BRB No. 99-1054

LARRY D. WARD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY	)	DATE ISSUED: 7/11/2000
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Denying 8(f) Relief of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington D.C., for self-insured employer.

Miriam D. Ozur (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Denying 8(f) Relief (97-LHC-2140) of Administrative Law Judge Daniel A. Sarno, 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 injured his back on December 11, 1987, requiring surgery for a herniated disc. He returned to light duty with employer on May 16, 1989, but reinjured his back on June 16, 1989, requiring a second back surgery. He has been unable to return to his usual employment and sought benefits under the Act. Employer sought relief from continuing compensation benefits pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing back condition stemming from the 1987 injury.[1]

The administrative law judge found that although employer and claimant stipulated that claimant had reached maximum medical improvement, this stipulation is not binding on the Director. He then found that the evidence does not establish that claimant reached maximum medical improvement; thus, his condition is not permanent and Section 8(f) is inapplicable. Alternatively, the administrative law judge found that employer did not prove a necessary element of Section 8(f) relief, as it failed to quantify claimant's disability resulting from the June 1989 injury, with the result that the record lacks sufficient evidence to establish that claimant's disability as a result of the combination of the 1987 and 1989 injuries is materially and substantially greater than his disability from the 1989 injury alone. Therefore, the administrative law judge denied employer relief from continuing compensation liability under Section 8(f).

Employer contends on appeal that the administrative law judge erred in finding that permanency was not established. In addition, employer contends that the administrative law judge erred in rejecting the opinions of Drs. Reid and Garner, and in finding that the evidence does not establish that claimant's disability as a result of the 1987 and 1989 back injuries combined is materially and substantially greater than it would have been due to the 1989 injury alone. The Director responds, agreeing that claimant's 1989 back injury resulted in a permanent disability. However, the Director contends that Dr. Reid's opinion is legally insufficient to establish that claimant's disability is not the result of the 1989 injury alone. The Director asserts that employer must establish the loss of wage-earning capacity with and

[1]Prior to the hearing, claimant and employer stipulated that claimant is entitled to continuing permanent partial disability benefits pursuant to 33 U.S.C. §908(c)(21). *See* Decision and Order at 2.

without consideration of the pre-existing disability in order to meet its burden in this regard and that merely the fact that claimant could or could not work "light duty" is insufficient. He thus urges affirmance of the denial of Section 8(f) relief.

Initially, the Director concedes that claimant has sustained a permanent disability as a result of his back injury, and thus that Section 8(f) is applicable. The administrative law judge found that employer offered a variety of dates between 1990 and 1995, and essentially concluded that because employer could not prove a date of maximum medical improvement, Section 8(f) relief must be denied. However, it is clear that at least by the stipulated date of November 13, 1995, claimant's disability was one of a lasting and indefinite duration, and thus, claimant was permanently disabled at least by this date. *See, e.g., Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for rehearing denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Accordingly, we reverse the administrative law judge's finding that the permanency of claimant's disability has not been established, and thus hold that Section 8(f) is potentially applicable. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). As neither party seeks an earlier date of permanency, claimant is entitled to permanent disability benefits on this date.

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 but is made materially and substantially greater as a result of the prior disability. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd,* 514 U.S. 122, 29 BRBS 87(CRT) (1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

In order to satisfy the contribution element, employer must show by medical evidence or otherwise that the ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. We affirm the administrative law judge's conclusion that this standard is not met in this case. Pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, an employer may show that a pre-existing disability renders a claimant's overall disability materially and substantially greater by quantifying the disability that ensues from the work injury

alone and comparing it to the pre-existing disability. *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131 (CRT); *see also Carmines*, 138 F.3d at 143-144, 32 BRBS at 55 (CRT); *Harcum II*, 131 F.3d at 1082-1083, 31 BRBS at 166-167 (CRT); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated in part on other grounds on recon.*, 32 BRBS 283 (1998); *Quan v. Marine Power & Equipment*, 31 BRBS 178 (1997), *aff'd sub nom. Marine Power & Equipment v. Dep't of Labor*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000).

Employer in the instant case contends that Dr. Reid's opinion that claimant would have been able to return to light duty at the shipyard following the 1989 injury if not for his weakened back following the 1987 surgery is sufficient to establish that claimant's disability is not solely due to the last injury. The administrative law judge found that Dr. Reid's opinion was not sufficient to meet this standard as it did not quantify disability due to the June 1989 injury alone. We agree. While Dr. Reid opined that claimant suffered a 5 percent impairment following the 1987 injury, he does not discuss the level of impairment which claimant suffered due to the 1989 injury alone.[2] Moreover, the administrative law judge found that Dr. Reid does not refer to any evidence justifying his conclusion nor does he explain how he arrived at it. Thus, the administrative law judge properly concluded he cannot "examine the logic" and "evaluate the evidence" as required under *Carmines*. Therefore, as Dr. Reid's opinion is insufficient to establish that claimant's ultimate permanent partial disability is materially and substantially greater than would have ensued from his back injury alone, we affirm the administrative law judge's finding that the contribution element has not been established and his consequent denial of Section 8(f) relief.

Accordingly, the administrative law judge's denial of Section 8(f) relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[2]In addition, contrary to employer's contention, the fact that Dr. Reid's opinion is uncontradicted is irrelevant. *Carmines*, 138 F.3d at 142, 32 BRBS at 48 (CRT).

REGINA C. McGRANERY
Administrative Appeals Judge