BRB No. 11-0666

HAROLD GLOWACKI	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CN/DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 05/10/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Granting Benefits and the Order Denying Employer's Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Larry J. Peterson (Peterson, Logren & Kilbury, P.A.), St. Paul, Minnesota, for employer/carrier.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits and the Order Denying Employer's Motion for Reconsideration (2010-LHC-0063) of Administrative Law Judge Daniel A. Sarno, 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 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 worked from December 2004 to August 25, 2008, as a control operator at employer's ore dock-facility on Lake Superior.[1] Tr. at 24-27. Claimant testified that he began to experience back pain, which he attributed to the heavy labor demands of his job.[2] Tr. at 64-66. However, he did not seek treatment. In 2006, claimant's right elbow became painful and worsened with work. *Id*. at 69-70, 73; CX 10 at 8. On November 1, 2007, claimant sought treatment for his elbow pain with Dr. Heinitz. On November 26, 2007, Dr. Heinitz diagnosed claimant with acute lateral epicondylitis in the right elbow. CX 10 at 8. He gave claimant a cortisone injection and prescribed physical therapy. *Id*.; Tr. at 72. On March 11, 2008, claimant sought treatment for his continuing back and elbow pain. Dr. Heinitz prescribed medication and returned claimant to full-duty work. Tr. at 67. Because of his persistent back and elbow pain, claimant received light-duty work restrictions on August 25, 2008, but he did not return to work. EX 14; Tr. at 69. On September 25, 2008, Dr. Heinitz stated that claimant's restrictions were most likely permanent, EX 17 at 12, and on June 1, 2009, claimant filed a claim for compensation under the Act for right elbow and lower back injuries. CX 25.

Employer stipulated to liability for claimant's November 2007 right elbow injury. With respect to claimant's back pain, the administrative law judge found that claimant's heavy labor at work caused his lower back to become symptomatic and that claimant established an aggravation to his back between 2004 and 2008, invoking Section 20(a) of

[1]Despite a history of prior back injuries and degenerative disc disease, on September 1, 2004, Dr. Wendland released claimant to work without restrictions. Tr. at 27-45; CX 11 at 8; EX 14.

[2]Claimant's duties as a control operator included using trapping machines to unload railroad cars full of iron ore pellets called taconite. His duties also included shoveling spilled taconite pellets from the dock and using high pressure hoses to clean the docks. Claimant also described using torches and sledge hammers during the winter in order to dislodge frozen taconite. Tr. at 46-64.

the Act, 33 U.S.C. §920(a). As employer failed to rebut the Section 20(a) presumption, the administrative law judge found that claimant's back condition also is work-related. Decision and Order at 15, 17, 19. The administrative law judge awarded claimant temporary total disability benefits from August 25 through October 1, 2008, and permanent partial disability benefits for a loss in wage-earning capacity from June 1, 2009, and continuing. 33 U.S.C. §908(b), (c)(21), (h). Addressing employer's Section 8(f), 33 U.S.C. §908(f), request, the administrative law judge found that claimant had pre-existing degenerative disc disease. Finding no evidence to establish that claimant's current disability is materially and substantially greater than the disability caused by claimant's work-related injuries alone, the administrative law judge denied employer's request for Section 8(f) relief. Decision and Order at 18. Employer filed a motion for reconsideration, which the administrative law judge denied. Employer appeals the denial of Section 8(f) relief, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Employer filed a reply brief.

Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks where an employee suffers from a manifest, pre-existing, permanent partial disability which combines with the work-related injury, resulting in permanent disability. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. 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). To be entitled to Section 8(f) relief where the work injury results in permanent partial disability, the employer must establish: (1) that the employee had a pre-existing permanent partial disability; (2) that this disability was "manifest" to the employer; (3) that the employee's permanent disability is not due solely to the employment injury; and (4) that the permanent partial disability being compensated "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *Duluth, Missabe & Iron Range Ry. Co. v. U.S. Dep't. of Labor*, 553 F.2d 1144, 5 BRBS 756 (8th Cir. 1977). An employer may establish contribution using medical or other evidence. *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).

The administrative law judge found that claimant's degenerative disc disease was a pre-existing, permanent partial disability and that the work injuries were to the right elbow and lower back.[3] The administrative law judge found, however, that Dr. Dowdle's opinion is insufficient to support employer's entitlement to Section 8(f) relief because he

[3]The administrative law judge did not address the manifest element.

acknowledged only the elbow injury as a work injury; therefore, he did not render an opinion on whether claimant's disability is materially and substantially greater than that which would have resulted solely from his work-related back and elbow injuries. Decision and Order at 18. Thus, the administrative law judge found that Dr. Dowdle's report does not establish that the resulting disability was not caused solely by the work injuries. The administrative law judge concluded that employer did not establish the contribution element of Section 8(f), and he denied employer's request for Section 8(f) relief.

Employer contends the administrative law judge erred in denying Section 8(f) relief. It asserts three theories of recovery: 1) claimant's pre-existing lumbar condition was a manifest pre-existing permanent partial disability that combined with claimant's November 2007 work-related elbow injury; 2) claimant's pre-existing permanent partial disability to his back combined with his work-related aggravation to his back; and 3) claimant's November 1, 2007, elbow injury is the pre-existing permanent partial disability and it combined with claimant's August 2008 work-related aggravation to claimant's back. We shall address each of these in turn.

Employer first contends the administrative law judge erred in finding the contribution element was not satisfied because it asserts that claimant's pre-existing lumbar condition was a manifest pre-existing permanent partial disability that combined with claimant's November 2007 work-related elbow injury, resulting in a materially and substantially greater disability than would have arisen due to the elbow injury alone. It asserts that Dr. Dowdle's opinion supports this argument. On September 8, 2009, Dr. Dowdle characterized claimant's work injury as the November 2007 elbow injury and the back condition, in its entirety, as a permanent pre-existing condition. EX 7-8. Dr. Dowdle opined that claimant's restrictions were "substantially worse based upon the presence of both injuries" because claimant was issued separate restrictions for his back and elbow conditions. EX 8 at 15. Dr. Dowdle explained that, potentially, each set of restrictions could limit claimant from different groups of job duties. Although employer accurately characterizes Dr. Dowdle's opinion, the administrative law judge awarded claimant permanent partial disability benefits for a loss in wage-earning capacity due to his back only. There is no compensable permanent disability attributable to claimant's elbow injury.[4] Consequently, employer cannot establish its entitlement to Section 8(f) relief by showing that claimant's overall disability is worse due to the combination of a pre-existing back injury and a subsequent work-related elbow injury, as the elbow condition is not compensable. 33 U.S.C. §908(f); *see generally Jenkins v. Kaiser*

[4]A permanent partial impairment to claimant's elbow is compensable only under the schedule at 33 U.S.C. §908(c)(1). *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980).

Aluminum & Chemical Sales, Inc., 17 BRBS 183 (1985). Therefore, employer has not established the contribution element on this basis.

Employer next asserts that the pre-existing permanent partial disability to claimant's back combined with the work-related aggravation to his back to result in a materially and substantially greater disability. Employer argues that Dr. Fleeson's opinion that claimant's pre-existing lumbar spine restrictions were permanent supports this contention. It is not clear that this argument was raised before the administrative law judge.[5] To the extent it may have been raised, and we are able to address it, *see, e.g., Shaw v. Todd Pacific Shipyards Corp.*, 23 BRB 96 (1989); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988), we reject it. As employer states, Dr. Fleeson attributed claimant's need for permanent back restrictions, in part, to claimant's aggravating work activities, pre-existing degenerative disc disease, and multiple prior back injuries. CX 1 at 12. However, Dr. Fleeson did not address whether claimant's pre-existing degenerative disc disease materially and substantially worsened his compensable disability, nor what claimant's disability and restrictions would be absent his pre-existing degenerative disc disease. CX 1. Therefore, Dr. Fleeson's report cannot support this theory of contribution or employer's entitlement to Section 8(f) relief.[6] *See Director, OWCP v. Ingalls Shipbuilding, Inc.* [*Ladner*], 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997); *Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007).

Employer also contends it is entitled to Section 8(f) relief because claimant's November 2007 elbow injury constitutes a permanent pre-existing partial disability which combined with the August 2008 back aggravation resulting in a materially and substantially greater disability than claimant would have sustained after the August 2008 back injury alone. Employer again forwards Dr. Dowdle's opinion as support, because Dr. Dowdle opined that claimant's restrictions were "substantially worse based upon the presence of both injuries." EX 8 at 15. Moreover, the record contains a functional capacity evaluation detailing claimant's physical restrictions and vocational evidence concerning suitable alternate employment. An employer may establish the contribution element using medical or other evidence, including vocational evidence. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 132 F.3d 1079, 31

[5]Although employer did not specifically state in its briefs before the administrative law judge that Dr. Fleeson's opinion supports employer's entitlement to Section 8(f) relief, employer did summarize Dr. Fleeson's opinion in the "Expert Opinions" section of its brief.

[6]We also reject any argument that Dr. Fleeson's opinion supports a finding that there is a cumulative elbow and back disability. Dr. Fleeson did not address the effects of claimant's elbow condition on his overall disability. CX 1.

BRBS 164(CRT) (4th Cir. 1997); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Thus, employer may demonstrate that claimant's wage-earning capacity is more limited because of his pre-existing elbow injury than it would be due to his subsequent back injury alone. *Id.* Claimant's restrictions related to his elbow injury, therefore, they are relevant to this inquiry.

Although employer raised this issue before the administrative law judge, the administrative law judge did not address it. Therefore, we vacate the administrative law judge's denial of Section 8(f) relief and remand the case for the administrative law judge to address this theory of recovery. *See generally Shrout v. General Dynamics Corp.*, 27 BRBS 160 (1993). On remand, the administrative law judge must address and make findings on each element of employer's burden under Section 8(f).[7] Specifically, he must determine whether claimant's 2007 elbow injury constitutes a manifest, pre-existing permanent partial disability and whether it materially and substantially contributed to claimant's overall disability following his 2008 back injury, such that claimant's disability is not due solely to the subsequent back injury. 33 U.S.C. §908(f)(1); *Louis Dreyfus Corp.*, 125 F.3d 884, 31 BRBS 141(CRT); *Duluth, Missabe & Iron Range Ry. Co.*, 553 F.2d 1144, 5 BRBS 756.

[7]Consequently, we reject the Director's assertion that the administrative law judge's failure to consider employer's alternative theory of recovery is harmless on the ground that Dr. Dowdle did not acknowledge an August 2008 cumulative trauma injury to claimant's back.

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 findings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order – Granting Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge