BRB No. 13-0119

STANLEY W. VANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EAST COAST CRANES & ELECTRICAL c/o CAROTEC SERVICES USA	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 09/20/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand and the Decision and Order Denying Employer's Motion for Reconsideration on Second Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Dale Vernon Berning, Virginia Beach, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

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 on Second Remand and the Decision and Order Denying Employer's Motion for Reconsideration on Second Remand (2008-LHC-00447) of Administrative Law Judge Richard K. Malamphy 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 third time. To recapitulate, claimant worked for employer from 1992 to July 31, 2007, maintaining and operating cranes. Claimant testified that he worked ten to twelve hour shifts, which rotated weekly from the day shift to the mid shift to the night shift. Tr. at 8-9. In 2005, claimant reported that he had difficulty sleeping, felt excessively drowsy during his waking hours, and had a motor vehicle accident when he ran off the road due to sleepiness. He was diagnosed with sleep apnea, hypothyroidism and a deviated septum. EXs 5, 6. Claimant underwent surgery for the deviated septum; he was prescribed thyroid medication and a C-PAP machine for his sleep apnea. Tr. at 10-11. Claimant testified that his daytime hypersomnolence did not improve. *Id*. In July 2007, claimant was referred by his treating physician, Dr. Hoffman, to Dr. Ripoll, who specializes in sleep disorders. *Id*. at 11-14. Dr. Ripoll diagnosed claimant with obstructive sleep apnea and shift work sleep disorder (SWSD). He opined that claimant's hypersomnolence during working hours was a danger to himself and others. CX 1 at 2. Due to the diagnoses of sleep apnea and SWSD, Dr. Hoffman restricted claimant from returning to shift work that involved operating a crane. CX 2. Claimant has not worked since July 2007. Claimant filed a claim for compensation and medical benefits under the Act, alleging that he is temporarily totally disabled by a work-related injury. Employer controverted the claim and requested Section 8(f) relief, 33 U.S.C. §908(f), from continuing compensation liability.

In his initial decision, the administrative law judge found that claimant established that he suffers only from sleep apnea, which claimant did not allege was caused by his working conditions, and that claimant does not have SWSD. *Id*. at 17-18. The administrative law judge concluded that claimant failed to present sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), and he denied the claim for compensation and medical benefits under the Act.

Claimant appealed the administrative law judge's finding that he is not entitled to the Section 20(a) presumption and the consequent denial of benefits. *Vane v. East Coast Cranes & Electrical (Vane I)*, BRB No. 10-0217 (Jul. 29, 2010) (unpub.) The Board

vacated the administrative law judge's finding that claimant is not entitled to the Section 20(a) presumption and remanded the case for the administrative law judge to address all relevant evidence concerning the existence of daytime hypersomnolence, including whether that condition could have been caused or aggravated by claimant's shift work, which the Board stated is the gravamen of claimant's assertion of a work-related sleep disorder.[1] *Vane I*, slip op. at 4.

On remand, the administrative law judge found claimant entitled to the Section 20(a) presumption, as claimant established the physical harm of hypersomnolence and that his shift work for employer could have caused this harm. Decision and Order on Remand at 14. The administrative law judge found that employer rebutted the Section 20(a) presumption based on the diagnoses of obstructive sleep apnea and hypothyroidism, which can cause hypersomnolence, and because claimant continued to experience sleep troubles after he quit shift work. The administrative law judge also found there is no evidence that shift work aggravated or contributed to claimant's sleep disorder, and that the SWSD diagnosis of Dr. Ripoll is not well-documented by the evidence of record. *Id*. at 15-16. In weighing the evidence as a whole, the administrative law judge concluded that the evidence does not establish that claimant's shift work caused or contributed to his hypersomnolence and that it is "more likely that sleep apnea and hypothyroidism caused and continue to cause his sleep problems." *Id*. at 16-17.

Claimant appealed the administrative law judge's finding that employer rebutted the Section 20(a) presumption and that he did not establish that his hypersomnolence is work-related. *Vane v. East Coast Cranes & Electrical (Vane II)*, BRB No. 11-0605 (April 19, 2012) (unpub.). The Board reversed the administrative law judge's rebuttal finding as there is no medical evidence that claimant's daytime hypersomnolence was not caused, contributed to or aggravated by his employment. *Vane II*, slip op. at 6. Accordingly, the Board concluded that claimant's hypersomnolence is work-related, as a matter of law. The Board vacated the denial of the claim and remanded the case for the administrative law judge to address the remaining issues raised by the parties. *Id*.

On remand, the administrative law judge found that claimant's SWSD became permanent two weeks after he stopped working on July 31, 2007, and that claimant's hypersomnolence, therefore, reached maximum medical improvement on August 14, 2007. The administrative law judge found that claimant established he cannot return to

[1]Additionally, the Board vacated the administrative law judge's rejection of Dr. Ripoll's diagnosis of SWSD, as the administrative law judge erred in relying on the 2005 diagnosis of sleep apnea and hypothyroidism by Drs. Debo and Dawoodjee to undermine Dr. Ripoll's 2007 opinion, and in finding that Dr. Ripoll's diagnosis of SWSD is inconsistent with the circumstances of claimant's sleep disorder testing. *Vane I*, slip op. at 4-5.

his usual employment and that employer failed to establish the availability of suitable alternate employment. The administrative law judge found that claimant has memory and cognitive problems, which were not considered by employer's vocational consultant, Ms. Bouchard, when she identified possible job opportunities. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability from August 1 to August 13, 2007, and continuing compensation for permanent total disability from August 14, 2007. Employer's request for Section 8(f) relief was denied. The administrative law judge found that employer failed to present evidence quantifying the level of impairment that would have ensued from the work injury alone. Employer's motion for reconsideration of the permanent total disability award was denied.

On appeal, employer challenges the total disability award and the denial of Section 8(f) relief. Claimant responds, urging affirmance in all respects. The Director responds in support of the denial of Section 8(f) relief.

Employer contends that claimant is not entitled to total disability compensation because he voluntarily retired. Employer argues that claimant's voluntary retirement is evident by his application for and receipt of a disability pension from the Seafarers Pension Plan as well as Social Security disability benefits, and he informed Ms. Bouchard in December 2007 that he did not want to work since it would interfere with his pension and disability benefits.

The determination of whether a claimant's retirement is voluntary or involuntary is based on whether a work-related occupational disease forced the claimant to leave the workforce. If his departure is due solely to considerations other than the work injury, his retirement is voluntary and claimant is limited to a permanent partial disability award based on his degree of permanent physical impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment.* 33 U.S.C. §§902(10), 908(c)(23); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986); 20 C.F.R. §702.601(c). If claimant's work-related condition played a role in causing his retirement, the retirement is "involuntary" and claimant is entitled to disability benefits for his loss in earning capacity. 33 U.S.C. §908(a), (b), (c), (e); *R.H. [Harvey] v. Baton Rouge Marine Contractors Inc.*, 43 BRBS 63 (2009), *aff'd Louisiana Ins. Guar. Ass'n v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

Claimant stopped working on August 1, 2007, as he was deemed temporarily not fit for duty by his treating physician, Dr. Hoffman, due to sleep apnea and SWSD. CX 2 at 1. On August 21, 2007, Dr. Hoffman opined that claimant is permanently unfit for duty due to these conditions, and he reiterated on June 10, 2008, that claimant is permanently unfit for duty due to daytime hypersomnolence. CXs 2 at 3; 7. Claimant testified that, on August 1, 2007, he presented employer with Dr. Ripoll's July 31, 2007 report, in which Dr. Ripoll stated that claimant "is hypersomnolent during the working

hours and he might be a security risk to self and other." CX 1 at 2; Tr. at 15-17. There is no evidence of record that claimant stopped working on August 1, 2007, for any reason other than his work-related daytime hypersomnolence. Accordingly, as a matter of law, claimant's "retirement" was due to the work injury. *See generally Harvey*, 43 BRBS 63. Claimant's seeking a pension and Social Security disability benefits after he stopped working, CX 5; EX 9, as well as claimant's telling Ms. Bouchard in December 2007 that he did not wish to return to work, EX 7 at 1, are irrelevant to the determination that claimant's daytime hypersomnolence forced him to leave the workforce on August 1, 2007. *See Harmon*, 31 BRBS 45.

Employer argues that claimant's entitlement to compensation terminated two weeks after he stopped working since the medical evidence establishes that the effects of SWSD ended by this time. Employer asserts that any subsequent disability, therefore, is not work-related. The administrative law judge addressed employer's contention on reconsideration, finding that employer's contention fails to recognize that claimant continues to experience daytime hypersomnolence and mental deficiencies as a result. Accordingly, the administrative law judge rejected employer's contention that claimant's work-related disability resolved two weeks after he stopped working. Decision and Order Denying Employer's Motion for Reconsideration on Second Remand (Order on Recon.) at 2.

In order to establish a prima facie case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). Medical opinions that a claimant's return to work is contraindicated due to the likely exacerbation of a work injury will support a prima facie case of total disability, even if the underlying disease is not permanently worsened by the working conditions.[2] *See Bath Iron Works Corp, v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). In *Rice v. Service Employees Int'l, Inc.*, 44 BRBS 63 (2010), for example, the claimant established a prima facie case of a totally disabling psychological condition where both psychologists of record opined that claimant should not return to work in a war zone because it would cause her work-related condition to become symptomatic. *Rice*, 44 BRBS at 65.

[2]In *Crum v. General Adjustment Bureau*, 12 BRBS 458 (1980), the Board held that a claimant was limited to temporary disability benefits because his cardiac symptoms subsided when he was removed from the workplace. *See also Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983). The United States Court of Appeals for the District of Columbia Circuit reversed this holding, stating that, although the claimant's condition improved with the cessation of his workplace exposure, his underlying angina remained indefinite and his disability was likely to be permanent. *Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984).

The administrative law judge found that claimant has been "universally instructed to refrain from engaging in shift work." Decision and Order on Remand at 16. Dr. Nard opined that SWSD is a "major contributor" to claimant's symptoms and prevents his returning to work for employer. EX 3 at 13. Dr. Sautter opined that claimant's cognitive deficits are consistent with a diagnosis of obstructive sleep apnea, and he stated that, "[I]t is possible that his evening shift work contributed to his excessive daytime sleepiness thus heightening the problem." CX 3 at 5. Dr. Hoffman completed disability forms stating that claimant is unfit for work due to excessive daytime somnolence; he also diagnosed sleep apnea and SWSD. CXs 3 at 1, 3; 7 at 1. The uncontradicted evidence of record establishes that claimant continues to have daytime hypersomnolence, Tr. at 22-24; EXs 4 at 2; 7; that SWSD is a contributing factor in claimant's stopping work on July 31, 2007, and that his daytime hypersomnolence would be aggravated by a return to shift work. Claimant need not keep going back to work if his work injury will become symptomatic each time he does. *See Rice*, 44 BRBS at 65. Claimant, therefore, presented substantial evidence that he is unable to return to work due to his work injury. *See White*, 584 F.2d 569, 8 BRBS 818. Thus, we reject employer's contention that claimant's work-related disability resolved two weeks after he stopped working for employer, and we affirm the administrative law judge's finding that claimant established his prima facie case of total disability as it is supported by substantial evidence.

Employer contends that the administrative law judge erred in finding that its labor market survey did not establish the availability of suitable alternate employment. Employer argues that no doctor assigned work restrictions based on claimant's psychological deficiencies and Dr. Mansheim opined that claimant is not psychologically impaired. In his decision, the administrative law judge found that claimant is limited from engaging in shift work and that he requires employment accommodating his cognitive and mental deficiencies. Decision and Order on Second Remand at 18. Specifically, the administrative law judge found, based on the Mental Residual Functional Capacity Assessment conducted by Roy McCoy, a therapist, CX 4; EX 3 at 15-16, that claimant has marked limitations in his ability to understand, remember, carry out detailed instructions or to complete a normal workday and workweek, and moderate limitations in his ability to remember locations and work-like procedures, to understand and remember, to carry out very short and simple instructions, to maintain attention and concentration for extended periods, to make simple work-related decisions, and to set realistic goals or plans independently of others. Decision and Order on Second Remand at 18. The administrative law judge found that, "[T]hese restrictions conform with the deficiencies noted by … physicians and are consistent with claimant's own credible reports of his symptoms." *Id.* The administrative law judge found that employer's vocational expert, Ms. Bouchard, testified that the only restriction she considered when compiling a labor market survey was claimant's restriction from performing shift work. *Id.*; *see* Tr. at 39. Accordingly, the administrative law judge concluded that employer did not establish the availability of suitable alternate employment because its labor market

survey failed to also account for claimant's psychological deficiencies. Decision and Order on Second Remand at 18-19. On reconsideration, the administrative law judge rejected employer's contention that Ms. Bouchard had considered all of claimant's restrictions since she testified that she considered only claimant's restriction against shift work. Order on Recon. at 2. The administrative law judge also rejected employer's contention that claimant's ability to cogently testify at the hearing dispels his contention of mental deficiencies. *Id*. at 2-3.

Once claimant established that he is incapable of resuming his usual employment duties with employer due to his work injury, he established a prima facie case of total disability; the burden thus shifted to employer to establish the availability of suitable alternate employment. *See Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT)(4th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Lentz v. The Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988). In this regard, the administrative law judge must compare claimant's work restrictions with the requirements of the positions identified by employer in order to determine whether employer has met its burden of proof. *See Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 32 BRBS 212(CRT) (5th Cir. 1998); *Hernandez v. National Steel & Shipbuilding Co.*, 32 BRBS 109 (1998). Positions identified in a labor market survey may be discredited if the consultant fails to take into consideration all relevant restrictions found by the administrative law judge. *See Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000); *Canty v. S.E.L Maduro*, 26 BRBS 147 (1992).

In identifying claimant's physical and psychological work restrictions, the administrative law judge credited claimant's reports of his symptoms, and the medical opinions of Drs. Ripoll, Sautter and Nard. Dr. Ripoll opined that claimant has neuropsychological problems that could affect his ability to work. EX 4 at 2. Dr. Sautter conducted a neuropsychological assessment at Dr. Nard's request on September 4, 2007. He conducted a battery of tests and concluded, based on the results, that claimant's overall cognitive functioning "is consistent with common occurrence of deficits in memory, attention, and visuospatial and constructional abilities" of someone with sleep apnea. CX 3. On November 20, 2007, Dr. Nard signed off on the Mental Residual Functional Capacity Assessment, which stated that claimant was moderately or markedly limited in the areas specifically found by the administrative law judge. CX 4 at 1-2; EX 3 at 15-16. Claimant testified that he has problems with memory and concentration. Tr. at 18, 22, 27. As this constitutes substantial evidence that claimant has cognitive impairments that affect his ability to work, we affirm the administrative law judge's rejection of employer's labor market survey, which failed to account for these impairments. *See Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 35 BRBS 7(CRT) (5th Cir. 2001); *see also Devor v. Dep't of the Army*, 41 BRBS 77, 80 (2007); *Monta v. Navy Exchange Service Command*, 39 BRBS 104, 108 (2005). Therefore, we affirm the award of permanent total disability compensation.

Lastly, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. In his decision, the administrative law judge found the Director conceded that claimant had pre-existing permanent disabilities of sleep apnea and hyperthyroidism and that these conditions were manifest to employer. The administrative law judge found, however, found that the contribution element is not met, and he denied Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an 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 claimant is permanently totally disabled, if it establishes that the claimant had a manifest, pre-existing permanent partial disability, and that claimant's permanent total disability is not due solely to the subsequent injury. 33 U.S.C. §908(f); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990).

The Director concedes that employer correctly asserts that the administrative law judge erred by applying the law for establishing the contribution element in case of permanent partial disability, which provides that an employer must show that the ultimate permanent partial disability is not due solely to the work injury *and* that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. Decision and Order on Second Remand at 20-21; 33 U.S.C. §908(f)(1); *see Director, OWCP v. Newport News Shipbuildi*ng & *Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). However, the Director responds that the administrative law judge's finding that employer did not establish the contribution element may be affirmed, as a matter of law, under the legal standard applicable in cases of permanent total disability.

Employer bears the burden of proving that claimant's pre-existing conditions contribute to his permanent total disability. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *see also Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). "Where a subsequent injury and its effects are alone sufficient to cause permanent total disability the mere presence of a pre-existing disability will not warrant contribution from the special fund." *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT), *citing John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93, 95 & n.2, 12 BRBS 229, 232 & n.2 (4th Cir. 1980).

Employer contends that the vocational and medical evidence establishes that, but for claimant's pre-existing sleep apnea and hypothyroidism, claimant would be able to secure suitable alternate employment notwithstanding the restriction against shift work

that is related to the work injury. Dr. Sautter diagnosed claimant with cognitive impairments secondary to pre-existing sleep apnea; however, he specifically opined that,

> cognitive functioning is consistent with the occurrence of deficits in memory, attention, and visuospatial and constructional abilities observed in individuals with a diagnosis of obstructive sleep apnea syndrome … daytime sleepiness … may interfere with attention, memory, and proper encoding of information … It is also possible that his evening shift work contributed to his excessive daytime sleepiness this heightening the problem.

CX 3 at 5. Dr. Nard testified that sleepiness can lead to memory disturbance, poor concentration, and irritability and he believed that claimant's SWSD "was a major contributor to his problems." EX 3 at 8, 13. However, he agreed with Dr. Sautter's diagnosis of cognitive impairment secondary to obstructive sleep apnea, and he opined that hypothyroidism also could be a contributing factor. *Id*. at 9, 11-12. In addressing employer's claim for Section 8(f) relief, the administrative law judge did not discuss this evidence. Therefore, we must vacate the administrative law judge's denial of Section 8(f) relief, and we remand this case for the administrative law judge to address whether employer established the contribution element under the standard applicable in permanent total disability cases. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 16 BRBS 107(CRT) (4th Cir. 1984).

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 on Second Remand and the Decision and Order Denying Employer's Motion for Reconsideration on Second Remand are 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