BRB No. 98-1245

THOMAS M. GREENLAW	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NATIONWIDE BUILDING MAINTENANCE, INCORPORATED	)	DATE ISSUED: May 27, 1999
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order On Remand and Order Denying Motion For Reconsideration of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves, L.L.C.), Mobile, Alabama, for employer/carrier.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol A. De Deo, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order On Remand and Order Denying Motion For Reconsideration (94-LHC-969) of Associate Chief Administrative Law Judge James Guill 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).

This case is before the Board for the second time. Claimant, who had a pre-existing left eye condition (pterygia), sustained a work-related injury on October 21, 1988, when a cable holding cargo broke and hit claimant in the face, resulting in a depression fracture of the skull, profound memory deficit, a seizure disorder, and a right eye impairment. Following this incident, employer voluntarily paid claimant permanent total disability benefits. 33 U.S.C. §908(a). Thereafter, employer sought relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his original Decision and Order, the administrative law judge, based on his finding that employer satisfied its burden of establishing that the manifest pre-existing condition rendered claimant's visual disability materially and substantially greater than it would have been from the October 1988 injury alone, granted employer's request for Section 8(f) relief.

The Director appealed the administrative law judge's award of Section 8(f) relief. The Board vacated the award, holding that the administrative law judge erred in focusing on whether claimant's visual disability was materially and substantially greater than that which would have resulted from the work injury alone. The Board remanded the case for the administrative law judge to determine whether employer satisfied the contribution element of Section 8(f) by establishing that claimant's overall total disability is not due solely to the work injury. *Greenlaw v. Nationwide Building Maintenance, Inc.*, BRB No. 96-0578 (Jan. 16, 1997).

In his Decision and Order on Remand, the administrative law judge credited the newly submitted report of Dr. Beneke that claimant would have been employable subsequent to the work injury from an ophthalmologic standpoint if his eyesight had not been impaired by the pre-existing condition. The administrative law judge stated that the medical evidence establishes that while the work injury was severe, it would not have resulted in total disability in an otherwise unimpaired individual. The administrative law judge thus found that employer satisfied the contribution element and he awarded employer Section 8(f) relief.

The Director filed a motion for reconsideration, contending that the administrative law judge neglected to consider whether claimant's head injuries were so severe so as to totally disable claimant irrespective of his pre-existing eye condition. The administrative law judge denied the motion, finding that "solely from a standpoint of visual impairment," claimant's work injury would not have rendered him totally disabled. Order on Recon. at 2. The administrative law judge noted that although Drs. Bowden and Beneke restricted their opinions to claimant's level of visual impairment, Dr. Bogg's opinion is similarly flawed in that his opinion is restricted to claimant's neurological impairment to the exclusion of any visual disability.

The Director appeals the administrative law judge's award of relief pursuant to Section 8(f), again contending that the contribution element is not satisfied. Employer responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work injury. *Ceres Marine Terminal v. Director OWCP*, 118 F.3d 387, 31 BRBS 91 (CRT) (5th Cir. 1997); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996); 33 U.S.C. §908(f)(1). In this case, it is undisputed that employer established the existence of a manifest, pre-existing permanent partial disability. The Director contends, however, that the administrative law judge erred in again concluding that employer satisfied the contribution element by establishing that claimant's visual impairment is not due solely to the work injury.

Dr. Bowden, an ophthalmologist, stated on September 11, 1991, that claimant's physical disability is due to a combination of the work injury which resulted in a profound visual loss in the right eye and the pre-existing corneal scarring and distortion in the left eye. Dr. Beneke, also an ophthalmologist, stated on June 23, 1997, that claimant's pre-existing left eye impairment will limit claimant's employment opportunities; specifically, Dr. Beneke stated that claimant will not be able to work in an outdoor environment due to glare, and will not be able to operate a commercial vehicle or heavy machinery.

The administrative law judge noted that these physicians addressed only

claimant's visual impairments, but found the opinion of Dr. Boggs similarly problematic in that he addressed only the neurological component of claimant's impairment. On June 20, 1990, Dr. Boggs stated that claimant has a 60 percent whole man impairment due to the head injury. He stated that claimant has brain damage with encephalomalacia that results in profound and severe memory deficit which nearly precludes the capability of learning new material. He noted that claimant also has a seizure disorder that has been difficult to control. Dr. Boggs felt claimant to be unemployable at that time. While not discrediting Dr. Boggs' opinion, the administrative law judge nevertheless stated that Dr. Boggs did not address the fact that "many jobs potentially available to Claimant would not require him to learn a substantial amount of new information," Order on Recon. at 2, and thus he gave greater weight to the opinions of the ophthalmologists that claimant's visual impairment is not due solely to claimant's work-related injury. The administrative law judge found that claimant's visual impairment, due to both the pre-existing condition and the work injury, "appears to be the prime factor restricting [claimant's] employment prospects rather than his diminished memory capacity." *Id.*

We agree with the Director that the evidence of record is legally insufficient to establish that claimant's total disability is not due solely to the work injury. As the Board stated in its prior decision, the proper inquiry is whether claimant's pre-existing impairment contributed to claimant's overall disability and not merely to his visual impairment. The opinions of Dr. Bowden and Dr. Beneke address only claimant's visual impairment. While these opinions establish that claimant's pre-existing left eye impairment either increased the level of his overall physical disability or would further limit his employability, based on his visual problems, they do not take into account the other results of the head injury claimant sustained, namely his seizure disorder and profound memory deficit.[1] Specifically, these opinions do not state that the work injury alone, in its totality, did not result in claimant's total disability. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); *see also Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993). Moreover, although under appropriate circumstances the

[1]In its prior decision, the Board agreed with the Director that the administrative law judge erred in crediting Dr. Bowden's opinion as he addressed only the impairment to claimant's eyes. *Greenlaw,* slip op. at 3. Dr. Beneke's opinion, submitted by employer on remand, suffers from the same deficiency.

administrative law judge may infer that a claimant's total disability is not due to the work injury alone, *see, e.g., Ceres Marine Terminal,* 118 F.3d at 391, 31 BRBS at 94 (CRT), the administrative law judge's inference here that claimant's visual impairment is the prime factor inhibiting his employability rather than his memory deficit (or his seizures, which the administrative law judge did not address) is not supportable in view of the severity of the injuries claimant

suffered and in view of the limited nature of the doctors' opinions.[2] *See generally Jaffe New York Decorating*, 25 F.3d at 1080, 28 BRBS at 30 (CRT). Employer, therefore, failed to meet its burden of producing evidence to establish that claimant's total disability is not due to the work injury alone. Consequently, the administrative law judge's award of relief pursuant to Section 8(f) must be reversed.

Accordingly, the administrative law judge's Decision and Order on Remand and the Order Denying Motion for Reconsideration granting employer Section 8(f) relief is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[2]In *Ceres Marine Terminal,* the United States Court of Appeals for the Fifth Circuit stated that if the record does not contain explicit evidence that claimant's total disability is not due solely to the second injury, the administrative law judge may infer such a result based on factors such as "the perceived severity of the pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them." 118 F.3d at 391, 31 BRBS at 94 (CRT).