BRB Nos. 96-1242

JOHN OPSAHL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Order on Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fee of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Lawrence Baron and Daniel L. Keppler (Lawrence Baron, Attorney at Law, P.C.), Portland, Oregon, for claimant.

Richard M. Slagle (Williams, Kastner & Gibbs LLP), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer[1] appeals the Decision and Order - Awarding Benefits and Order on Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fee (95-

[1]Claimant filed a cross-appeal in this case. On claimant's motion, the Board dismissed claimant's cross-appeal by Order dated September 7, 1996.

LHC-1339) of Alfred Lindeman 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 was employed as a general longshoreman in Longview, Washington, and obtained his work off of the "main board," or roster maintained by the ILWU. On July 24, 1990, claimant suffered an injury to his left leg after slipping on some bark while lashing a log ship for employer Stevedoring Services of America. The accident fractured claimant's left tibia and fibula, and necessitated extensive treatment.[2] Claimant subsequently developed impairments to his right shoulder, hip and lower back, which were attributed to this initial leg injury by Dr. Gregory Irvine. *See* CX 81:217; EX 14:286; Tr. at 133-34. These conditions were found to have reached maximum medical improvement on December 14, 1993. Claimant suffered a subsequent injury on May 13, 1995, when his left leg "gave out" and he landed on his left shoulder.

[2]Dr. David Black performed two surgical procedures, a fasciotomy and the insertion of an intramedullary nail at the fracture site. Claimant next saw Dr. Michael Marble, who performed a bone graft, after which claimant developed a deep infection. This condition necessitated intravenous antibiotic therapy. Claimant was then seen by a plastic surgeon, and again by Dr. Marble, who removed the intermedullary nail. *See* CXS 6, 19, 20, 22, 37. Claimant has also been treated continuously by Dr. Irvine.

Claimant filed for benefits under the Act, seeking compensation for injuries to his shoulders, lower back and hip, as well as depression, which he alleged were due to the 1990 work-related injury to his leg.[3] After a formal hearing, the administrative law judge awarded claimant benefits for a loss in post-injury wage-earning capacity pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), for an unscheduled permanent partial disability for the period between December 14, 1993, the date on which claimant's left leg, lower back, right shoulder and hip conditions reached maximum medical improvement, until May 13, 1995, the date of claimant's consequential left shoulder injury, and scheduled benefits in the amount of 25.92 weeks for a 9 percent loss of use of the left leg, 33 U.S.C. §908(c)(2), commencing December 14, 1993. The administrative law judge then awarded claimant temporary total disability benefits from May 13, 1995 and continuing as a result of claimant's left shoulder injury, directed employer to pay a Section 14(e) penalty and applicable interest, and denied employer's request for relief under Section 8(f)(1), 33 U.S.C. §908(f)(1). Decision and Order at 16-17.

On employer's motion for reconsideration, the administrative law judge agreed that the amount of claimant's benefits for the duration of the concurrent scheduled and unscheduled awards[4] exceeded the maximum compensation amount permitted by Section 6(b)(1), 33 U.S.C. §906(b)(1), as well as exceeding his pre-injury weekly earnings, and thus modified the Decision and Order to reflect that claimant would receive scheduled benefits in the amount of $660.62 per week for 25.92 weeks from December 14, 1993, and permanent partial disability benefits under Section 8(c)(21) at the rate of $652.16 per week thereafter until May 13, 1995. Order on Motion for Reconsideration and Supplemental Decision and Order Awarding Attorney's Fee . In so ruling, the administrative law judge determined that for the period during which the awards were concurrent, the amount of compensation should not exceed the statutory limit imposed by Section 6(b)(1), 33 U.S.C.§906(b)(1). He further concluded that since the unscheduled and scheduled awards should be compensated separately and because the "schedule [is] a mere administrative convenience," it would be "inconsistent with the purpose of the scheduled sections to attempt to quantify how much that condition actually contributed after 25.92 weeks toward [claimant's] loss in earning capacity." Order at 3. He thus declined to "factor out" any loss in wage-earning capacity attributable solely to the leg injury from the Section 8(c)(21) award. The administrative law judge also awarded attorney's fees of $27,474.86. Order at 5.

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[3]Employer voluntarily paid claimant compensation for temporary total disability from July 25, 1990 until December 17,1993, then paid permanent partial disability benefits from December 18, 1993 through October 20, 1994. *See* Decision and Order at 5.

[4]The administrative law judge originally awarded claimant $652.16 per week from December 14, 1993 for his loss in wage-earning capacity, 33 U.S.C. §908(c)(21), and $660.62 per week for 25.92 weeks from that same date under Section 8(c)(2), (19). Decision and Order at 16.

Employer appeals, asserting that the administrative law judge erred in finding that claimant's injuries to his shoulders, lower back and hip were derived from the work-related leg injury, because these findings, and the medical evidence[5] in support thereof, are based on claimant's "false testimony." Employer further contends that the administrative law judge erred in not factoring out the economic loss due to the scheduled injury from the post-injury loss in wage earning capacity due to claimant's unscheduled injuries. Employer also challenges the administrative law judge's findings with respect to claimant's post-injury wage-earning-capacity, and contests the administrative law judge's denial of Section 8(f) relief. Claimant responds to employer's appeal, and urges that the Board affirm. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

[5]Dr. Irvine ascribed this injury to claimant's "dysfunctional lower extremity," which in turn was related to claimant's "gait disturbance" caused by the work-related injury. CX-109: 295; Tr. 135-36, 166; *see* CX-81: 217-20; Tr. 133-34.

Initially, we reject employer's argument that the administrative law judge erred in finding that claimant's shoulder, back and hip injuries were derived from claimant's work-related leg injury.[6] The administrative law judge found, based on application of the Section 20(a) presumption, and, in the alternative, on the record as a whole, that claimant's injuries to his right shoulder, lower back and hip, as well as his depression, occurred as a result of his work-related left leg injury, in that claimant developed pain in his lower back and hip as a result of an "altered gait, limping, use of crutches and a cane," and reasonably relied on Dr. Irvine's opinion that these injuries were a direct result of the original injury. Decision and Order at 5-10; *see* Tr. at 133. Indeed, Dr. Irvine ascribed these impairments to claimant's original leg injury even though he recognized that claimant's perceptions may not have been accurate. *See* Tr. at 61. The administrative law judge reviewed the record as a whole, including the evidence cited by employer as "false" or "overstated," and his causation findings are supported by substantial evidence and within his discretion as the trier-of-fact. *See Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120, 126 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994). Accordingly, we affirm the administrative law judge's determination that claimant's shoulder, lower back and hip injuries, as well as his depression, are due to his work-related injury to the left leg.

[6]Employer asserts that the administrative law judge erred in relying on "false testimony" to find a work-related nexus of these consequential injuries, and urges that the record should be reopened under Section 22 to examine this evidence. Er. Br. at 6-7. Employer has not filed a motion seeking modification.

We next address employer's challenge to the administrative law judge's determination of claimant's post-injury wage-earning capacity.[7] Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h), 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 1582, 17 BRBS 149, 153 (CRT) (9th Cir. 1985); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39, 42 (1996). Determinations of wage-earning capacity under Section 8(h) require a comprehensive review of all relevant factors, such as claimant's physical condition, age, education, work experience, claimant's earning power on the open market and any other reasonable variable that would form a rational basis for the decision. *See Mangaliman*, 30 BRBS at 43; *see also Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

Employer contends that the administrative law judge erred in not adequately addressing a number of longshore jobs that would be available to claimant as a disabled senior longshoreman. According to employer, the administrative law judge should have addressed whether claimant was capable of performing the jobs of "lift truck operator, crane chaser (safety man), gang boss, sticker man and clerk" which were alleged to be within claimant's restrictions.[8] Er. Br. at 14-15, *citing* Tr. at 101-06.

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[7]Employer initially contends that the administrative law judge erred in finding that claimant is unable to return to his usual longshore employment, as claimant can perform two of his former jobs, *i.e.,* sling man/frontman and button pusher. Er. Br. at 13. This argument is without merit. A claimant can establish a *prima facie* case of total disability by demonstrating that he is unable to return to his regular or usual work. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 333 (1989); *see generally Bumble Bee Seafoods v. Director,* OWCP, 629 F.2d 1327, 1329 (9th Cir. 1980); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986). Claimant has met this burden where, as here, he cannot return to the full panoply of longshore work performed at the time of injury. *Manigault*, 22 BRBS at 333. Employer also asserts that the administrative law judge erred in not requiring claimant to demonstrate reasonable diligence in securing employment. This argument is also rejected, because claimant does not bear the complementary burden of demonstrating diligence in obtaining alternate employment until employer has established the availability of suitable alternate employment. *See generally Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691, 18 BRBS 79, 82-83 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Dove v. Southwest Marine of San Francisco,* 18 BRBS 139, 141 (1986).

[8]Dr. Irvine restricted claimant to a 25 pound repetitive lifting and a 50 pound absolute

restriction, no ladder climbing, rest breaks after four hours of standing or ambulation, and a 15 minute break in an eight-hour shift. Tr. 142-43; EX-14:278. A Functional Capacities Evaluation (FCE) which was administered in September 1994, reported that claimant "demonstrated physical capabilities in the sedentary range of work as defined by the U.S. Department of Labor ... [and that claimant] should avoid standing or walking for more than 5 minutes continuously and for more than 1 hour out of an 8-hour work shift ... avoid repetitive or prolonged use of the right shoulder." *See* CX 86:231-32. The administrative law judge rejected Dr. Farris' contrary assessment in favor of those by Dr. Irvine, the FCE and Dr. Marble. Decision and Order at 12.

We agree with employer that the administrative law judge's findings with respect to claimant's wage-earning capacity for the period of his permanent partial disability cannot be affirmed.[9] The administrative law judge identified two jobs, those of slingman/frontman and button pusher, as the sole jobs available to claimant given the work restrictions set by Dr. Irvine and the results of a Functional Capabilities Evaluation (FCE) and also determined that these positions are available to claimant for just eight hours per week, and concluded that claimant has a residual post-injury wage-earning capacity of $240 per week based on the eight hours per week in the only two positions found to be available to claimant. Decision and Order at 13.

There is evidence of other longshore positions not specifically considered by the administrative law judge. The administrative law judge did not make specific findings as to the particular positions which employer argues are within claimant's restrictions and did not adequately explain why positions such as the fork-lift operator testified to by Mr. Thomas are outside the restrictions identified by Dr. Irvine and the FCE. *See* Tr. at 98-110, 150-51, 173-74; *see also* CX-86. Because the Board cannot render more specific findings to supplement the administrative law judge's Decision and Order, *see Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701, 14 BRBS 538, 543 (2d Cir. 1982), we vacate the administrative law judge's findings with respect to claimant's wage-earning capacity, and remand this case to the administrative law judge to evaluate anew the question of claimant's residual wage-earning capacity, addressing all relevant factors in making these findings. *See Mangaliman,* 30 BRBS at 39.

Employer next asserts that the administrative law judge erred by not factoring out the effects of claimant's scheduled injury to his left leg before determining the loss in claimant's wage-earning-capacity, arguing this act is required from the Board's decisions in *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1989), and *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). In *Frye*, the Board held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant may receive a Section 8(c)(21) award for a loss in claimant's wage-earning capacity. In *Bass*, the Board held that where harm to a part of the body not covered under the schedule results from the natural progression of an injury to a scheduled member, a claimant is not limited to one award for the combined effect of his conditions, but may receive a separate award under Section 8(c)(21) for the consequential injury in addition to an award under the schedule for the initial injury. *Bass,* 28 BRBS at 17-18. Where the scheduled injury is compensated separately, any loss in post-injury wage-earning capacity that is found due to the scheduled injury must be factored out of the

[9]We affirm the administrative law judge's finding of temporary total disability as of May 13, 1995, the date of claimant's consequential shoulder injury, as it is unchallenged on appeal.

Section 8(c)(21) award. *Frye*, 21 BRBS at 198.

We agree with employer that the administrative law judge erred by not factoring out the effects of claimant's permanent partial disability to the left leg in rendering a finding about the extent of claimant's wage-earning capacity following December 14, 1993. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 235 (1985). The administrative law judge's finding that claimant's unscheduled injuries have "an independent impact on his subsequent wage-earning capacity," and his determination that the scheduled injury provides a "presumptive basis for compensating the economic effects of [claimant's] injury," Order at 3, provide further support for the need for the administrative law judge to factor out from the post-injury loss in wage-earning capacity any portion which must be attributed to the residual effects of claimant's leg injury. Accordingly, we vacate the administrative law judge's disability awards under Section 8(c)(21), and remand for a discussion of the evidence pertaining to the effect of claimant's leg impairment on his post-injury wage-earning capacity. *Bass*, 28 BRBS at 11; *Turney*, 17 BRBS at 232. On remand, the administrative law judge should discuss the medical evidence regarding claimant's physical restrictions and determine the extent, if any, to which claimant's limited wage-earning capacity is due to his leg impairment.

Employer last asserts that the administrative law judge erred in denying it relief from continued compensation liability for claimant's permanent partial disability pursuant to Section 8(f), 33 U.S.C. §908(f). Section 8(f) shifts liability to pay compensation for permanent partial disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury. *Sproull v. Director, OWCP,* 86 F.3d 895, 899-900, 30 BRBS 49, 51 (CRT)(9th Cir. 1996). Where an employee is permanently partially disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 750, 23 BRBS 34, 35 (CRT)(5th Cir. 1990); *See Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 126-27 (1996); *Readel v. Foss Launch and Tug*, 20 BRBS 229, 232 (1988). Section 8(f) does not apply if the employee's disability is due solely to the work injury alone. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984).

The administrative law judge found that although claimant's 1989 injury was a manifest pre-existing permanent partial disability, employer's evidence did not satisfy the contribution prerequisite because he found that claimant's 1989 right shoulder injury did not render claimant's permanent partial disability materially and substantially greater than it would have been based solely on the disability resulting from the 1990 injury and its sequelae alone. Decision and Order at 15-16. The administrative law judge acknowledged Dr. Irvine's recognition of a causal relationship between claimant's prior rotator cuff injury in 1989 and his current right shoulder problems, *id*., but determined, again citing Dr. Irvine,

that the current right shoulder problem did not result in any permanent disability and that employer failed to establish the contribution predicate for the application of Section 8(f). *Id*.

We reject employer's assertion that the administrative law judge's analysis of Dr. Irvine's opinion in ruling that the 1989 right shoulder impairment did not render claimant's permanent partial disability materially and substantially greater, requires us to overturn the denial of Section 8(f) relief in this instance. *See* EX 14:289. Dr. Irvine's statement, that claimant "does, however ... have a diminished working capacity as pertains to the shoulder ... ," EX 14:289, does not establish that claimant's permanent partial disability has been rendered materially and substantially greater by the pre-existing disability to his right shoulder. *See Abbott v. Louisiana Ins. Guaranty Ass'n*, 27 BRBS 192, 206-207 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); *Readel*, 20 BRBS at 232-233. The administrative law judge thus properly denied Section 8(f) relief in this case.

Accordingly, the administrative law judge's findings with respect to claimant's post-injury wage-earning capacity are vacated, and the case is remanded for reconsideration of this issue consistent with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge