BRB No. 13-0129

WESLEY A. WIGGINS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 11/26/2013
	)	
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 Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), for self-insured employer.

Ann Marie Scarpino (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-LHC-01029, 01030) of Administrative Law Judge Kenneth A. Krantz 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 injured his knees on June 15, 2004, during the course of his employment for employer as a rigger/forklift driver. CX 2 at A. In a decision issued on February 11, 2008, Administrative Law Judge Bergstrom accepted the parties' stipulations that claimant's knee injuries reached maximum medical improvement on October 31, 2006, and that claimant had a 52 percent left knee impairment and a 40 percent right knee impairment; he awarded benefits accordingly. Claimant alleged that he injured his neck and back moving pine blocks during the course of his employment on September 1, 2005. CX 2 at B. Claimant sought compensation for temporary total disability from September 28, 2005 to October 30, 2006, and for permanent total disability from October 31, 2006. Employer controverted the claim, and it timely requested Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f).

In his decision, Administrative Law Judge Krantz (the administrative law judge), found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his neck and back conditions are related to his employment and that employer failed to rebut the presumption. Decision and Order at 20-22. The administrative law judge found that claimant is unable to return to work for employer and that employer established the availability of suitable alternate employment. *Id*. at 22-30. The administrative law judge awarded claimant compensation for temporary total disability from October 31, 2006 to November 1, 2008. *Id*. at 30. The administrative law judge found that claimant is entitled to ongoing permanent partial disability benefits commencing November 1, 2008. The administrative law judge denied employer's request for Section 8(f) relief finding that employer did not show that claimant's permanent partial disability is materially and substantially greater than that which would have resulted from the second injury alone. *Id*. at 32-34.

On appeal, employer contests the denial of Section 8(f) relief. Employer contends the administrative law judge erred in finding the contribution element was not satisfied. Employer avers that claimant has a greater loss of wage-earning capacity due to his pre-existing knee injuries, and that, as a matter of law, a $37.80 per week greater wage loss is "material and substantial" for purposes of granting Section 8(f) relief. Moreover, employer asserts that claimant's physical disability due to both injuries is materially and substantially greater than that due to the second injury alone. The Director responds that the administrative law judge's denial of Section 8(f) relief does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), and that the case must be

remanded for the administrative law judge to fully discuss the basis for his conclusion.[1] We agree that the case must be remanded for further consideration.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from 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 a claimant is permanently partially disabled if it establishes that the claimant had a manifest, pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and is "materially and substantially greater than that which would have resulted from the subsequent work injury alone." 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); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). In *Harcum*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, 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 134, 32 BRBS 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 whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 71(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003).

The administrative law judge found, based on the Director's concession, that claimant's 2004 knee bilateral injuries resulted in a manifest, pre-existing permanent partial disability. Decision and Order at 32. The administrative law judge found, based on the opinion of Ms. Seaford, employer's vocational consultant, that claimant would have a residual weekly wage-earning capacity of $375 based only on his 2005 back and neck injuries, but that his wage-earning capacity is $337.20 because his knee disability further disables him. The administrative law judge found that claimant's disability is not due solely to the subsequent injury but that this $37.80 increased loss in wage-earning capacity is not "materially and substantially" greater than the loss in wage-earning capacity due solely to the neck and back injury. Decision and Order at 34. Thus, he denied Section 8(f) relief.

[1]Claimant, who is without counsel, wrote the Board on May 18, 2013. In his letter, claimant states that he has not received any compensation payments from employer since December 14, 2012. Claimant may apply to the district director for a supplemental order declaring default. 33 U.S.C. §918(a).

Employer contends the administrative law judge's finding that the contribution element is not satisfied is not in accordance with *Newport News Shipbuilding & Dry Dock Co. v. Stallings*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001). In *Stallings*, the claimant received a permanent partial disability award for a loss of wage-earning capacity of $3.78 per week. The Fourth Circuit held that employer was not precluded from seeking Section 8(f) relief, as the court held that it was legally and factually possible for employer to establish that the claimant's current disability was materially and substantially greater due to his pre-existing disabilities, despite the small size of the monetary award. *Id.*, 250 F.3d at 875-877, 35 BRBS at 56-57(CRT). The court stated that Section 8(f) relief "depends on comparing the degree of disability that would have resulted solely from Stallings's work-related injury (metal fume fever) with the degree of disability that Stallings currently suffers as a result of the combination of the metal fume fever and his preexisting medical conditions of COPD and hypertension." *Id*., 250 F.3d at 876, 35 BRBS at 57(CRT). In other words, the employer could establish entitlement to Section 8(f) relief if the claimant's disability was attributable to both injuries and not the subsequent injury alone and if the ultimate disability was materially and substantially greater than the disability that would have resulted only from metal fume fever.[2]

In this case, the administrative law judge found that claimant has an inflation-adjusted post-injury wage-earning capacity of $305.03 per week, based on the average wages paid by the suitable alternate positions.[3] Decision and Order at 31. Ms. Seaford opined that if claimant had suffered only the second injury, his wage-earning capacity would be $375 per week. She stated that the pre-existing knee injuries reduced claimant's wage-earning capacity to $337.20 per week. EX 9 at 42. The administrative law judge found that an additional $37.80 per week loss in wage-earning capacity (or 10 percent) does not demonstrate that claimant's ultimate disability is materially and substantially greater than the disability resulting solely from the September 2005 neck and back injuries. Decision and Order at 31.

We agree with employer and the Director that the administrative law judge did not sufficiently explain the basis for his finding that a 10 percent greater loss in wage-earning capacity is not "material and substantial."[4] Moreover, the administrative law judge did

---

[2]Thus, we reject employer's contention that *Stallings* supports an award of Section 8(f) relief as a matter of law.

[3]The unadjusted wage-earning capacity is $341.20. Decision and Order at 31.

[4]On remand in *Harcum*, the employer presented vocational evidence demonstrating that, if the claimant had suffered his second injury absent his pre-existing disability, he would have been capable of earning $6.00 per hour. However, with both injuries, he was capable of earning only $3.80 per hour, and he was not capable of performing certain types of sedentary work for which he would have been otherwise

not address the *Stallings* decision. In this respect, the administrative law judge did not discuss whether Section 8(f) applies on the ground that employer has quantified the increased physical impairment and resulting disability due to each of claimant's injuries. In this regard, Ms. Seaford described the specific impairments attributable to each of claimant's injuries. The report states that claimant's:

> 2004 knee injury primarily results in diminished mobility and ability to ambulate, and/or stand for extended periods of time. On the other hand the injury to his neck and back have a primarily detrimental effect upon Mr. Wiggins' strength and endurance as well as negatively impacting his upper extremities. … Indeed, if Mr. Wiggins suffered only from his neck and back injury, he would most probably be able to compensate to perform jobs which do not require a substantial amount of upper body strength and use of the upper extremities. Conversely, if he only suffered from the 2004 knee injury and not the 2005 neck and back injury, Mr. Wiggins would be able to tolerate extended sitting and positions which required extended use of his upper extremities.

EX 9 at 42. In his decision, the administrative law judge quoted this section of Ms. Seaford's report, and he found her opinion "well-documented and well-reasoned;" he relied on it to find that claimant's current disability is not due solely to the subsequent work injury. Decision and Order at 34. The administrative law judge, however, did not discuss this evidence in terms of determining whether claimant's physical disability due to the pre-existing disability is materially and substantially greater than that due to the 2005 injury alone. Therefore, we vacate the administrative law judge's denial of Section 8(f) relief. On remand, the administrative law judge should consider the entirety of Ms. Seaford's opinion and determine whether it is sufficient to meet employer's burden. In particular, the administrative law judge must explain his rationale for finding that Ms.

---

qualified. Thus, employer contended that claimant's pre-existing disability caused his ultimate wage-earning capacity to be reduced by $2.20 per hour, a 36 percent decrease, and that it was thus entitled to Section 8(f) relief. The administrative law judge denied Section 8(f) relief, primarily because employer did not present any medical evidence. On appeal, the Fourth Circuit observed that medical evidence, although often utilized, is not essential for an employer's satisfaction of the contribution element. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997). The court held that the vocational evidence sufficiently quantified what the claimant's injury would have been absent the pre-existing injury; it stated that the evidence presented by employer was of the type contemplated by *Harcum I*, and it held that employer was entitled to Section 8(f) relief. *Harcum II*, 131 F.3d at 1082-83, 31 BRBS at 167(CRT) ("In fact, the court cannot discern how the objective quantification ……. is in any way deficient.").

Seaford's statements regarding the impairments attributable to each injury, as well as her dollar figures, which he found establishes an approximately ten percent greater loss of wage-earning capacity due to the pre-existing injury, are or are not sufficient to meet employer's burden. *See Stallings*, 250 F.3d at 876, 35 BRBS at (CRT); *Harcum II*, 131 F.3d at 108, 31 BRBS at 167(CRT).

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further proceedings in accordance with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge