

FLOYD GANDY) BRB No. 92-2280
)
Claimant-Petitioner)
)
v.)
)
COOPER STEVEDORING COMPANY,)
INCORPORATED)
)
and)
)
HOME INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents)
)
)

FLOYD GANDY) BRB No. 95-767
)
Claimant)
)
v.)
)
COOPER STEVEDORING COMPANY,)
INCORPORATED)
)
and)
)
HOME INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners) DATE ISSUED:
)
)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Respondent) DECISION AND ORDER

Appeals of the Decision and Order - Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, and the Decision and Order Denying Section 8(f) Relief of George P. Morin, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2005) of Administrative Law Judge James W. Kerr, Jr. awarding benefits and employer appeals the Decision and Order (92-LHC-3103) of Administrative Law Judge George P. Morin denying Section 8(f), 33 U.S.C. §908(f), relief on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).¹ 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).

In BRB No. 92-2280, the administrative law judge found that claimant was exposed to injurious noise while working for employer sufficient to cause a hearing loss. The parties stipulated that the date of injury under the Act is February 18, 1987. The administrative law judge averaged the results of the three audiograms of record and concluded that claimant has a 2.087 percent binaural hearing impairment. Thus, the administrative law judge found that the evidence supports the claim for benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13). However, the administrative law judge found that claimant was receiving total disability benefits for a 1984 injury to his right hand, and he stated that as a claimant cannot receive benefits under the schedule at 33 U.S.C. §908(c)(1)-(20) concurrently with total disability compensation, no compensation is due in this case.

On appeal, claimant contends that the administrative law judge erred in failing to award permanent partial disability benefits which would lapse during periods that total disability compensation is being paid. Claimant also contends that no final award of permanent total disability benefits has been made for the injury to his right hand. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

As the administrative law judge correctly found, claimant cannot receive both total disability benefits and a concurrent award of permanent partial disability benefits pursuant to the schedule.

¹These appeals are hereby consolidated for purposes of decision. 20 C.F.R. §802.104(a).

See Tisdale v. Owens-Corning Fiber Glass Co., 13 BRBS 167 (1981), *aff'd mem. sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); *see also Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). However, contrary to claimant's assertion, the administrative law judge found that the evidence supports claimant's entitlement to benefits under Section 8(c)(13), but that no benefits are due because he was receiving total disability benefits as a result of his hand injury. Thus, although claimant may not receive additional compensation, the administrative law judge's Decision and Order is an award of benefits. In addition, we take official notice of the administrative law judge's Order of Remand dated August 12, 1993 and Decision and Order Denying Section 8(f) Relief dated October 4, 1994, in BRB No. 95-767 in which the parties stipulated that claimant is permanently totally disabled due to his 1984 right hand injury, and that claimant has been receiving total disability benefits since the time of injury. Thus, there has been no period of time during which the total disability compensation lapsed, and we affirm the administrative law judge's Decision and Order.

In BRB No. 95-767, employer appeals a denial of relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). Employer and claimant stipulated that claimant is totally and permanently disabled as a result of an injury to his right hand sustained while working for employer on June 24, 1984. The parties also stipulated that claimant reached maximum medical improvement on May 1, 1987, and that employer had paid voluntary temporary total disability benefits up to the date of the hearing. Employer sought Section 8(f) relief on this claim.

The administrative law judge found that the evidence fails to establish that claimant suffered from a pre-existing permanent partial disability. In addition, the administrative law judge found that claimant's earlier injuries were not manifest to employer at the time of the 1984 hand injury and that employer did not establish that any of claimant's prior injuries contributed to claimant's permanent total disability. Thus, Section 8(f) relief was denied.

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. §§908(f), 944. Section 8(f) is applicable if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury; 2) the disability was manifest prior to the employment injury; and 3) the current disability is not due solely to the most recent injury. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992). Employer has the burden of proving all three of the required elements for Section 8(f) relief. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988).

To satisfy the contribution element, employer must show that a claimant's subsequent injury alone would not have caused the permanent total disability. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992). In the present case, the administrative law judge found that "employer failed to prove that the alleged pre-existing disabilities materially and substantially contributed to the claimant's present disability." Decision and Order at 8. The only evidence of record that relates to the contribution of claimant's prior injuries is a report by Dr. Semon dated May 29, 1991. Dr. Semon initially discusses claimant's right hand injury and opines that he has a permanent partial disability of 90 percent of the right arm, and may require amputation of the right arm below the elbow. Emp. Ex. 6. Next, Dr. Semon outlines claimant's other injuries: 1966 - a 15 percent permanent partial disability to claimant's right; 1969 - a 15 percent permanent partial disability to claimant's right hand; 1978 - a neck injury, which resulted in degenerative disc disease; 1983 - a back injury with a residual permanent partial disability of 5 percent of the whole body; and two injuries that occurred after the 1984 work injury.² Dr. Semon concludes that these injuries, "with the consequent, cumulative disability imparted to the patient by each respective cumulative injury," had rendered claimant's total disability materially and substantially greater than that which would have resulted from the work injury alone. Emp. Ex. 6

In his analysis of the evidence, the administrative law judge rejected Dr. Semon's opinion regarding the cumulative effect of claimant's prior injuries. The administrative law judge found that Dr. Semon did not have actual knowledge of these alleged injuries, nor does he state in the letter that his conclusions are based on a review of other medical records. The administrative law judge notes that there is no other medical evidence of the 1966 and 1969 injuries in the record, and that there is evidence that the 1978 neck injury did not result in cervical disc injury or a residual permanent partial disability. Lastly, the administrative law judge notes that Dr. Semon included two injuries which were not diagnosed at the time of the 1984 hand injury in reaching his conclusion.

As employer does not raise any arguments on appeal regarding the administrative law judge's finding that the contribution element of Section 8(f) is not satisfied, and as the administrative law judge's finding is rational and supported by substantial evidence, we affirm the administrative law judge's finding that the evidence does not support a finding that claimant's previous injuries contributed to his total disability.³ See generally *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); see also *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT)(D.C. Cir. 1994); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990). Thus, we affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, the Decision and Order of Administrative Law Judge James W. Kerr, Jr.

²The two subsequent injuries are a 1986 diagnosis of asbestosis and a 1987 diagnosis of work-related hearing loss.

³Thus, we need not address employer's contentions regarding the administrative law judge's finding that employer did not establish that claimant had a pre-existing permanent partial disability that was manifest to employer at the time of the work-related hand injury. *Campbell Industries, Inc.*, 678 F.2d at 682, 14 BRBS at 978.

awarding benefits for claimant's work-related hearing impairment, but finding no payments due, is affirmed. In addition, the Decision and Order of Administrative Law Judge George P. Morin denying employer relief from continuing compensation liability pursuant to Section 8(f) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge