the case on the record. Decision and Order at 1. The administrative law judge accepted the parties' stipulations and found that claimant is entitled to temporary total, temporary partial, and permanent partial disability benefits, medical expenses and interest. Decision and Order at 10. With regard to employer's request for Section 8(f) relief from continuing liability for compensation, the administrative law judge found that claimant has been treated for rotator cuff tendinitis since 1977, that he had surgery in November 1978,<sup>1</sup> that claimant was released to work in January 1979 with an anatomical but not a functional impairment, and that claimant did not seek medical care for his shoulder problems again until 1985. Further, the administrative law judge found that rotator cuff tendinitis is a progressive disease, and that claimant sustained a work-related dislocated shoulder on February 18, 1987. Decision and Order at 8-9. Consequently, the administrative law judge concluded:

[T]he "rotator cuff tendinitis" problem was not a pre-existing condition or disability that caused or contributed to the disabling injury of 2-18-87. Instead, the disability now suffered was caused solely by the dislocated shoulder of February 18, 1987.

Decision and Order at 10. The administrative law judge thus denied employer's request for relief pursuant to Section 8(f).

Employer thereafter filed a motion for reconsideration in which it sought clarification as to whether it failed to show a pre-existing permanent partial disability or contribution or both. In an Order denying the motion, the administrative law judge merely reiterated his previous conclusion.<sup>2</sup> Order dated January 28, 1992 (Order 1). Subsequently, the Director filed a response to employer's

---

<sup>1</sup>The record contains evidence of arthritic changes in claimant's acromioclavicular (AC) joint which required surgery on November 12, 1978, to remove the distal 1.5cm of his clavicle. Dep. Krieger at 8-10.

<sup>2</sup>The administrative law judge also discussed counsel's fee petition and awarded an attorney's fee. Order dated January 28, 1992.

motion, and the administrative law judge issued a new Order, in which he re-phrased his conclusion, stating:

I find and conclude that the discussions of the evidence clearly support the denial of Section 8(f) relief. The requirements for relief under Section 8(f) of the Act are set out on page 3 of the original Decision and Order issued herein and the evidence wholly fails to meet the second listed requirement.

Order dated February 6, 1992 at 2 (Order 2). Employer now appeals the denial of Section 8(f) relief, contending the administrative law judge erred in finding no pre-existing permanent partial disability and no contribution. The Director has not responded to the appeal.

Section 8(f) shifts the 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 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, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see, e.g., Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

Employer initially contends the administrative law judge erred in finding that it failed to establish the existence of a pre-existing permanent partial disability. Contrary to this contention, however, the administrative law judge did find that claimant had a pre-existing permanent partial disability. Specifically, in his second Order, the administrative law judge stated: "the evidence wholly fails to meet the second listed requirement." Order 2 at 2. The "second listed requirement" in the administrative law judge's initial decision is the contribution element and not the pre-existing permanent partial disability element. *See* Decision and Order at 3. Thus, the administrative law judge denied employer's request for Section 8(f) relief because employer failed to establish that claimant's resultant disability was not due to the subsequent work injury alone, and not because it failed to show a pre-existing permanent partial disability. Additionally, the evidence of record supports the administrative law judge's finding that claimant had been treated for tendinitis and arthritis since the 1970's, and that those conditions are progressive and degenerative diseases. Decision and Order at 8; *see also* Dep. Krieger at 7-9, 16, 21; Dep. Habig at 13-14. Both Dr. Krieger, claimant's treating physician, and Dr. Habig, who examined claimant on July 12, 1989, stated that claimant had an anatomical impairment to his shoulder, which generated chronic problems, prior to the work injury in 1987. Dep. Krieger at 8, 11, 32-33; Dep. Habig at 13, 15. Thus, as the record establishes that claimant's pre-1987 shoulder condition is a serious and lasting one, we affirm the administrative law judge's finding that claimant had a pre-existing permanent partial disability to his shoulder prior to his February 1987 work-related injury. *See C&P Telephone*, 564 F.2d at 503, 6 BRBS at 399 (D.C. Cir. 1977); *Dugas v. Durwood Dunn, Inc.*, 21

BRBS 277, 280 (1988).

Employer also contends the administrative law judge erred in determining that claimant's present disability is solely the result of his 1987 work injury.<sup>3</sup> In order to satisfy the contribution element necessary to establish entitlement to Section 8(f) relief, employer must show that claimant's present permanent partial disability is materially and substantially greater than it would have been absent the pre-existing disability. *See Two "R" Drilling Co.*, 894 F.2d at 748, 23 BRBS at 35 (CRT); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). The record in this case contains conflicting medical evidence concerning whether claimant's pre-existing shoulder problems contributed to his current permanent partial disability. Specifically, Dr. Habig, in a report dated September 8, 1989, stated that claimant's present condition is related to his February 1987 work accident and subsequent surgery and not to his previous AC joint surgery. However, when deposed in 1990, Dr. Habig stated that claimant's shoulder instability problems were the result of his shoulder dislocation, and that claimant's current anatomical impairment is materially and substantially greater than it would have been had he not had an anatomical impairment prior to February 1987. Dep. Habig at 6, 15-17, 21, 23.

In denying employer's request for Section 8(f) relief, the administrative law judge credited Dr. Habig's 1989 report in concluding that employer failed to establish the contribution element necessary for Section 8(f) relief.<sup>4</sup> In so doing, the administrative law judge, although acknowledging Dr. Habig's deposition testimony, failed to take into consideration that portion of that physician's subsequent testimony which, if credited, could support a finding that claimant's pre-existing back conditions contributed to his current permanent partial disability. *See generally Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992). Thus, although it is within the discretionary power of the administrative law judge to determine the credibility of witnesses and to evaluate and draw inferences from the medical evidence of record, *see Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1992); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), we hold that the administrative law judge erred in relying upon the opinion of Dr. Habig, as expressed in his 1989 report, to find that employer had failed to establish the

---

<sup>3</sup>Employer incorporates a "common sense" element in its argument, *i.e.*, claimant's prior shoulder problems must have affected his present shoulder condition. The Fifth Circuit has previously rejected this "common sense" argument because it reads the contribution element out of the law. *Two "R" Drilling Co. Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990). Therefore, this argument must fail.

<sup>4</sup>The administrative law judge also credited the opinion of Dr. Krieger on this matter. However, we note that Dr. Krieger did not examine claimant after his February 1987 work injury, and he offered no opinion as to whether the pre-existing shoulder condition contributed to claimant's current disability. Rather, Dr. Krieger directed his testimony to the question of whether claimant's pre-existing condition could have contributed to the February 1987 shoulder dislocation. Dep. Krieger at 21, 23, 26.

contribution element necessary for Section 8(f) relief, without addressing Dr. Habig's subsequent deposition testimony further expounding on his opinion as to whether claimant's pre-existing conditions contributed to his present disability. We therefore vacate the administrative law judge's determination that employer has failed to satisfy the contribution element, and we remand the case to him for further consideration of whether claimant's current permanent partial disability is materially and substantially greater than it would have been absent his pre-1987 shoulder condition. *See generally Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

Accordingly, the administrative law judge's Decision and Order and Orders Denying Motion for Reconsideration are affirmed with regard to claimant's entitlement to disability benefits, vacated with regard to the denial of Section 8(f) relief, and remanded for further consideration in accordance with this decision.

SO ORDERED.

---

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

ROBERT J. SHEA  
Administrative Law Judge