BRB Nos. 92-1505
and 92-1505A

JOHN E. PASKOSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION AND ORDER

Appeals of the Decision and Order of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Roger L. Smith, Glen Burnie, Maryland, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, 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, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the Decision and Order (88-LHC-945) of Administrative Law Judge Lawrence E. Gray 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 worked for employer as a front-end loader driver, when, on July 27, 1987, he was injured when a tire lost air causing the loader to turn over on its side. Claimant's head hit the left side window of the cab and struck the pavement as he fell several feet from the left side of the loader. Claimant did not seek medical attention following the accident, but several witnesses testified that he demonstrated decreased physical abilities for several weeks after the accident. On September 4, 1987, claimant suffered the first of a series of strokes. Contending that the strokes are causally related to the July 27, 1987 injury, claimant sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant exhibited symptoms of decreased physical ability and physical debilitation immediately following the July 27, 1987 injury, which culminated in a stroke on September 4, 1987. The administrative law judge concluded that Dr. Schilder's testimony was sufficient to invoke the Section 20(a), 33 U.S.C. §920(a), presumption of causation and that the presumption is not rebutted. In addition, the administrative law judge found that claimant is permanently and totally disabled, and thus benefits were awarded. Finally, the administrative law judge found that employer is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing hearing loss which the administrative law judge found was manifest to employer and substantially increased claimant's disability.

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 20(a) presumption, and specifically, in requiring the rebuttal evidence under Section 20(a) to identify the non-occupational cause of the stroke. Therefore, employer urges the Board to vacate the award of benefits and remand the case to the administrative law judge to weigh the evidence as a whole. In addition, employer contends that the administrative law judge erred in not considering employer's argument that claimant failed to comply with the requirements of Section 7 of the Act, 33 U.S.C. §907. Specifically, employer contends that claimant did not seek authorization for his medical care and that the physicians did not file an attending physician's report within the 10 day period required by Section 7. Claimant responds, urging affirmance of the administrative law judge's award of benefits.

On cross-appeal, the Director contends that the administrative law judge erred in granting employer relief under Section 8(f). Specifically, the Director contends that the administrative law judge erred in finding that claimant suffered from a pre-existing permanent partial disability and that claimant's hearing loss contributed to his permanent total disability. Employer responds, urging affirmance of the administrative law judge's award of Section 8(f) relief.

Initially, employer contends on appeal that the administrative law judge erred in finding that the evidence of record is insufficient to rebut the Section 20(a), 33 U.S.C. §920(a), presumption of causation. Once invoked, Section 20(a) places the burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by claimant's employment. When employer produces such substantial evidence, the presumption drops out of the

case, and the administrative law judge must weigh all of the evidence relevant to the causation issue. *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

In his Decision and Order, the administrative law judge found that the Section 20(a) presumption was not rebutted in the face of the overwhelming evidence that the etiology of claimant's stroke is unknown. Decision and Order at 12. While an opinion that is equivocal as to etiology is insufficient to support rebuttal, *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988), a medical opinion based on existing scientific evidence that a claimant's injury is not causally related to the harmful working conditions, even if the physician admits the actual etiology may be unknown, is sufficient to establish rebuttal of the presumption. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990)(Lawrence, J., dissenting); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986).

In the present case, while they state that the etiology of claimant's strokes is unknown, Drs. Khurana, Lancelotta and Stern unequivocally state that, based on current medical opinion regarding strokes and the specific facts involved here, there is no relationship between the head injury sustained by claimant in July 1987, and his subsequent strokes. *See* Emp. Exs. 58, 59, 60. As the opinions of Drs. Khurana, Lancelotta and Stern are specific and comprehensive, we hold that they sever the presumed connection between claimant's injury and his employment. *See Devine*, 23 BRBS at 281. Accordingly, we reverse the administrative law judge's determination that employer failed to rebut the Section 20(a) presumption, and we remand the case for the administrative law judge to determine whether claimant's employment injury caused his stroke based on the evidence as a whole. *Id.*

Employer also contends on appeal that the administrative law judge erred in failing to address its arguments raised prior to the first hearing, and thereafter, that claimant did not properly request authorization for his medical care and that his physicians did not file the appropriate forms within the 10 day period required by Section 7, 33 U.S.C. §907. Employer's liability for payment of claimant's medical expenses is determined pursuant to Section 7(d). 33 U.S.C. §907(d). Under Section 7(d), claimant must request employer's prior authorization for the medical services performed by any physician, including claimant's initial choice, in order for the expenses to be compensable. *Shahady v. Atlas Tile & Marble Co.*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983).

In the present case, employer raised the issue of authorization for medical care at least at the initial hearing, H. Tr. at 22, and included all previous issues in the second pre-hearing statement dated September 13, 1989. In addition, employer again raised the issue in its post-hearing brief to the administrative law judge. Inasmuch as the administrative law judge did not address this issue in his Decision and Order, we vacate the administrative law judge award of medical benefits and instruct the administrative law judge on remand to consider the evidence and render findings of fact

and conclusions of law on this issue.[1] *See Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

On cross-appeal, the Director contends that the administrative law judge erred in granting employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge found that claimant had a pre-existing permanent partial disability, hearing loss in his right ear, that was manifest to employer and contributed to his over all permanent total disability. Decision and Order at 11. Section 8(f) relief is available if employer establishes that claimant had a manifest pre-existing permanent partial disability which, in combination with the subsequent work injury, contributes to a greater degree of permanent disability. *See* 33 U.S.C. §908(f)(1); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41 (1986). Employer has the burden of proving all three of the required elements for Section 8(f) relief. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988).

Initially, the Director contests the administrative law judge's finding that claimant suffered from a pre-existing permanent partial disability. The record contains an audiometric evaluation that was performed when claimant was discharged from the Army that reveals a 9 percent hearing loss in claimant's right ear, as well as evaluations performed by Dr. Burgess and Mr. Seipp, a certified audiologist, that rendered results consistent with the Army results. Emp. Exs. 56, 57, 61. The record also contains the opinion of Dr. Ominsky who reports that the audiometric evaluation performed on August 26, 1989, reveals that claimant does not have a significant hearing loss in his right ear and did not need the hearing aid he was using. Dir. Ex. 3.

While the administrative law judge mentioned the contrary evidence of record and concluded that claimant did have a hearing loss, he did not explain how he resolved the conflict in the evidence. Therefore, we vacate the administrative law judge's finding that employer established the existence of a pre-existing permanent partial disability under Section 8(f). On remand, the

[1]Under Section 7(d)(2), an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. Further, in the interest of justice, the Secretary may excuse the failure to comply with the provisions of this section. 33 U.S.C. §907(d)(2)(1988); *see generally Roger's Terminal Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir. 1986), *cert denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT)(9th Cir. 1991). Moreover, under Section 7(d)(2) and its implementing regulation, Section 702.422(b), 20 C.F.R. §702.422(b)(1994), the Secretary's authority to determine whether "the interest of justice" warrants excusing the failure to comply with the provisions of Section 7(d)(2) is delegated solely to the Director and his delegates, the district directors. *Toyer v. Bethlehem Steel Corp.*, 28 BRBS 347 (1994)(McGranery, J., dissenting). Therefore, the district director and not the administrative law judge has the authority to determine whether non-compliance with Section 7(d)(2) should be excused.

administrative law judge must adequately detail the rationale behind his decision resolving this conflict; he must analyze and discuss the medical evidence of record, and explicitly set forth his reasons as to why he has accepted or rejected such evidence. See *Cotton*, 23 BRBS at 383; *Hoodye*, 23 BRBS at 344.

The Director also contends that the administrative law judge erred in finding that claimant's hearing impairment contributed to his permanent total disability. In order to establish the contribution element of Section 8(f), employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's permanent total disability. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992). *See also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Dominey v. Arco Oil Gas Co.*, ___ BRBS ___ (Aug. 20, 1996); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

In the present case, the administrative law judge reviewed the reports of the examining physicians, audiologists, and the vocational rehabilitation analysis provided by the Easter Seal Foundation and concluded that the tinnitus in claimant's left ear as well as the weakness in claimant's left side combine with the pre-existing hearing loss in claimant's right ear to rule out potential employment in positions such as telephone solicitor, thus rendering claimant totally disabled. After consideration of the administrative law judge's findings on this issue, the arguments raised on appeal, and the evidence of record, we hold that the administrative law judge's finding that claimant's hearing loss, if established on remand, contributes to his permanent total disability is supported by substantial evidence and contains no reversible error. *See generally Quan v. Marine Power & Equipment Co.*, ___ BRBS ___, BRB No. 92-0861 (Aug. 15, 1996).

Accordingly, the Decision and Order of the administrative law judge awarding benefits and granting Section 8(f) relief is vacated, and the case is remanded to the administrative law judge for further consideration.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge