BRB No. 01-0548

BAILEY HALL, III	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 26, 2002
	)	
	)	
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 of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

Thomas G. Giblin (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (00-LHC-1966) of Administrative Law Judge Richard E. Huddleston 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, while performing services as a handyman for employer, sustained an injury to his back on October 2, 1985. The parties stipulated that the injury arose out of and in the course of his employment and that claimant reached maximum medical improvement on August 9, 1990. In addition, claimant and employer stipulated that claimant is unable to return to his pre-injury duties and that as of June 15, 1998, there has been no suitable light duty work available with employer. However, since that date, the parties stipulated that claimant has worked as a custodian with the Suffolk Public School System and that his wages in that position represent his actual residual wage-earning capacity. Claimant was awarded ongoing permanent partial disability benefits of $113.60 per week. 33 U.S.C. §908(c)(21). The only issue before the administrative law judge was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge found that the evidence establishes that claimant had a pre-existing permanent back disability.[1] The administrative law judge also found that employer had actual and constructive knowledge of claimant's pre-existing disability. However, the administrative law judge found that employer did not establish that claimant's current permanent partial disability is materially and substantially greater than it would have been if it had resulted from the work-related injury alone. Therefore, the administrative law judge denied employer's request for relief pursuant to Section 8(f).

On appeal, employer contends that the administrative law judge erred in finding that

[1]The administrative law judge found that claimant suffered a back injury in 1981 when he was pulling cable, as a result of which claimant received several work restrictions, Emp. Ex. 8, and again in 1982 when Dr. Harmon recommended that he be assigned to a different job, Emp. Ex. 8 at 13. Claimant injured his back again in 1983 while he was grinding, and claimant was placed on restrictions on January 14, 1985, for residual problems due to the November 30, 1983 injury. Emp. Ex. 8 at 15.

claimant's pre-existing permanent partial disability did not contribute to his current disability, and thus in denying relief pursuant to Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance 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, 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. 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 & 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 establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. *See Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT). In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to show contribution, employer must quantify the level of the impairment that would ensue from the work-related injury alone. *Id*., 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT), the court explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability.

In the present case, employer submitted the February 8, 1993, report of Dr. Hall in support of its application for Section 8(f) relief. Dr. Hall opined that claimant's disability is materially and substantially worsened by his pre-existing back injury and back defect. He stated that claimant's 1985 injury was rather minor and that "if he had a normal back, the injury would have resolved with no permanent disability." Emp. Ex. 8. Further, Dr. Hall opined that each of claimant's prior back injuries permanently weakened the back disc structure, making claimant more susceptible to further injury.

The administrative law judge stated that he could not credit Dr. Hall's report as it is confusing and contradictory. The administrative law judge found that it was unclear which

medical records Dr. Hall reviewed before reaching his conclusion and that Dr. Hall did not explain his understanding of the injuries at issue. The administrative law judge specifically found that Dr. Hall did not discuss any reports concerning the last work-related back injury, on October 2, 1985, and thus that there is no basis on which to review his rationale that this injury alone did not cause claimant's disability. Decision and Order at 8.

Contrary to employer's contention, the administrative law judge was not bound to accept Dr. Hall's opinion merely because it is uncontradicted by other evidence of record. *Carmines*, 138 F.3d at 142, 32 BRBS at 53(CRT). The administrative law judge is entitled to evaluate the weight to be accorded to the evidence, and to determine the sufficiency of that evidence to establish the premise asserted. *See Carmines*, 138 F.3d at 140, 32 BRBS at 52(CRT); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Employer has not raised any reversible error in the administrative law judge's weighing of the evidence, and we affirm the administrative law judge's treatment of Dr. Hall's report as it is rational. Therefore, as it is employer's burden to establish the extent of claimant's disability that would have resulted from the subsequent work injury alone, and the administrative law judge rationally found that Dr. Hall's report did not adequately address claimant's October 1985 work injury, we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant's disability is not due to the work injury alone and that his ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted from the work injury alone.[2] *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2001).

Accordingly, the Decision and Order of the administrative law judge denying employer relief from continuing compensation liability pursuant to Section 8(f) is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]Contrary to employer's contention, Drs. Tiesenga and Powell do not address the extent of claimant's disability due to the October 1985 injury alone.

BETTY JEAN HALL
Administrative Appeals Judge