BRB No. 92-1633

BOBBIE JOE GARRISON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS, CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY 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 of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-947) of Administrative Law Judge Vivian Schreter-Murray 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, a sheetmetal worker, sustained a work-related injury to his back on May 21, 1981 when he bent down to lift a bulkhead panel. Claimant underwent a disc replacement in January 1982 as a result of this injury. Additional surgical treatment was required in February 1983 and in May 1983. The parties stipulated to several facts: that claimant reached maximum medical improvement on March 24, 1986; that claimant has a post-injury wage-earning capacity of $120 per week; and that he is entitled to permanent partial disability compensation at a weekly rate of $232. Thus, the sole issue presented before the administrative law judge was employer's entitlement to relief under Section 8(f) of the Act.

In her Decision and Order, the administrative law judge denied relief under Section 8(f) because: (a) there was inconsistent evidence as to whether claimant suffered prior back injuries in 1962 and 1980, and if he did, there was no evidence of any serious or lasting complaints of pain or impairment; (b) there was no probative evidence that claimant had a heart condition or suffers from diabetes, other than by history; (c) while there was evidence that claimant has a congenital hearing impairment, a cautious employer would have no basis for discharging him since his longshore work involved little communication with others. The administrative law judge subsequently relied on the opinion of an orthopedic panel consisting of Drs. Stainsby, Gunn, and Burns, who opined that claimant's present disability is due solely to his 1981 work-related injury. Thus, the administrative law judge denied Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in finding that it was not entitled to Section 8(f) relief. Specifically, employer argues that the administrative law judge erred in not finding that claimant's congenital hearing impairment, heart condition, diabetes and prior back problems were pre-existing permanent partial disabilities within the meaning of Section 8(f). Employer asserts that claimant's current disability is due to the combination of these conditions and the work-related back injury. Additionally, employer argues that the administrative law judge committed error in not considering the October 28, 1991, letter of Dr. Nacht and the reports of Dr. Galen. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision. While the Director concedes that the administrative law judge committed error by not considering Dr. Nacht's report, the Director maintains that this error is harmless, inasmuch as this report does not establish entitlement to Section 8(f) relief.

The sole issue on appeal is whether employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Section 8(f) shifts liability to pay compensation for permanent disability compensation from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to the employer; and 3) the employee's permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. Where an employee is permanently partially disabled, the employer must also show that the current permanent partial disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Pino v. International Terminal Operating Co.*, 26 BRBS 81 (1992).

In the instant case, employer contends that the opinion of Dr. Nacht, as well as the opinions of Drs. Pipe, Bigos and Galen, establish the contribution element of Section 8(f). We disagree. The Director concedes that claimant's hearing impairment constitutes a pre-existing permanent partial disability,[1] and that the administrative law judge committed error in not considering the 1991 report of Dr. Nacht. We hold, however, that this error was harmless inasmuch as Dr. Nacht's letter, which states that "the combination of his back disorder and his hearing loss would make him extremely difficult to employ or vocationally rehabilitate," *see* Cl. Ex. 1., does not establish that his disability is "materially and substantially greater" as a result of his hearing loss. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g in pert. part and modifying on other grounds McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT)(9th Cir. 1989).

We further hold that the reports of Drs. Pipe, Bigos and Galen do not satisfy the contribution element of Section 8(f). The reports of Drs. Pipe and Bigos merely note claimant's hearing impairment and do not comment on its contribution to claimant's disability. *See* Emp. Ex. 5 at 103, 110, 134. Dr. Galen's medical records from 1976 through 1978, while possibly establishing that claimant had a pre-existing permanent partial disability as a result of his heart condition, do not establish that this condition has contributed in any way to his current disability. Moreover, the administrative law judge credited the opinion of the orthopedic panel, consisting of Drs. Stainsby, Gunn and Burns, that "claimant's present disability is due solely to the work related injury of May 21, 1981, and the subsequent surgery that was carried out for the patient's complaints arising from that injury." These physicians stated further that "claimant's present disability is not materially and substantially greater than that which would have resulted from the May 21, 1981 injury, and the surgical treatment alone." Dir. Ex. D at 103. This opinion was supported by employer's vocational expert, who testified that claimant is not competitively employable based on his back condition alone. Tr. at 81. We hold that the administrative law judge's decision to credit the opinion of the

[1]Claimant has no hearing in his left ear due to a hereditary condition, limited hearing in his right ear due to otosclerosis, and requires the use of a hearing aid. Emp. Ex. 5 at 103, 110.

orthopedic panel is rational and supported by substantial evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Thus, based on the record before us, we cannot say that the administrative law judge erred in finding that claimant's present disability is due solely to his work-related back injury. We therefore affirm the administrative law judge's finding that Section 8(f) relief is not available to employer in this case.[2]

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]Based on our holding herein, employer's contentions with regard to claimant's alleged pre-existing permanent partial disability are moot.