BRB Nos. 97-1386
and 97-1386A

JUAN A. BURNS	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Granting Permanent Partial Disability and Denying Section 8(f) Relief of Administrative Law Judge Richard K. Malamphy, United States Department of Labor.

Robert E. Walsh and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Melissa R. Link (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

LuAnn Kressley (Martin Krislov, Deputy Solicitor for National Operations; 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 McGRANERY, Administrative Appeals Judges.
PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Granting Permanent Partial Disability and Denying Section 8(f) Relief (96-LHC-1179) 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 May 3, 1985, claimant injured his lower back while working as a crane operator for employer. As a result of this injury, claimant underwent three surgical procedures in June 1985, on March 31, 1987, and on February 16, 1988. The parties stipulated that claimant reached maximum medical improvement as of January 19, 1991, and that as a result of his work injury claimant was unable to perform his pre-injury crane operator duties. Employer voluntarily paid claimant various periods of temporary partial and temporary total disability compensation. Claimant sought permanent total or permanent partial disability compensation under the Act commencing April 13, 1995.

The administrative law judge determined that although claimant established his *prima facie* case of total disability, he was limited to permanent partial disability benefits under Section 8(c)(21), 33 U.S.C. §908(c)(21), as employer established the availability of suitable alternate employment paying the minimum wage, and claimant did not establish that he made a diligent effort but was unable to secure such work. The administrative law judge also denied employer's request for relief under Section 8(f), 33 U.S.C. §908(f), finding that although the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant's 1980 right knee injury resulted in a manifest, pre-existing permanent partial disability, employer failed to introduce evidence sufficient to establish that claimant's pre-existing knee condition materially and substantially contributed to his overall disability.

Claimant appeals the denial of permanent total disability benefits, contending that the administrative law judge erred in determining that employer established the availability of suitable alternate employment. Employer responds to claimant's appeal, urging affirmance. In addition, employer appeals the denial of Section 8(f) relief, arguing that the administrative law judge erred in failing to find that it satisfied the contribution element of Section 8(f). The Director responds to employer's appeal, urging affirmance.

Suitable Alternate Employment

In the present case, as it is undisputed that claimant is unable to perform his usual job, claimant established a *prima facie* case of total disability, thus shifting the burden to employer to demonstrate the availability of suitable alternate employment by presenting evidence of alternate jobs that are available in the relevant geographic market for which claimant is physically and educationally qualified. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 264, 31 BRBS 119, 124 (CRT) (4th Cir. 1997); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 16 BRBS 74 (CRT) (4th Cir. 1984). We affirm the administrative law judge's finding that employer established the availability of suitable alternate employment as it is rational, in accordance with applicable law, and supported by the testimony and labor market survey of employer's vocational expert, Mr. Karmolinski, as well as by the approval of various alternate job opportunities by Dr. Garner, the neurologist who performed claimant's surgeries.[1] Claimant argues on appeal that since he sought compensation commencing in April 1995, Mr. Karmolinski's vocational survey is insufficient as he relied on 1989 medical restrictions imposed by Dr. Garner who last examined claimant in January 1994, and he did not obtain any information from claimant regarding his limitations on sitting, standing, and lifting. Claimant asserts that as it is employer's affirmative burden to establish the availability of suitable alternate employment and employer neither secured nor proffered any updated or recent evaluation of his physical capacity covering the time during which benefits are claimed, the administrative law judge erred in finding that employer met it burden of proof based on Mr. Karmolinski's testimony. Claimant further avers that the administrative law judge failed to account for his testimony that his condition has, in fact, worsened and that it is becoming more difficult for him to perform almost any activity or function.[2]

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[1]The positions identified by Mr. Karmolinski which were approved by Dr. Garner included an order taker at Papa John's, a crab picker at York River Seafood, a door greeter at Wal-Mart, a security guard at James York Security, a donation attendant at Goodwill Industries, and a fund raising telemarketing position with the National Wheelchair Sports Foundation. EX-C at 7.

[2]Claimant described his limitations as follows: that after sitting only 20 minutes

Initially, we reject claimant's assertion that the administrative law judge neglected to consider his testimony. The record reflects that the administrative law judge considered and rejected claimant's testimony that his present level of pain is such that it precludes him from performing any work. The administrative law judge found that claimant's assertions in this regard were not corroborated by his treating physician, Dr. Garner, or any other witness or documentary evidence in the record, noting that claimant had visited a physician only three times since 1990 for his back condition and that he required only Tylenol to control his pain. Thus, contrary to claimant's assertions, the administrative law judge considered claimant's testimony regarding his pain and perceived limitations but determined that it did not support a finding of total disability when weighed against the credible and consistently stated medical opinion of Dr. Garner.

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he gets stiff and starts hurting; that he can stand a maximum of 30 minutes; that his ability to lift is severely limited; that he must rest frequently; and that he is unable to perform any activity without significant pain.

Claimant's assertion that Mr. Karmolinski's testimony cannot properly meet employer's burden because it is premised on outdated medical restrictions is also rejected. The administrative law judge specifically determined that while Dr. Garner's restrictions were initially made permanent in 1989, he subsequently confirmed their continuing applicability in 1993 and 1994. Although he did not see claimant again, he also indicated in a note dated January 31, 1997, that claimant's restrictions remained unchanged, and he approved the jobs identified by Mr. Karmolinski as suitable. We therefore reject claimant's argument that the administrative law judge erred in finding Mr. Karmolinski's opinion sufficient.[3] *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994).

Claimant further contends that employer's vocational evidence was deficient in that although claimant suffers from various additional physical ailments including problems with his shoulder and knee, as well as hernias and a skin condition, none of these conditions was taken into account in identifying the alternate positions. Inasmuch as the administrative law judge rationally found that claimant's shoulder and skin condition problems were not demonstrated through medical evidence, Mr. Karmolinski's failure to account for those conditions is irrelevant.[4] Although the record does contain medical evidence documenting claimant's hernias, contrary to the administrative law judge's finding, inasmuch as the record also reflects that Mr. Karmolinski considered this condition in conducting his labor market survey, and that no additional restrictions were imposed based on it, any error by the

[3] Although claimant also argues that Mr. Karmolinski's labor market surveys should have been scrutinized heavily in light of his relatively limited background in vocational testing, the administrative law judge specifically considered Mr. Karmolinski's qualifications and committed no error in this regard. Decision and Order at 9-10, 15-16.

[4] We note that the administrative law judge nonetheless concluded that, although there was some question as to claimant's ability to work for Papa John's because of his psoriasis, the other positions were well within the limitations set by Dr. Garner.

administrative law judge in this regard is harmless. Claimant's knee condition was, in fact, taken into account in identifying suitable alternate job opportunities, as Mr. Karmolinski relied upon the restrictions imposed by Dr. Garner, who incorporated prior restrictions relating to claimant's knee in his assessment of claimant's physical capacity. *See* EX-G at 1; EX-C at 2.

Claimant also argues that whether the alternate jobs identified were realistically available to him is questionable in light of his difficulties with reading and writing in English, his limited education, and his poor reading, spelling, and mathematical skills. Inasmuch, however, as Mr. Karmolinski opined after conducting testing, meeting with claimant, and considering his prior work history, that the unskilled labor jobs he identified were within claimant's abilities[5] and the prospective employers whom he contacted indicated that they were willing to consider someone who fit claimant's profile, Tr. at 63, claimant's argument in this regard fails. In fact, with regard to one job, the fund-raising position with National Wheelchair Sports Foundation, the potential employer viewed claimant's background in Spanish as an asset for raising funds in the Spanish speaking community. Tr. 64.

Finally, claimant contends that the vocational evidence fails to establish that the positions identified were available on a full-time basis. This argument is also without merit; the record reflects that the positions Mr. Karmolinski identified at York River Seafood, Wal-Mart and James York Security were full-time positions, and the other positions had the potential for full-time work. *See* EX-C at 7; Tr. at 66-76. Accordingly, as the administrative law judge's suitable alternate employment finding is supported by substantial evidence and claimant has failed to establish any reversible error the administrative law judge made in his evaluation of the record evidence or credibility determinations, his determination that claimant is only partially disabled is affirmed.

Section 8(f)

On cross-appeal, employer challenges the administrative law judge's denial of Section 8(f) relief, contending that the administrative law judge erroneously rejected its vocational evidence regarding the effects of claimant's knee impairment on the ground that it did not satisfy the contribution element set forth in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). Employer specifically avers that based on the uncontradicted opinion of Dr. Reid and Mr. Karmolinski's Loss of Access to the Labor Market Survey, it has

[5]The record reflects that Mr. Karmolinski specifically considered claimant's past problems with the law and determined that they would not impede claimant from obtaining the alternate work identified. Tr. at 101-102. *See generally Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988).

introduced evidence sufficient to establish that claimant's chronic knee disability contributed to and made his disability materially and substantially worse than it would have been based solely on his back injury and employer has quantified the degree of such contribution both medically and vocationally. The Director responds, urging affirmance.

To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134 (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997). 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, an employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability which would have resulted from the work-related injury alone.

> A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Harcum I, 8 F.3d at 185, 27 BRBS at 130-131 (CRT). In *Harcum II*, the United States Court of Appeals for the Fourth Circuit reiterated that employer is not limited to medical evidence, but may also submit vocational evidence in an effort to meet its burden to establish the contribution element. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT).

In analyzing the contribution issue in this case, the administrative law judge discussed Mr. Karmolinski's opinion that claimant's knee injury resulted in a 10 percent loss of access to the labor market and that, adding adjustments for claimant's back injury resulted in a total loss of access of 67 percent. The administrative law judge concluded that while this evidence gives the appearance of quantification, it does not satisfy the *Harcum I* standard. Specifically, the administrative law judge stated that the percentages given by Mr. Karmolinski do not reflect disability or impairment, but merely estimate the number of jobs that claimant is able to acquire due to the first injury alone and the combination of the two injuries.

The administrative law judge issued his decision in this case prior to the second opinion of the Fourth Circuit in the *Harcum* case. In *Harcum II*, the Fourth Circuit held that the employer's vocational evidence was sufficient to provide the administrative law judge with a basis to award Section 8(f) relief, satisfying the requirement that the level of impairment be quantified previously set out in *Harcum I*. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). The evidence at issue in *Harcum II* consisted of testimony by a vocational expert, Ms. Edwards, that without his pre-existing cervical spine injury, the claimant would have been able to earn $6.00 per hour, but because of his pre-existing condition, the claimant was only capable of earning $3.80 per hour. In addition, Ms. Edwards testified that because of claimant's pre-existing injury, he is unable to perform certain types of sedentary work.

In the present case, employer's vocational expert, Mr. Karmolinski, performed a transferable skills analysis to discern what types and percentages of jobs were available to claimant based solely on his pre-existing knee injury, and based on his knee and back injury in combination. Based on claimant's pre-existing knee injury, and the restrictions imposed by Dr. Bobbitt, Mr. Karmolinski opined that claimant had a loss of access to approximately 38 percent of directly transferable occupations, a loss of 4 percent of closely transferrable occupations and a loss of almost 10 percent of unskilled occupations within claimant's capabilities. Mr. Karmolinski further opined that when evaluating claimant's access to the labor market utilizing the restrictions imposed by Dr. Garner, claimant had lost approximately 97 percent of directly transferable occupations, 100 percent of closely transferable occupations, and approximately 66 percent of unskilled occupations within his capabilities.[6] Based on these findings, he concluded that as claimant's pre-existing knee disability resulted in a 10 percent loss of access and claimant's combined loss of access for his knee and back injury was 67 percent, his pre-existing condition significantly increased claimant's disability and the combination of the two injuries made claimant materially and substantially more disabled than if he had had the back injury alone. EX-G at 1. In addition, in a report dated June 27, 1995, Dr. Reid opined that claimant's disability was not caused by his 1985 back injury alone, but represented a material contribution from and a substantial worsening by his pre-existing chronic knee disability. The doctor stated that even with his back disability claimant would have been able to perform light and sedentary work in the open

[6]Mr. Karmolinski also identified specific types of jobs that would be available to claimant based on his having only the knee injury and his having both the knee and the back injury.

market, but that now he would not be hired for many such jobs because of his knee. EX-K at 2.

In *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, ___ BRBS ___, BRB No. 97-1317 (June 19, 1998), the Board recently recognized that vocational evidence similar to that presented in this case could, if properly credited, establish "the level of impairment that would ensue from the work-related injury alone," and thereby provide the administrative law judge with a basis to determine if claimant's ultimate permanent partial disability is materially and substantially greater than his disability caused by the work-related injury alone under *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). *Farrell, slip op* at 6. Evidence as to the number of jobs claimant could obtain due to the prior injury and to the two injuries combined is clearly relevant under *Harcum II.* As the administrative law judge summarily discounted this relevant evidence, we vacate his finding that employer did not establish contribution under Section 8(f) and remand this case for reconsideration of whether the ultimate permanent partial disability is materially and substantially greater than that due solely to the work injury consistent with *Harcum II* and *Farrell*.[7]

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and this case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[7]In considering the contribution issue on remand, the administrative law judge should also reconsider Dr. Reid's medical opinion. Although the administrative law judge found that the doctor's opinion was insufficient to establish contribution because he offered no quantification as to the impairment claimant would have based on the work injury alone, in his June 25, 1995, report Dr. Reid stated that even with his back disability claimant would have been able to perform light and sedentary work in the open market, but that now he would not be hired for many such jobs because of his knee. EX-K at 2. Dr. Reid's testimony in this regard is similar to the vocational opinion of employer's expert in *Harcum II.*

REGINA C. McGRANERY
Administrative Appeals Judge