BRB No. 96-674

ANTHONY M. ZUVICH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES	)	DATE ISSUED:_____
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

James P. Aleccia, Long Beach, California, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (93-LHC-43, 94-LHC-2158, 94-LHC-2159, 94-LHC-2160) of Administrative Law Judge Ellin M. O'Shea 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 worked as a utility man for employer. On May 10, 1988, he was unloading a container of textiles when he injured his back and right hip. Tr. at 25-28. He remained out of work until September 2, 1988, and then he returned to his usual work. On October 20, 1988, claimant was unable to go to work because of pain, and he remained out of work until November 21, 1988, when he again returned to his usual employment. He continued working until July 12, 1989, when recurrent pain caused him to stop. On October 21, 1989, claimant returned to work in a light duty capacity. Dr. Rhodes, claimant's treating physician, reported on April 2, 1990, that claimant had progressive degenerative arthritis in his right hip which equated to a six percent impairment of the whole person. Jt. Ex. 21. The parties stipulated to claimant's entitlement to temporary total and permanent partial disability and medical benefits. 33 U.S.C. §§907, 908(c)(21). Thus, the sole issue before the administrative law judge was the applicability of Section 8(f) of the Act, 33 U.S.C. §908(f).

The administrative law judge determined, *inter alia*, that claimant's work subsequent to May 10, 1988, did not permanently aggravate or worsen his condition. Decision and Order at 12. She credited the opinion of Dr. Rhodes and concluded that claimant's present disability was not due solely to his May 10, 1988, injury but that his pre-existing degenerative hip condition, which was caused by a 1956 automobile collision, also contributed. However, because the hip condition was not manifest prior to May 10, 1988, she held that employer is not entitled to Section 8(f) relief. *Id.* at 13. Employer appeals the administrative law judge's denial of Section 8(f) relief, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

Employer contends the administrative law judge erred in denying it relief from continuing liability for compensation pursuant to Section 8(f). Specifically, employer argues that the administrative law judge erred in finding that claimant's work subsequent to May 10, 1988, did not aggravate his condition.[1]

Section 8(f) shifts the liability to pay compensation for permanent disability or death 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 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); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). An

[1]Employer does not contest the administrative law judge's finding that claimant's pre-existing hip condition was not manifest. It attempted to obtain the medical records related to that injury but was unable to do so, as they were either misplaced or destroyed. Emp. Brief at 11.

employment-related aggravation of a pre-existing disability will satisfy the contribution element. *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). However, a second injury has not occurred when a claimant's condition is the natural progression of his pre-existing disability. *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *Vlasic v. American President Lines*, 20 BRBS 188 (1987).

In this case, employer's argument is based on the premise that claimant's May 10, 1988 injury caused a pre-existing permanent partial disability and that his subsequent periods of work aggravated that disability and, in conjunction with the pre-existing condition, caused a greater disability. Contrary to employer's argument, the record contains substantial evidence to support the administrative law judge's finding that no second injury or aggravation occurred, thereby making employer ineligible for Section 8(f) relief. Dr. Rhodes, on whom the administrative law judge relied, reported on July 25, 1989, that claimant has a permanent partial disability due to his May 10, 1988, trauma which is superimposed on the existing residual condition in his right hip which was caused by the 1956 accident but remained asymptomatic until claimant was injured in 1988. Jt. Ex. 21. Further, he stated that claimant's symptoms increased with any activity, work or non-work, and in April 1990, he diagnosed progressive degenerative arthritis of the right hip. At this time, Dr. Rhodes established work restrictions and assessed an overall impairment rating of six percent of the whole person, stating that there is no basis to establish an apportionment theory in this case. *Id.* Claimant testified he suffered increased pain in his hip and back with repeated bending and lifting at work, and Dr. Rhodes reported that claimant suffered recurrent problems of variable frequency, severity and duration which were precipitated by work activities. Dr. Rhodes, however, did not describe claimant's post-May 1988 work in terms of aggravating claimant's hip condition, and he stated that non-work activities also increased claimant's symptoms and that the symptoms subsided with rest and/or over-the-counter medication. Jt. Exs. 17, 21; Tr. at 30-38.

We hold that the administrative law judge reasonably determined that claimant's post-May 1988 employment did not aggravate his condition, but that claimant's condition is the result of the natural progression of the May 1988 injury. Based on Dr. Rhodes' diagnosis of a degenerative process in claimant's hip, the administrative law judge rationally inferred that the symptomatology was the natural consequence of the May 1988 injury. Decision and Order at 12. Consequently, employer failed to establish the occurrence of a second injury following claimant's May 10, 1988 injury, and we reject its contention that the administrative law judge erred in denying Section 8(f) relief.[2] *See generally Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21

[2]Although some of Dr. London's opinions could be interpreted as support for employer's position, the administrative law judge rationally discredited Dr. London's opinion because his testimony and reports contain contradictory statements. Jt. Exs. 13, 22. As the Board may not interfere with an administrative law judge's credibility determinations unless they are inherently incredible or patently unreasonable, or reweigh the evidence, we reject employer's argument on this point. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir.

BRBS 150 (CRT) (11th Cir. 1988).

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

1981). Moreover, we reject employer's contention that claimant's testimony that his work aggravated his hip condition is sufficient to entitle it to relief under Section 8(f). The contribution element may be satisfied by reference to "medical or other evidence," including claimant's testimony in an appropriate case, *see Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT) (9th Cir. 1996), but the administrative law judge herein rationally determined that the issue of whether claimant's condition was aggravated by his continued employment is a medical question. Decision and Order at 12.