BRB No. 98-1341

WILBUR S. JOHNSON, JR. Claimant v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: July 2, 1999 DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

LuAnn B. Kressley (Henry L. Solano, Solicitor of Labor; Carol A. 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (94-LHC-1771) of Administrative Law Judge Fletcher E. Campbell, 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, an electrician, injured his right shoulder at work on September 25, 1992, while pulling a cable. Claimant last worked for employer in June 1995. Employer voluntarily paid claimant temporary total and temporary partial disability benefits. Claimant requested modification of his stipulated award for temporary partial disability benefits, seeking permanent total disability benefits from January 6, 1996, to the present and continuing. 33 U.S.C. §922. The administrative law judge found that claimant met his *prima facie* case of total disability as stipulated, that employer established the availability of suitable alternate employment, and that claimant's post-injury wage-earning capacity is $4.25 per hour, the minimum wage in 1992. The administrative law judge found that claimant reached maximum medical improvement on January 9, 1996, as stipulated. Consequently, the administrative law judge awarded claimant permanent partial disability benefits from January 9, 1996, to the present and continuing, and medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Employer contends that the administrative law judge erred in denying it Section 8(f) relief, asserting that Dr. Reid's opinion is sufficient to establish that claimant's ultimate permanent partial disability materially and substantially exceeds his disability as it would have resulted from the work injury alone in accordance with the holdings of the United States Court of Appeals for the Fourth Circuit in *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 & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997), and *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 (1995). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to 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. *Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.* In this case, employer alleged that claimant's prior back impairment or his hearing loss entitles it to Section 8(f) relief.

In order to satisfy the contribution element, 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. In *Harcum I*, the court explained the above standard as follows:

> 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 185-186, 27 BRBS at 130-131 (CRT). In *Harcum II*, 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). The evidence must determine what claimant's disability would have been independent of the pre-existing injury; it is not proper simply to calculate the current disability and subtract the disability that resulted from the pre-existing injury. *Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT).

In denying employer Section 8(f) relief in this case, the administrative law judge initially assumed that claimant had a pre-existing permanent partial disability that was manifest to employer.[1] *See* Decision and Order at 10. The administrative

[1]The Director concedes that claimant has a manifest, pre-existing low back disability,

law judge then found that Dr. Reid's opinion is insufficient to establish the contribution element as it does not quantify claimant's current disability with and without the alleged pre-existing disabilities. Decision and Order at 10. Consequently, the administrative law judge denied employer Section 8(f) relief as he could not determine whether claimant's ultimate disability is materially and substantially worse as a result of claimant's pre-existing disabilities.

We affirm the administrative law judge's finding that Dr. Reid's opinion is insufficient to establish the contribution element. Dr. Reid's opinion states in relevant part:

> Mr. Johnson's disability is not caused by his 1992 right shoulder injury alone, but rather his disability is materially contributed to, and made materially and substantially worse by his pre-existing chronic back disability and hearing loss. Even with his shoulder disability, Mr. Johnson can perform available telephone solicitor work. However, Mr. Johnson would not be hired for such work because of his hearing loss. Mr. Johnson's back injury also adds to his lack of employability.

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but makes no such concession with respect to claimant's hearing loss. Dir. Br. at 1 n. 1.

Emp. Ex. 15(d). Dr. Reid's opinion that claimant's pre-existing back injury adds to his lack of employability is not sufficient to satisfy the contribution element.[2] *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT). Employer also asserts that the evidence establishes that claimant's work injury to the right shoulder was minor, necessitated minimal restrictions, and that it was only when Dr. Walko took into consideration claimant's pre-existing chronic low back problems that claimant's restrictions became so severe that his employment prospects were severely limited. The evidence does not support employer's assertion. Dr. Walko's report does not identify which restrictions are imposed for the work injury to the right shoulder and which are for the pre-existing low back problems; thus, Dr. Walko's restrictions do not establish the level of impairment that would ensue from the work injury to the

[2]In *Carmines*, the court stated that a doctor's mere assertion that claimant's ultimate disability was made materially and substantially worse by claimant's pre-existing conditions was not sufficient to warrant Section 8(f) relief. *Carmines*, 138 F.3d at 144, 32 BRBS at 55 (CRT). In the instant case, the fact that claimant's pre-existing back disability was "chronic," does not necessarily lead to an inference that this chronic, pre-existing back disability materially and substantially contributed to claimant's ultimate permanent partial disability. *See generally Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *see also John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93, 95 n. 2, 12 BRBS 229, 232 n. 2 (4th Cir. 1980).

shoulder alone.[3] Consequently, with respect to the pre-existing back injury, the administrative law judge's determination that he did not have a basis on which to determine whether claimant's ultimate permanent partial disability is materially and substantially greater is affirmed as it is supported by substantial evidence and in accordance with law. *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT); Emp. Ex. 15(d). We, therefore, affirm the administrative law judge's denial to employer of Section 8(f) relief based on that injury.[4]

[3]Dr. Walko restricted claimant from no work above the shoulder and no climbing, two hours of bending, kneeling, and stooping, two and one-half hours of walking, four hours of standing, six hours of sitting, lifting up to 20 pounds with the left hand, but no lifting with the right arm. Emp. Exs. 9(b), 14(c).

[4]Employer's reliance on the holding in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Parkman]*, No. 96-2653 (4th Cir. Sep. 18, 1997)(unpub.) in support of this contention is misplaced as *Parkman* is unpublished, and as the Fourth Circuit has published several cases addressing the issue at hand. *See* United States Court of Appeals for the Fourth Circuit Local Rule 36(c).

With regard to claimant's pre-existing hearing loss, Dr. Reid's opinion that claimant cannot perform available telephone solicitor work because of it, but could with his shoulder disability, also does not establish the type and extent of disability that claimant would have suffered without the pre-existing hearing loss. Dr. Reid's opinion with respect to claimant's pre-existing hearing loss is similar to the vocational evidence offered in *Harcum II* which was held sufficient to establish the contribution element; the difference between these two cases, however, is that in the instant case the medical or vocational evidence does not specifically establish the extent to which claimant's wage-earning capacity was reduced by claimant's being unable to take a telephone solicitor job due to his pre-existing hearing loss.[5] In fact, employer's vocational expert, Mr. Karmolinski, whose opinion was credited by the administrative law judge, did not identify such jobs as suitable for claimant, nor did he rule out telephone solicitor jobs or any type of job due to claimant's pre-existing hearing loss.[6] *See* Decision and Order at 7-9; Emp. Ex. 14; Tr. at 28, 31, 39-40. Consequently, with respect to the pre-existing hearing loss, the administrative law judge's determination that he did not have a basis on which to determine whether claimant's ultimate permanent partial disability is materially and substantially greater is affirmed as it is supported by substantial evidence and as it is in accordance with law.[7] *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT)*; Harcum II*, 131 F.3d at

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[5]In *Harcum II*, the vocational expert stated that without the claimant's pre-existing cervical spine injury, the claimant would be capable of earning $6 per hour, but with it, he was capable only of earning $3.80 per hour, and that because of claimant's pre-existing cervical spine injury, telephone solicitation is not a possible vocational option whereas it would be if he did not have the pre-existing back condition. *Harcum II*, 131 F.3d at 1082, 31 BRBS at 166 (CRT).

[6]Mr. Karmolinski identified suitable alternate jobs for claimant such as unarmed security guard, door greeter, cashier, order taker, and donation center attendant. Emp. Ex. 14; Tr. at 28. Dr. Walko did not approve of one of the cashier jobs or the order taker position (with which Mr. Karmolinski agreed) because they involved using both the left and right arms. Tr. at 31, 39-40.

[7]The type of evidence sufficient to establish contribution in the Fourth Circuit was offered in *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated on other grounds on recon.*, 32 BRBS 282 (1998). In *Farrell*, the Board held that the vocational expert's testimony that the claimant's pre-existing mental impairment increased the number of jobs no longer available to him for generally transferable occupations from 80 to 97 percent and for unskilled occupations from 48-49 to 76 percent is sufficient, if credited, to establish the contribution element, as it establishes the level of impairment that would ensue from the work injury alone and thereby provides 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 injury alone. *Farrell*, 32 BRBS at 121.

1079, 31 BRBS at 164 (CRT)*; Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT); Emp. Ex. 15(d). We, therefore, affirm the administrative law judge's denial to employer of Section 8(f) relief based on that injury.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge