BRB No. 06-0256

JOHN E. HUFFMAN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BLACKWATER SECURITY CONSULTING, L.L.C.	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE	)	DATE ISSUED: 09/28/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Compensation Order Approving Stipulations and Denying Section 908(f) Special Fund Relief of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Roger A. Levy (Laughlin, Falvo, Levy & Moresi), San Francisco, California, for employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Compensation Order Approving Stipulations and Denying Section 908(f) Special Fund Relief (2005-LHC-0213) of Administrative Law Judge Gerald M. Etchingham 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 (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, an armed security specialist in Pakistan, injured his back on March 21, 2003, when the vehicle in which he was riding hit a bump and threw him against the roof. He was released to return to work with permanent physical restrictions on October 20, 2003. EX 7. Claimant and employer stipulated as to the nature and extent of claimant's disability. The Director, Office of Workers' Compensation Programs (the Director), however, raised issues concerning claimant's average weekly wage and residual wage-earning capacity. In addition, the Director disputed employer's entitlement to Special Fund relief pursuant to Section 8(f), 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge found the evidence supported the private parties' stipulations that claimant's average weekly was $1400 at the time of his injury and that claimant has a residual wage-earning capacity of $500 per week. Accordingly, he awarded claimant compensation for temporary total disability from March 21, 2003 to October 19, 2003, and for permanent partial disability benefits thereafter. 33 U.S.C. §908(b),(c)(21), (h). However, he found that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f) as employer did not satisfy the contribution element.

Employer appeals, contending that the administrative law judge erred in finding that it did not establish the contribution element necessary for Special Fund relief under Section 8(f). The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

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); *Marine Power & Equip. v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT)(9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997).

The Director concedes, and the administrative law judge found, that claimant's pre-existing back condition for which he underwent a microdiscectomy on December 20, 2001, constitutes a pre-existing permanent partial disability which was manifest to employer. However, the administrative law judge found that employer failed to establish the contribution element necessary for Section 8(f) relief because it did not quantify the level of impairment ensuing solely from the work-related injury. For the reasons that follow, we agree with employer that the administrative law judge applied improper standards to the Section 8(f) analysis. Therefore, we vacate the denial of Section 8(f) relief and remand for further findings.

The Ninth Circuit, in whose jurisdiction this case arises, has not found it necessary to precisely define the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f). The court has held that this standard may be met by medical evidence or by other evidence, *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT); *Sproull*, 86 F.3d 895, 30 BRBS 49(CRT), and has found that evidence demonstrating that the current level of disability is the result of a combination of the pre-existing condition and the work injury is sufficient to meet it. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). Employer also must establish that the current disability is not due solely to the work injury. 33 U.S.C.§908(f)(1); *Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

In the instant case, the administrative law judge found that employer failed to quantify the degree of claimant's disability arising from the work injury alone. In so finding, the administrative law judge stated that employer attempted to calculate claimant's disability arising from this injury merely by subtracting from the current disability that which resulted from his pre-existing injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). The administrative law judge's finding is not supported by the medical evidence of record.[1]

Dr. von Rogov opined that claimant's pre-existing back injury resulted in an impairment of eight percent, pursuant to the American Medical Association *Guides to the*

[1] In his response brief, the Director concedes that the administrative law judge erred in finding that Dr. von Rogov applied the "subtraction" method of quantification. Dir.'s Response Brief at 9 n. 3.

Evaluation of Permanent Impairment (AMA *Guides*). EX 7; Dep. at 16. Following the work injury in 2003 claimant suffered degenerative disc changes, epidural scar tissue with a small area of possible recurrent disc herniation, and an additional compression fracture at T12. EX 7. Dr. von Rogov testified that claimant's overall back impairment was now 10 percent, as claimant sustained an additional two percentage point impairment from the compressive lumbar radiculopathy which had become symptomatic as a result of the work injury. Moreover, he stated that the compression fracture of claimant's T12 vertebrae, absent any prior injury, would have resulted in a two percent impairment of the whole person under the AMA *Guides*. EX 7; Dep. at 16-17. Accordingly, Dr. von Rogov opined that claimant suffered a four percent impairment of the whole man as a result of the second injury alone. EX 7. Thus, contrary to the administrative law judge's finding, Dr. von Rogov established the degree of claimant's disability arising from the work injury alone.

The Director contends, however, that even though the administrative law judge misconstrued the evidence, his conclusion was legally correct because employer must establish that the pre-existing impairment contributed to a materially and substantially greater economic disability and not merely to a greater physical impairment. The Director cites *Quan,* 203 F.2d 664, 668-669, 33 BRBS 204, 206(CRT) for this proposition. We reject this construction of *Quan,* as in that case the evidence relating to the contribution element was solely vocational in nature. Therefore, the administrative law judge had to rely on it, rather than on any medical evidence, regarding the effect of claimant's pre-existing condition and subsequent injury on claimant's disability. The case does not mandate that the contribution inquiry involve solely claimant's economic disability, and indeed the court's decision in *Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT), suggests otherwise. Therein, the court affirmed the administrative law judge's award of Section 8(f) relief based on a doctor's opinion that the combination of the claimant's pre-existing compression fracture of the back and the work injury resulted in a greater impairment. Therefore, as the administrative law judge in this case applied an improper standard in addressing the medical evidence of contribution, we must remand this case for reconsideration of Dr. von Rogov's opinion in conjunction with any other relevant medical evidence. *See generally Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Employer also contends that the administrative law judge did not properly address the vocational evidence it presented in support of its claim for Section 8(f) relief. The Director responds that the vocational evidence is insufficient to establish the contribution element. Employer may establish the contribution element through vocational evidence that establishes that claimant's disability is not due solely to the work injury and that the pre-existing disability materially and substantially affects claimant's wage-earning capacity. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *see also Director, OWCP v.*

Newport News Shipbuilding & Dry Dock Co. [Harcum II], 132 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).

The administrative law judge found that the vocational evidence presented by employer's vocational counselor, Mr. Drew, "failed to provide evidence that Claimant would have suffered a loss of earning capacity from the 2003 injury alone." Decision and Order at 10. We cannot affirm this finding as a basis for the denial of Section 8(f) relief. The proper inquiry in the context of vocational evidence concerns a comparison between available jobs and/or wage rates with and without consideration of claimant's pre-existing disability. In this way, the administrative law judge can ascertain whether claimant's disability is due solely to the work injury, and if not, whether the pre-existing disability contributed in a material and substantial way to that disability. *See Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996); *see also Harcum II*, 132 F.3d 1079, 31 BRBS 164(CRT); *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 118, *vacated in part on recon. on other grounds*, 32 BRBS 282 (1998). Therefore, on remand the administrative law judge must address the vocational evidence in accordance with the applicable standards.[2]

[2] The Director contends that if the case is remanded for reconsideration of the vocational evidence as it relates to the contribution element of Section 8(f), then the administrative law judge should be instructed to reconsider claimant's post-injury wage-earning capacity as he did not address all relevant evidence. The Director correctly notes that he is not bound by the private parties' stipulations regarding claimant's post-injury wage-earning capacity. *Brady v. J. Young & Co.*, 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985). The Director raised as issues before the administrative law judge claimant's average weekly wage and post-injury wage-earning capacity. The administrative law judge therefore addressed these issues based on the evidence submitted into the record and made findings of fact. Decision and Order at 4-8. We decline to remand the case for further findings regarding claimant's wage-earning capacity. The Director was obligated to raise this issue in a cross-appeal, as acceptance of the Director's contention does not support the administrative law judge's denial of Section 8(f) relief. *Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 282 (1998), *vacating in part on recon.* 32 BRBS 118 (1998).

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Compensation Order Approving Stipulations 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