BRB No. 03-0418

SAM PUGH, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: MAR 11, 2004
	)	
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

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

Douglas S. Collica (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (02-LHC-1445) of Administrative Law Judge Daniel L. Leland 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a back injury while working for employer on March 17, 1999. An MRI revealed a small paracentral disc herniation at L4-5, L5-S1, and L3-4, and Dr. McAdam performed corrective surgery. Following the surgery, claimant began experiencing constant pain in his right leg, which, from what the doctors told him, was due to a "damaged nerve from the back surgery to his right leg." Hearing Transcript (HT) at 27. In March 2001, Dr. Skidmore fitted claimant with a spinal cord stimulator to help him deal with his leg pain, and claimant stated that it has reduced, but not eliminated, his symptoms. Claimant subsequently suffered a stroke on July 16, 2001, which had no residual effects, and a second one on November 8, 2001, which significantly weakened the left side of his body. Specifically, Dr. Raines stated that following the second stroke, claimant needs assistance when walking and does not have functional use of his left hand.

Employer voluntarily paid claimant temporary total disability benefits from March 13, 2000, until February 3, 2002, and temporary partial disability benefits commencing February 20, 2002, and continuing. Claimant thereafter sought benefits for permanent total disability which he alleged resulted from his work-related back injury and subsequent strokes, which he contended were work-related consequences of the back injury. Employer disputed the work-related nature of claimant's strokes and any resulting liability for claimant's total disability. Employer alternatively sought Section 8(f) relief, 33 U.S.C. §908(f), based on claimant's pre-existing back and shoulder impairments and history of hypertension.

In his decision, the administrative law judge determined that claimant established a *prima facie* case that his right leg pain and strokes are work-related, that claimant was therefore entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), and that employer failed to rebut the presumption. The administrative law judge thus concluded that claimant's stroke is a compensable consequence of his March 17, 1999, work-related back injury. The administrative law judge also found that claimant is unable to perform his usual work for employer, and that employer did not establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability benefits from November 8, 2001, and continuing, and medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge further determined that employer is not entitled to Section 8(f) relief as it did not

establish the requisite contribution element, since there is no evidence that claimant's disability is not due solely to his work-related back injury.

On appeal, employer challenges the administrative law judge's findings that claimant's stroke is work-related, and that it is not entitled to Section 8(f) relief. In response, claimant urges affirmance of the administrative law judge's causation finding. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief for claimant's disability arising from his stroke based on the absolute bar of Section 8(f)(3), 33 U.S.C. §8(f)(3), since employer did not, in its application, request Section 8(f) relief for disability arising due to that particular condition.

Section 20(a)

Employer asserts that the administrative law judge erred in finding that the strokes suffered by claimant in 2001 were a consequence of his March 17, 1999, back injury. Employer avers that claimant's theory of causation, *i.e.*, that the pain he experienced following his back surgery caused an increase in his blood pressure which, in turn, contributed to his strokes, is not supported by substantial evidence. In particular, employer contends that the administrative law judge erred in relying on the unsubstantiated conclusion of Dr. Raines that claimant's work-related pain contributed to his subsequent strokes to find invocation of the Section 20(a) presumption in this case. Employer alternatively asserts that even if claimant is entitled to invocation, Dr. Raines's testimony that pain will not affect one's blood pressure after a few months is sufficient to establish rebuttal of the Section 20(a) presumption. Employer therefore requests that the Board remand this case for consideration of the evidence as a whole on the issue of causation.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving that he sustained an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge initially observed that it is undisputed that claimant suffered a physical harm, *i.e.*, a stroke on November 8, 2001. The administrative law judge next found, based on claimant's testimony regarding his post-surgery leg pain, and Dr. Raines' testimony that pain can elevate blood pressure and his opinion that claimant's chronic high blood pressure was the determining factor for his first stroke, that claimant's right leg pain resulting from his March 17, 1999, work injury

could have elevated his blood pressure and thus contributed to his strokes. The administrative law judge therefore found claimant entitled to invocation of the Section 20(a) presumption that his strokes are work-related.

In contrast to employer's contention, Dr. Raines's opinion is substantiated by his deposition testimony and his periodic examinations of claimant over the course of seven years. At deposition, Dr. Raines acknowledged that claimant had a number of risk factors for stroke, *i.e.*, hypertension, tobacco use, and genetics, but that his hypertension would be the primary cause of his strokes in this case. CX 15 at 5-6. In addition, Dr. Raines articulated that claimant's back injury, or more specifically pain associated with the back injury may have contributed to his pre-existing hypertension which in turn contributed to claimant's strokes. CX 15 at 11, 15, 21, 26, 46-47, 49. In light of this evidence, we affirm the administrative law judge's finding that claimant is entitled to the Section 20(a) presumption that his strokes are work-related, as his findings that claimant's work-related right leg pain potentially caused an elevation in claimant's blood pressure which, in turn, could have contributed to his strokes by aggravating his pre-existing risk factors, *i.e.*, his hypertension, are supported by substantial evidence. *See generally Price v. Stevedoring Services of America,* 36 BRBS 56 (2002); *see also Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 373 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).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *Moore,* 126 F.3d 256, 31 BRBS 119(CRT); *Bridier v. Alabama Dry Dock & Shipbuilding Co.*, 29 BRBS 84 (1995). In considering rebuttal, the administrative law judge explicitly rejected employer's assertions that Dr. Raines's opinion establishes that claimant's strokes are not work-related. Specifically, the administrative law judge determined that while the testimony of Dr. Raines raises questions regarding the significance of claimant's leg pain as a contributing factor to his stroke, Dr. Raines never stated that claimant's leg pain could not have raised his blood pressure and caused or contributed to his stroke. Consequently, he concluded that employer did not establish rebuttal of the Section 20(a) presumption and that therefore claimant's stroke is a compensable consequence of his 1999 work-related back injury.

As the administrative law judge observed, employer sought to establish rebuttal based on the testimony of Dr. Raines, and evidence regarding claimant's overall treatment, including the specific treatment provided by Dr. Raines. In this regard, employer argues that claimant's testimony establishes that he has chronic pain, which, by virtue of Dr. Raines's testimony, would not affect his blood pressure after a few months, thereby refuting the underlying premise of Dr. Raines's conclusion that claimant's back injury could have contributed to his strokes. At his deposition, Dr. Raines extensively

reviewed a history of claimant's blood pressure since 1995, including indications that his blood pressure was at its worst prior to his March 17, 1999, work injury. CX 15 at 29-49. In addition, Dr. Raines stated that after a few months, a "degree of daily pain [going from 0 pain pre-injury to a 2 or 3 post-injury on a scale of 1 to 10] does not affect the blood pressure, and that's pretty well described in the literature." CX 15 at 49. He, however, added that when pain shoots up beyond a certain threshold the blood pressure would elevate, CX 15 at 48, and Dr. Raines indicated "the exacerbation of [claimant's] blood pressure after '99 at times correlated when he was having *increased pain*." CX 15 at 26 [emphasis added]. Dr. Raines concluded that claimant's back injury could have contributed to his high blood pressure, and consequently, to his strokes. Thus, as Dr. Raines opined, claimant, although a victim of chronic pain, was susceptible to having post-work injury instances of "increased pain" which could correlate with an increase in his blood pressure. Moreover, the administrative law judge determined that employer did not establish that claimant's March 17, 1999, work injury did not aggravate his pre-existing hypertension to cause the strokes. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). As the administrative law judge's findings are supported by substantial evidence, they are affirmed. Consequently, we affirm the administrative law judge's findings that employer did not establish rebuttal of the Section 20(a) presumption, and thus, that claimant's strokes are a compensable consequence of his 1999 work-related back injury. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151 (1989); *Cairns v. Matson Terminals* 21 BRBS 252 (1988).

Section 8(f)

Employer argues that the administrative law judge erred in denying its request for Section 8(f) relief. Employer maintains that the administrative law judge's finding on the issue of compensation liability, *i.e.*, that claimant suffered pain as a result of his back injury and subsequent surgery and that that pain elevated his blood pressure to the point that it caused or contributed to his strokes, necessarily establishes that claimant's pre-existing hypertension contributed to claimant's overall totally disabling condition. In response, the Director asserts that employer is barred pursuant to Section 8(f)(3) from seeking Section 8(f) relief for the disability resulting from claimant's stroke because it failed to raise that ground in its application to the district director. The Director maintains that employer asserted in its application for Section 8(f) relief that claimant's pre-existing hypertension contributed to his work-related back injury, and did not assert that claimant's hypertension contributed to his stroke injury, which resulted in the compensable disability in this case. In addition, the Director asserts that employer has not put forth any reason as to why it could not have reasonably anticipated the Special Fund's liability for the compensable injury of claimant's stroke when it filed its Section 8(f) application, as the second stroke occurred several weeks before its application was filed.

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 claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997). In order to establish the contribution element of Section 8(f) in a case involving permanent total disability, employer must show that a claimant's subsequent injury alone would not have caused claimant's permanent total disability. *See Maryland Shipbuilding & Dry Dock Co. v. Director, OWCP*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Thus, a claimant's total disability must have been caused by both the work injury and the pre-existing condition; unless an employer can demonstrate such, it may not receive Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In his decision, the administrative law judge initially found that claimant's hypertension was a manifest pre-existing permanent partial disability.[1] With regard to contribution, the administrative law judge initially stated that "only claimant's 1999 back injury will be considered the work-related injury in the analysis of this element," since he found that employer "only asked for [Section 8(f)] relief based on claimant's back injury, not his stroke, even though claimant's second stroke occurred several weeks before the application was filed and employer clearly had knowledge of the stroke." Decision and Order at 17. The administrative law judge then reviewed but rejected Dr. Tornberg's opinion regarding the contributory nature of claimant's pre-existing conditions to his work-related *back* disability, as it is not supported by the other evidence of record.[2] The administrative law judge's findings in this regard are not directly challenged by employer, because employer's argument concerns the administrative law judge's failure to address whether claimant's pre-existing, manifest, hypertension contributed to claimant's total disability due to the work-related *stroke*. The administrative law judge declined to address this issue because employer had not raised this theory in its Section

[1]The administrative law judge found that employer did not establish that claimant's back and shoulder injuries were pre-existing permanent partial disabilities and therefore rejected employer's request for Section 8(f) relief based on those conditions. The administrative law judge's finding that claimant's hypertension is a manifest pre-existing permanent partial disability, is affirmed, as it is not challenged on appeal.

[2]Specifically, Dr. Tornberg opined that claimant's disability is not caused by his 1999 back injury alone, but rather is materially contributed to, and made materially and substantially worse by his pre-existing chronic back disability, shoulder disability with surgery, and hypertension, and that the hypertension slowed and limited his overall recovery.

8(f) application to the district director. The Director responds that this finding should be affirmed, pursuant to Section 8(f)(3).

In the instant case, claimant initially sought benefits for permanent partial and total disability as a result of his work-related back injury sustained on March 17, 1999. Employer, by letter dated November 26, 2001, requested Section 8(f) relief as "the claimant injured his back on March 17, 1999," CX 2, and submitted fifteen medical exhibits in support of its position. Employer's application did not seek Section 8(f) relief for the condition resulting from the stroke, despite the fact that claimant's disabling stroke occurred two weeks prior to the filing date of employer's request. Significantly, however, claimant had not at that time sought benefits for disability due to his stroke.

At the hearing held on November 20, 2002, claimant sought permanent total disability benefits for the stroke he sustained in November 2001, alleging that it was a compensable consequence of his work-related back injury. HT 8-9, 11. In response, both at the hearing and in its post-hearing brief, employer disputed the claim and alternatively raised Section 8(f) relief on the stroke claim. In its post-hearing brief, employer maintained that if the administrative law judge found that claimant suffered from permanent total disability as a result of his stroke, then it is entitled to Section 8(f) relief because Dr. Raines clearly attributes claimant's total disability to a combination of his stroke, which is primarily due to his pre-existing hypertension, and his back injury. The Director filed a post-hearing brief opposing the employer's claim for Section 8(f) on the grounds that employer did not satisfy the requirements of Section 8(f) and also averred in a footnote that employer's failure to raise claimant's condition resulting from his stroke as a basis for awarding Section 8(f) relief precludes any such award on that basis, pursuant to Section 8(f)(3).

Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), provides that a request for relief and a statement of the grounds therefor shall be presented to the district director prior to consideration of the claim by the district director, and that failure to present such a request shall be an absolute defense to the Special Fund's liability unless the employer could not have reasonably anticipated the liability of the Fund prior to the issuance of a compensation order.[3] *See Director, OWCP v. Newport News Shipbuilding & Dry Dock*

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[3]Section 8(f)(3) of the Act states:

> Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore (*sic*), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the

Co. [Dillard], 230 F.3d 126, 34 BRBS 100(CRT) (4th Cir. 2000); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Elliot]*, 134 F.3d 1241, 31 BRBS 215(CRT) (4th Cir. 1998); 20 C.F.R. §702.321(b)(3). In *Elliot*, 134 F.3d 1241, 31 BRBS 215(CRT), and *Dillard*, 230 F.3d 126, 34 BRBS 100(CRT), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an employer requesting Section 8(f) relief must identify any pre-existing conditions, which provide the basis for its Section 8(f) claim, while its application is still before the district director; for any new grounds for Section 8(f) relief raised thereafter, employer must demonstrate that, with respect to the new ground, it could not have reasonably anticipated the liability of the Special Fund before the district director considered the claim.[4] The Director maintains that although *Elliot* and *Dillard* involve the failure to articulate the pre-existing conditions on which employer ultimately relied, the court's reasoning applies to employer's failure, herein, to correctly identify the compensable condition in the application it filed with the district director.

In *Elliot*, the court emphasized that:

> Congress established [Section] 8(f)'s timing requirement to ensure that the district director had a full and fair opportunity to defend the special fund from a [Section] 8(f) claim; this opportunity logically must entail defending against the *grounds* for the claim. Indeed, the statute expressly provides that any request for [Section] 8(f) relief is to be accompanied by "a statement of grounds therefore." (*sic*). When an employer files with the district director an application on one ground, that application is of little assistance to the district director in defending against the employer's request for relief on a wholly unrelated ground.

Elliot, 134 F.3d at 1245, 31 BRBS at 219(CRT) (emphasis in original). As the Director suggests, this logic similarly applies when a new "ultimate" disability is raised as the basis for Section 8(f) relief after the district director considers the claim. Thus, for any new "ultimate" disability raised as the basis for Section 8(f) relief in this fashion, employer must demonstrate that, with respect to the new "ultimate" disability, it could not have reasonably anticipated the liability of the Special Fund before the district

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> employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3).

[4]In *Elliot*, 134 F.3d 1241, 31 BRBS 215(CRT) the employer attempted to substitute wholly new pre-existing conditions as its basis for Section 8(f) relief after the claim was before the administrative law judge, and in *Dillard*, 230 F.3d 126, 34 BRBS 100(CRT), employer attempted to add additional pre-existing conditions to its claim for Section 8(f) relief.

director considered the claim Moreover, the Fourth Circuit in both *Eliot* and *Dillard* emphasized that when employer raises new grounds for Section 8(f) relief at the hearing, and the Director timely raises the Section 8(f)(3) defense, the administrative law judge must consider whether employer could have reasonably anticipated the liability of the Special Fund, on the grounds now asserted, while the claim was before the district director. Thus, where the administrative law judge had not specifically considered this issue, the case must be remanded for him to do so. *Dillard,* 230 F.3d 126, 34 BRBS 100(CRT); *Elliot,* 134 F.3d 1241, 31 BRBS 215(CRT); *see also Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999).

In this case, the administrative law judge found that employer raised new grounds for Section 8(f) relief for the first time before him at the formal hearing. Employer did so in response to claimant's seeking benefits based on the theory that his strokes following his back injury were work-related, a theory which claimant fully articulated at the hearing.[5] The Director timely raised Section 8(f)(3) in response, in its post-hearing brief, albeit only in a footnote stating employer cannot raise the issue at this late date. *See generally Abbey v. Navy Exchange,* 30 BRBS 139 (1996). The administrative law judge, however, did not consider whether employer's failure to raise its new grounds for Section 8(f) relief is excused because it could not have reasonably anticipated the liability of the Special Fund on these grounds while the case was before the district director. *Dillard,* 230 F.3d 126, 34 BRBS 100(CRT); *Elliot,* 134 F.3d 1241, 31 BRBS 215(CRT). In *Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT), the Fifth Circuit stated that employer is not required to raise Section 8(f) before the district director if the existence of the relevant medical evidence is unknown until after the case is before the administrative law judge; employer is not required to engage in discovery while the case is before the district director in order to develop its claim for Section 8(f) as employer need only request Section 8(f) relief when it knows it has a claim. *See also Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997). As the administrative law judge did not make the necessary findings of fact, we must remand this case for the administrative law judge to specifically resolve the issue regarding the applicability of the Section 8(f)(3) bar. *Dillard,* 230 F.3d 126, 34 BRBS 100(CRT). If, on remand, the administrative law judge determines that employer could not have anticipated Special Fund liability on the grounds now asserted while the case was before the district director, he must then consider employer's claim for Section 8(f) relief on the merits.

[5] Under these circumstances, and in light of *Dillard,* we cannot accept Director's suggestion and hold that Section 8(f) relief for disability due to the strokes was not timely raised based on the administrative law judge's finding that employer filed its Section 8(f) application two weeks after the last stroke occurred. This fact alone does not establish when employer reasonably knew that it could be liable for disability due to the stroke and thus could reasonably anticipate Special Fund liability for it. Employer cannot be required to raise Section 8(f) for an injury prior to the time claimant seeks benefits for it.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge