

BRB No. 97-1565

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

Appeal of the Decision Granting Motion for Reconsideration and Reversing the Grant of Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Samuel J. Oshinsky (Marvin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor), 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 Granting Motion for Reconsideration and Reversing the Grant of Section 8(f) Relief (96-LHC-697) 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 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).

On June 19, 1988, claimant suffered a thoracic lumbar strain while working as a painter for employer when a sheet of metal fell and hit him on the back. Previously, claimant sustained back injuries while working for employer in 1977, 1982, 1986 and 1987; x-rays taken after the 1986 injury revealed degenerative disc disease. Claimant reached maximum medical improvement on September 4, 1990. Employer voluntarily paid claimant temporary partial disability compensation, 33 U.S.C. §908(e), temporary total disability compensation, 33 U.S.C. §908(b), and permanent partial disability compensation, 33 U.S.C. §908(c)(21), for various periods of time from 1988 through 1995.¹ It is undisputed that claimant is entitled to permanent partial disability compensation from July 18, 1995 and continuing.

The only issue before the administrative law judge was whether employer is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f)(1994). In his initial Decision and Order, the administrative law judge granted employer Section 8(f) relief, based upon the uncontradicted November 27, 1996 report of Dr. Reid, wherein Dr. Reid opined that claimant's permanent back impairment is not the sole result of his June 29, 1988, injury but rather is the result of the multiple back injuries he sustained at work, his degenerative disc disease and his obesity. Dr. Reid stated further:

If Mr. Drane had only his June 19, 1988 back injury alone, it would not have resulted in the permanent restrictions he now has. However, because Mr. Drane had his pre-existing back conditions of degenerative disc disease and multiple back injuries, his back was in a permanently weakened condition at the time of the June 19, 1988 injury, and the effects of that injury were exponentially greater.

Emp. Ex. 2.

¹Additionally, employer voluntarily paid claimant permanent total disability compensation for various periods during 1991, 1992 and 1994. 33 U.S.C. §908(a).

Thereafter, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration with the administrative law judge, contending that his decision to grant employer Section 8(f) relief was not in accordance with the holding of the United States Court of Appeals for the Fourth Circuit 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 (1995). In his Decision Granting Motion for Reconsideration and Reversing the Grant of Section 8(f) Relief, issued on April 22, 1997, the administrative law judge reversed his initial decision to grant employer Section 8(f) relief, as he determined that Dr. Reid's opinion did not quantify the level of impairment that would ensue for claimant's 1988 work-related injury alone, in accordance with the requirements of *Harcum I*.² Moreover, the administrative law judge rejected employer's contention that claimant's inability to work overtime due to his back impairment demonstrates that claimant's pre-existing back condition materially and substantially contributes to his overall disability. Employer subsequently filed a motion for reconsideration with the administrative law judge, which the administrative law judge denied on July 24, 1997.

On appeal, employer contends that the administrative law judge erred in reversing his initial decision to grant it Section 8(f) relief. Specifically, employer asserts that Dr. Reid's opinion is sufficient to establish the contribution element of Section 8(f) pursuant to the requirements espoused in *Harcum I*. In addition, employer relies on the holding of the Fourth Circuit in *Director, OWCP v. Newport*

²In *Harcum I*, the Fourth Circuit held that in order to satisfy the contribution element of Section 8(f), an employer must show 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 held that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone so that an adjudicative body has a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT).

News Shipbuilding & Dry Dock Co. [Parkman], No. 96-2653 (4th Cir. September 18, 1997). In response, the Director states that in light of the holdings of the Fourth Circuit in *Parkman* and *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997), it no longer opposes employer's request for Special Fund relief, and requests that the Board reverse the administrative law judge's denial of Section 8(f) relief and enter an order awarding employer such relief commencing 104 weeks from September 4, 1990, the date claimant reached maximum medical improvement.

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 materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

Subsequent to the administrative law judge decision denying employer Section 8(f) relief, the Fourth Circuit issued its decisions in *Parkman* and *Harcum II*.³ In *Harcum II*, the court clarified its holding in *Harcum I*, holding that the quantification criterion required to satisfy the contribution element of Section 8(f) need not only be satisfied with medical evidence; in that case, a vocational rehabilitation specialist's report discussing wage rates available to claimant with and without the pre-existing disability was determined to be sufficient to satisfied the quantification criterion and, thus, establish the contribution element of Section 8(f).

In the instant case, employer and the Director now agree that Dr. Reid's opinion, specifically that the effects of claimant's 1988 work-related injury were made "exponentially greater" by claimant's pre-existing back condition, is sufficient

³In *Parkman*, the court held that *Harcum I* does not require rigid adherence to numbers, percentages, or quotas in order to satisfy the quantification criterion.

to satisfy the quantification criterion, pursuant to *Harcum II* and *Parkman*, necessary to satisfy the contribution element of Section 8(f). Consistent with these decisions, we therefore hold that employer has satisfied contribution element of Section 8(f) and, consequently, that employer is entitled to Section 8(f) relief.

Accordingly, the administrative law judge's Decision Granting Motion for Reconsideration and Reversing the Grant of Section 8(f) Relief is reversed. The administrative law judge's initial Decision and Order Granting Permanent Partial Disability and Section 8(f) Relief is reinstated in its entirety.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge