BRB No. 01-0550

PAUL STITZEL	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 22, 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 and Order on Stipulations of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Andrew D. Auerbach (Eugene Scalia, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Mark A. Reinhalter, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (00-LHC-1974) 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 administrative law judge's findings of fact and conclusions of law 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).

Claimant, on December 19, 1977, sustained a work injury to his low back. In a decision issued in 1980, Administrative Law Judge Ramsey awarded claimant ongoing permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). Employer was granted relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).[1] Claimant eventually returned to work for employer with permanent work restrictions against bending, lifting and stooping.

On April 22, 1996, claimant injured his back and hips at work. Employer voluntarily paid various periods of temporary total disability benefits to claimant. Administrative Law Judge Campbell (the administrative law judge) issued an order on December 8, 1998, awarding claimant temporary total disability benefits from September 10, 1996 to January 8, 1997, due to his inability to perform his job after hip replacement surgeries which the administrative law judge determined were required because of the work-related aggravation of claimant's pre-existing arthritic hip condition. Thereafter, at the October 31, 2000, hearing scheduled to determine claimant's entitlement to permanent total disability benefits, employer accepted liability for such benefits and stated that the only remaining issue was its entitlement to Section 8(f) relief. In his Decision and Order, the administrative law judge stated that the Director, Office of Workers' Compensation Programs (the Director), had conceded that employer established a pre-existing permanent partial disability, a chronic back condition, that was manifest to employer, thus satisfying two elements of the three-prong test for obtaining relief under Section 8(f). The administrative law judge found, however, that employer failed to establish the contribution element necessary for Section 8(f) relief. Accordingly, the administrative law judge denied employer's request for Section 8(f) relief.[2]

On appeal, employer argues that the administrative law judge erred in finding that the contribution element is not satisfied in this case. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Section 8(f) shifts liability to pay compensation for permanent disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks. When an employee is permanently totally disabled, in order for an employer to obtain relief under Section

[1]The administrative law judge found that Section 8(f) applied because claimant had a congenital, pre-existing spinal condition, which was manifest to employer and which contributed to claimant's ultimate partial disability.

[2]The administrative law judge subsequently issued an order awarding claimant permanent total disability benefits in accordance with the parties' stipulations.

8(f), employer must prove that: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not due solely to the subsequent work-related injury. *See* 33 U.S.C. §908(f); *Director, OWCP v. Luccitelli*, 982 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). As noted, the Director conceded that claimant has a manifest, pre-existing, permanent partial disability, namely, a chronic back condition.

Employer first contends that the contribution element is satisfied in this case because Judge Ramsey found it satisfied in adjudicating employer's claim for Section 8(f) relief arising out of the 1977 injury. We reject employer's contention that it is entitled to Section 8(f) relief as a matter of law based upon the doctrine of *res judicata*. The application of *res judicata* or claim preclusion requires a showing of the following three elements:1) a final judgment on the merits in an earlier suit; 2) an identity of the cause of action in both the earlier and later suits; and 3) an identity of parties or their privies in the two suits. *Keith v. Aldridge*, 900 F.2d 736, 739 (4th Cir.), *cert. denied*, 498 U.S. 900, *citing Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981). Contrary to employer's contention, *res judicata* is inapplicable as there is no identity of the causes of action in the earlier and later proceedings. The earlier claim for relief under Section 8(f) was derived from a permanent partial disability award for a 1977 injury to claimant's lower back and legs, whereas the present claim for relief under Section 8(f) is based on a claim for permanent total disability for a 1996 injury to claimant's back and hips. "[T]he appropriate inquiry is whether the new claim arises out of the same transaction or series of transactions as the claim resolved by the prior judgment." *Hartnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); Restatement (Second) of Judgments §24. In this case, the underlying claim which gives rise to the request for Section 8(f) relief stems from a different work accident than the previous claim. This lack of identity of the claims thus precludes application of *res judicata*. *See Meekins v. United Transportation Union*, 946 F.2d 1054 (4th Cir. 1991). The fact that a chronic back condition is the pre-existing disability in each case does not mean that the claims are identical. Similarly, the doctrine of collateral estoppel does not apply here, as the cause of claimant's permanent total disability could not have been fully litigated in the earlier proceeding, as no such issue was presented by the claim. *See generally Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989), *rev'd on other grounds*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1092 (1995).

We next address employer's contention that the administrative law judge was required to credit the uncontradicted opinion of Dr. Tornberg, who stated that claimant's "disability was not caused by his April 22, 1996, back and hip injury alone, but rather his disability was materially contributed to and made materially and substantially worse by his pre-existing

chronic back disability."[3] EX 1. The administrative law judge rejected this opinion, in part, because he found it to be unreasoned and undocumented.

We affirm the administrative law judge's denial of Section 8(f) relief. In adjudicating a claim, it is well-settled that an administrative law judge is entitled to weigh the medical evidence and to draw his own inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the administrative law judge is not required to accept an uncontradicted medical opinion, but rather should evaluate the soundness of the doctor's opinion in light of other evidence of record. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Although Dr. Tornberg does state that claimant's disability is not due to the work injury alone, *see* EX 1, the administrative law judge rationally determined that Dr. Tornberg failed to elucidate the reasons for his opinion that claimant's pre-existing condition worsened claimant's ultimate disability. The contribution element is not satisfied by evidence that merely states that the pre-existing disability made the claimant's ultimate disability worse than it would have been with only the subsequent injury. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). Nor is it satisfied merely by the showing that claimant had a history of disabling problems to the same body part as that affected by the subsequent injury. *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990) (rejecting a "common sense test" which presumes contribution when the same body part is injured subsequently as previously). In this case, the administrative law judge rationally determined that Dr. Tornberg provides no

[3]Employer need not establish that claimant's pre-existing disability "materially and substantially" contributed to claimant's total disability. That standard is applicable in cases where the claimant's ultimate disability is only partial. *See* 33 U.S.C. §908(f)(1); *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).

basis for his opinion that claimant's prior back problems contributed to claimant's current disability; he merely recites the medical reports demonstrating the extent of the disability due to the prior injuries and concludes that claimant's current disability is worsened thereby. His opinion does not provide a basis, with medical or other evidence, for the administrative law judge to determine that claimant's current total disability is not due solely to the work injury. *See generally Director, OWCP v. Newport News Shipbuilding& Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *see also Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000). Thus, the administrative law judge rationally found Dr. Tornberg's opinion insufficient to establish the contribution element, and we affirm the denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order and Order on Stipulations are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge