BRB No. 92-1744

DALTON D. BROWNLEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
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 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Cathleen Reilly-Brew (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

LuAnn Kressley (Thomas S. Williamson, Jr., Solicitor of Labor; Carol 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (91-LHC-0766) of Administrative Law Judge Richard K. Malamphy 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).

On August 1, 1986, claimant, a boiler operator at employer's power plant, sustained a back injury while straining to open a valve. Employer voluntarily paid claimant temporary total disability benefits from August 2, 1986 until May 9, 1988, and agreed that claimant was entitled to permanent partial disability benefits as of June 1, 1988, the date of his retirement. The sole issue pending for adjudication in connection with this disability claim was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.

In his Decision and Order, the administrative law judge noted that claimant was diagnosed with "minimal arthritic changes" when a lumbar x-ray was taken on May 5, 1967, and that accident reports in the record indicated that claimant suffered a sacroiliac sprain on September 13, 1957, and a lumbosacral sprain on November 16, 1970. Based on the November 4, 1988, medical report of Dr. Lenthall, EX 45, and Dr. Harmon's report dated September 17, 1990, EX 46, which stated that these pre-existing conditions rendered claimant susceptible to future injury, the administrative law judge determined that these pre-existing conditions constituted manifest pre-existing permanent partial disabilities which materially and substantially contributed to the disability resulting from the 1986 back injury. Accordingly, he awarded employer Section 8(f) relief.[1] The Director appeals the award of Section 8(f) relief. Employer responds, urging affirmance.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In order to be entitled to Section 8(f) relief where claimant is permanently partially disabled, employer must establish that claimant had a manifest, pre-existing permanent partial disability, which combined with claimant's subsequent work injury to produce a materially and substantially greater degree of disability than that which would have resulted from the subsequent work injury alone. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); 33 U.S.C. §908(f)(1).

On appeal, the Director initially argues that the references to claimant's pre-existing lumbosacral and sacroiliac sprains in employer's accident reports are insufficient to establish that these conditions are pre-existing permanent partial disabilities under Section 8(f). The Director asserts that inasmuch as Dr. Lenthall merely described claimant's prior back strains as potentially disabling and there is no other record evidence establishing the severity or permanency of these injuries or documenting that claimant received treatment for them, the administrative law judge erred in finding that claimant's prior back sprains constituted serious lasting physical problems for

[1]In an Order dated February 6, 1992, the administrative law judge consolidated employer's claim for Section 8(f) relief in connection with the August 1, 1986, back injury with claimant's October 24, 1986, occupational disease claim for asbestosis. Employer's Exhibit 8. In his Decision and Order, the administrative law judge also awarded claimant permanent partial disability compensation for a 20 percent permanent physical impairment and awarded employer Section 8(f) relief in connection with the asbestosis claim, having found that the Director did not oppose such a finding. These findings are not challenged on appeal.

purposes of Section 8(f). In addition, the Director asserts that the administrative law judge erred in finding the contribution element satisfied based on Dr. Lenthall's opinion because it fails to establish that claimant's disability is not due solely to the August 1, 1986, back injury.[2]

The administrative law judge's finding that claimant's pre-existing back strains and arthritis constituted pre-existing permanent partial disabilities under Section 8(f) is affirmed. Based on Dr. Lenthall's opinion that claimant's lumbosacral sprain rendered him more susceptible to further back injuries, and Dr. Harmon's opinion that as early as 1967 claimant's x-rays showed evidence of arthritic changes which made him "more susceptible to a back injury, and with a greater disability," the administrative law judge rationally determined that employer established that claimant had a serious and lasting physical condition prior to the work accident. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988). Accordingly, we affirm his finding that employer satisfied the pre-existing permanent partial disability requirement of Section 8(f). *See Shrout*, 27 BRBS at 164; *Thompson*, 26 BRBS at 60; *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420, 426 (1990).[3]

While we affirm the administrative law judge's finding that employer established a pre-existing permanent partial disability for Section 8(f) purposes, we are unable to affirm his finding that claimant's pre-existing disability contributed to his present degree of disability because of an intervening change in the applicable legal standard. In the instant case, the administrative law judge determined that employer established the contribution element based on Dr. Lenthall's opinion that any disability claimant may have as a result of his 1986 back injury was contributed to and made materially worse by claimant's prior back injuries and his severe peripheral vascular disease.[4] Ex. 4. Subsequent to the administrative law judge's decision, however, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction the instant case arises, issued its decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds,* U.S. , 115 S.Ct. 1278 (1995). In

[2]As the Director has not challenged the administrative law judge's finding that the manifest requirement of Section 8(f) was satisfied in this case, this determination is affirmed.

[3]Although the Director also asserts that the minimal arthritic changes noted on the May 1967 x-ray cannot provide a basis for a finding of a pre-existing permanent partial disability as this condition was not among the conditions listed in employer's application for Section 8(f) relief before the district director, we need not address this argument as it is being raised for the first time on appeal. *See Marko v. Morris Boney Co.*, 23 BRBS 353 1990). We note, however, that inasmuch as the administrative law judge properly found that claimant's prior back strains were pre-existing permanent partial disabilities, any error made in this regard would, in any event, be harmless.

[4]Inasmuch as the administrative law judge found that claimant's thrombophlebitis was not a pre-existing permanent partial disability and this finding has not been challenged on appeal, on remand, the administrative law judge must factor out this condition in determining whether Dr. Lenthall's opinion is sufficient to establish the contribution element under applicable law.

Harcum, the Fourth Circuit stated that to establish the contribution element for purposes of Section 8(f) relief, it is insufficient to show that the pre-existing disability rendered the subsequent disability greater. The court held that where the employee is permanently partially disabled, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. The court further held that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone, *i.e.*, the employer must present evidence of the type and extent of disability that the employee would suffer "if not previously disabled when injured by the same work-related injury." *Id.*, 8 F.3d at 185, 27 BRBS at 131 (CRT). In light of this intervening change in applicable law, we vacate the administrative law judge's finding that employer satisfied the contribution element for Section 8(f) relief and we remand the case for reconsideration of this issue in light of *Harcum*.[5]

[5]The Director also suggests that the administrative law judge erred in awarding Section 8(f) relief based in part on claimant's minimal arthritic changes inasmuch as this condition was not among the pre-existing permanent partial disabilities which Dr. Lenthall identified as contributing to claimant's ultimate disability. On the facts presented, however, the administrative law judge reasonably inferred from Dr. Harmon's opinion that claimant's arthritic condition was an underlying cause of his September 16, 1970, back strain, which Dr. Lenthall did recognize as a factor contributing to claimant's disability. *See* Decision and Order at 23, 25.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge