BRB No. 99-1294

WILLIE E. MORRIS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

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

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1133) 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 findings of fact and conclusions of law of the administrative law

judge which 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 hurt her lower right side and lower back on December 7, 1989, moving a set of weights while employed by employer's cleaning services department. By Decision and Order of October 8, 1992, Administrative Law Judge Aaron Silverman awarded claimant continuing benefits for temporary total disability from October 8, 1990. By application dated March 23, 1998, employer submitted a request for Section 8(f) relief, 33 U.S.C. §908(f), based on medical evidence that claimant reached maximum medical improvement on July 29, 1998.

In addressing employer's request for Section 8(f) relief, Administrative Law Judge Campbell (the administrative law judge) found that employer established that claimant suffered from a manifest preexisting permanent partial disability, *i.e.*, three separate back injuries sustained between 1980 and 1982, but that employer failed to demonstrate that her ultimate permanent total disability is not due solely to the work-related injury. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

On appeal, employer argues that the administrative law judge erred in finding that it failed to establish that claimant's preexisting disability contributed to her present total disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's conclusion that employer failed to establish the contribution element necessary for relief under Section 8(f).

To avail itself of Section 8(f) relief where an employee is permanently totally disabled, an employer must affirmatively establish: 1) that claimant had a preexisting permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that claimant's permanent total disability is not due solely to the work injury.[1] *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080,

[1]The Courts of Appeals have phrased employer's burden of proof using either the "not due solely" terminology of the statute or "but for" terminology. In *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996), the Board held that the "but for" test is merely a variation of the statutory standard having the same implications; a claimant's total disability must have been caused by both the work injury and pre-existing condition. 30 BRBS at 137.

28 BRBS 30(CRT) (D.C. Cir. 1994)*; Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT)(1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

Employer submitted two medical opinions addressing the potential relationship between claimant's preexisting disability and her present disability. Dr. Reid , employer's in-house physician, stated that claimant's disability is not caused by her December 7, 1989, back injury alone, but rather, that her disability is materially contributed to, and made materially and substantially worse, by her pre-existing chronic back disability. He also stated that the current injury was rather minor and would have resolved with no permanent disability. Emp. Ex. 20. He then elaborated that the December 7, 1989 injury permanently and substantially aggravated and worsened claimant's weakened and defective back structure resulting in her current disability. *Id.* Dr. Rhoton, the other physician whose opinion employer offered, wrote "I am uncertain as to whether or not [claimant] would or would not have suffered permanent back disability as a result of the 12/7/89 injury if she did not have a pre-existing back condition. Certainly, it would seem like she would have been less likely to have experienced permanent back disability from her lifting accident if she had not already had back problems." Emp. Ex. 21.

Addressing this medical evidence, the administrative law judge found that Dr. Reid does not attempt to explain or justify his opinion that claimant's current injury was rather minor and that the current injury permanently and substantially aggravated claimant's weakened defective back structure, and provides no documentation as to when and for what Dr. Reid treated claimant. The administrative law judge further found that Dr. Reid's report does not cite or rely on the opinion of any other treating physician in support of any of his conclusions. The administrative law judge thus concluded that Dr. Reid's opinion is insufficient to establish that claimant's permanent total disability is not due solely to the last injury. As for Dr. Rhoton's report, the administrative law judge found that although he was one of claimant's treating physicians, his treatment commenced significantly after her 1989 injury.[2] Further, the administrative law judge found Dr. Rhoton's opinion "virtually unintelligible," Decision and Order at 6, and he found that the only clear message he was able to extract from it was that Dr. Rhoton is uncertain about crucial issues. The administrative law judge commented that this opinion, like that of Dr. Reid, is unsupported by reference to any tests or opinions of physicians who performed contemporaneous examinations, and the only basis for it appears to be claimant's description of her pain ten years after the fact. The administrative law judge thus found that employer did not carry its burden of establishing the contribution element, and that therefore employer's request for Section 8(f) relief must be denied.

[2]Dr. Rhoton first treated claimant on March 25, 1998. Emp. Ex. 21.

In seeking to reverse the administrative law judge's decision, employer contends that the administrative law judge erred by applying a higher than the "preponderance of the evidence" standard when weighing employer's evidence. Employer also challenges the administrative law judge's and the Director's "misinterpretation" of *Carmines.* We reject these contentions, and affirm the administrative law judge's denial of Section 8(f) relief as it is rational, supported by substantial evidence, and in accordance with law. As employer correctly notes, "preponderance of the evidence" means that the existence of a fact is more probable than not. *See Santoro v. Maher Terminals, Inc.,* 30 BRBS 171 (1996). The administrative law judge, however, is charged with assessing the credibility, reliability and foundation of the evidence submitted, *see Duhagon v. Metropolitan Stevedore Co.,* 31 BRBS 98, *aff'd* 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999), and indeed, the *Carmines* court expressly stated that "The ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Carmines*, 138 F.3d at 140, 32 BRBS at 52(CRT). Thus, merely because evidence is uncontradicted does not absolve the administrative law judge of performing this evaluation of the evidence. In the instant case, the administrative law judge rationally found Dr. Reid's opinion unreasoned, in that he merely recited the history of claimant's prior injuries and resulting restrictions, and summarily concluded that claimant's total disability is not due to the last injury alone but is contributed to by the pre-existing back disability. *See generally Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, the administrative law judge rationally determined that Dr. Rhoton's opinion was equivocal at best, and unsupported by any references to earlier medical records or opinions. *Id.* Thus, as the administrative law judge rationally discredited the evidence presented in support of employer's contention that claimant's permanent total disability is not due solely to the December 1989 injury, the administrative law judge's conclusion that the contribution element of Section 8(f) has not been met is affirmed.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge