BRB No. 97-1317

HENRY A. FARRELL	)	
	)	
Claimant	)	DATE ISSUED: June 19, 1998
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Entitlement of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

R. John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

Samuel J. Oshinsky, Counsel for Longshore (Martin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Entitlement (96-LHC-1300) of Administrative Law Judge Daniel A. Sarno, Jr., 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 if they 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, working as a first-class burner for employer, injured his low back on March 11, 1990. The parties ultimately agreed that claimant is entitled to permanent partial disability benefits as a result of his work-related back injury. Prior to the March 11, 1990, injury, claimant sustained two back injuries, one in 1979 and one in 1986, and also had some knee injuries. As a result, employer filed an application for Section 8(f), 33 U.S.C. §908(f), relief with the district director on the grounds that claimant had pre-existing permanent partial disabilities with regard to his knee and back, and suffered from chronic lymphedema.

After referral of the case to the Office of Administrative Law Judges, employer continued to assert its entitlement to Section 8(f) relief based on claimant's alleged pre-existing back disability and added an additional ground, an alleged pre-existing mental impairment, evidenced by claimant's low Intelligence Quotient (IQ) test scores. In response, the Director, Office of Workers' Compensation Programs (the Director), asserted the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), with regard to employer's assertion of a pre-existing mental impairment. In addition, the Director challenged employer's application on the merits.

In his decision, the administrative law judge initially determined that the absolute defense of Section 8(f)(3) is inapplicable as employer's initial application stated grounds for relief supported by medical evidence and thus was sufficiently documented pursuant to 20 C.F.R. §702.321. On the merits of the application, the administrative law judge determined that the evidence is insufficient to establish Section 8(f) relief with regard to both the mental impairment and back impairment. Specifically, the administrative law judge found that while claimant's mental impairment constituted an existing manifest permanent partial disability, it did not contribute to his current disability. As for the back condition, the administrative law judge determined that the evidence failed to demonstrate that claimant suffered from a prior manifest permanent partial disability of the back and that even assuming the existence of such a disability, the evidence failed to show that it contributed to claimant's overall disability. Accordingly, Section 8(f) relief was denied.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director responds, urging affirmance.

To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) 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. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134 (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

In order to satisfy the contribution element, an employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone.

> A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Harcum I, 8 F.3d at 185, 27 BRBS at 131 (CRT). In *Harcum II*, the Fourth Circuit reiterated that employer is not limited to medical evidence, but may also submit vocational evidence in an effort to meet its burden to establish the contribution element. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT).

PRE-EXISTING BACK INJURY

Employer asserts that the testimony of Dr. Williamson that claimant would not have needed back surgery but for his pre-existing back problems demonstrates that claimant's present disability is materially and substantially greater than that which would have resulted from the March 11, 1990, injury alone. Employer also maintains that, contrary to the administrative law judge's determination, it has offered

sufficient quantification to establish the contribution element under the standard set out in *Harcum*.

In the instant case, the administrative law judge determined that employer offered no quantification with regard to the pre-existing back disability and thus has offered no evidence by which to measure an increased impairment to claimant's back. Under *Harcum I*, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. *Harcum I,* 8 F.3d at 185, 27 BRBS at 131 (CRT). Employer, in the case at hand, has not established the level of disability in the absence of the pre-existing back injury, but rather only submits, through the testimony of Dr. Williamson, that the pre-existing back injury combined with the subsequent injury to increase claimant's overall impairment. Thus, the administrative law judge correctly determined that he did not have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. The administrative law judge's determination that employer has not, with regard to the pre-existing back injury, met the contribution element and thus, is not entitled to Section 8(f) relief based on that injury is affirmed as supported by substantial evidence.[1] *Carmines*, 138 F.3d at 134; *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT).

PRE-EXISTING MENTAL CONDITION

[1]In light of our finding, we decline to consider employer's contention that the administrative law judge erred in finding that claimant's spinal stenosis was not a manifest serious and lasting, pre-existing disability for purposes of Section 8(f) relief.

Employer argues that the administrative law judge erroneously rejected its vocational evidence regarding the effects of the mental impairment on the ground that it did not satisfy the contribution element set forth in *Harcum*.[2] Employer submits that if a mental impairment can be considered a pre-existing permanent partial disability, it can only be quantified in terms of vocational loss, and thus, the testimony of Ms. Bryant regarding the loss of available occupations is sufficient to satisfy the contribution element of Section 8(f).[3] With regard to the pre-existing mental impairment, the administrative law judge found that while the vocational evidence offered by Ms. Bryant that claimant's mental impairment caused there to be fewer available jobs, by 17 percentage points, in generally transferable occupations and by 28 percentage points with regard to unskilled occupations, gives the appearance of quantification, it does not satisfy the *Harcum* standard. Specifically, the administrative law judge noted that the percentages given by Ms. Bryant do not reflect the extent of disability or impairment sustained by claimant.

In *Harcum II*, which was decided after the administrative law judge issued his

[2]We further affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant's mental impairment constitutes a pre-existing, manifest disability, and thus, that employer has satisfied those requisite elements for establishing Section 8(f) relief.

[3]In his response brief, the Director raises, as an alternative means for affirming the administrative law judge's denial of Section 8(f) relief with regard to claimant's mental impairment, the argument that, contrary to the administrative law judge's determination, the absolute defense of Section 8(f)(3) is applicable as claimant's mental impairment as a basis for Section 8(f) relief was not raised in a timely fashion. *See* discussion, *infra*.

decision in this case, the Fourth Circuit held that the employer's vocational evidence was sufficient to provide the administrative law judge with a basis to award Section 8(f) relief, and thus satisfied the quantification requirement of the level of impairment previously set out in *Harcum I*. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). The evidence in that case consisted of testimony by a vocational expert, Ms. Edwards, that without his pre-existing cervical spine injury, the claimant would have been able to earn $6.00 per hour, but because of his pre-existing condition the claimant is only capable of earning $3.80 per hour. In addition, Ms. Edwards testified that because of claimant's pre-existing injury, he is unable to perform certain types of sedentary work.

In the instant case, employer's vocational expert, Ms. Bryant, performed a transferable skills analysis to discern what types of jobs or percentage of jobs were available to claimant first, with regard to his March 11, 1990, injury, and then upon consideration of claimant's additional mental impairment. Ms. Bryant testified that within the category of "generally transferable occupations,"[4] defined as those occupations that generally relate to work experience and would require some learning of essential job duties, claimant would qualify for 35 occupations pre-injury and only 7 post-injury. Employer's Exhibit (EX) 17 at 9-10. Thus, Ms. Bryant stated that claimant sustained an 80 percent occupational loss in this category post-injury. *Id.* In the category of "unskilled occupations," identified as jobs that can be learned within 30 days of demonstration on-the-job, Ms. Bryant noted that there were 3,125 occupations which claimant could qualify for pre-injury, and that post-injury about 48-49 percent of those jobs were no longer suitable based solely on his physical limitations. *Id.* at 10. Ms. Bryant then testified that claimant's pre-existing mental impairment increased the number of jobs no longer available to claimant for "generally transferable occupations" from 80 percent to 97 percent and for "unskilled occupations" from 48-49 percent to 76 percent.[5] *Id.* at 12-13. This evidence, if credited, shows the "the level of impairment that would ensue from the work-related injury alone," and thereby provides the administrative law judge with a

[4]In developing her study, Ms. Bryant used the *Dictionary of Occupational Titles*.

[5]Ms. Bryant also testified that with regard to the category of "directly transferable occupations," defined as those jobs which would require little or no learning of essential job duties, *i.e.*, jobs directly related to what he has actually done in his work history, there were eleven jobs pre-injury and zero jobs post-injury, thereby giving claimant a 100 percent loss in available jobs in that category post-injury. EX 17 at 9-13. This did not change upon factoring in claimant's mental condition.

basis to determine if claimant's ultimate permanent partial disability is materially and substantially greater than his disability caused by the work-related injury alone. *See Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). As the administrative law judge has not considered this relevant evidence, we must vacate his determination and remand for further consideration of employer's vocational evidence as it relates to claimant's pre-existing mental impairment to discern whether the ultimate permanent partial disability is indeed materially and substantially greater than that due solely to the work-related injury. *Id.*

Lastly, we address the Director's alternative grounds for affirming the administrative law judge's denial of Section 8(f). As previously noted, the Director argues in his response brief that the absolute defense of Section 8(f)(3) is applicable as claimant's mental impairment was not raised as a basis for Section 8(f) relief in a timely fashion before the district director.

Employer filed its Section 8(f) claim with the district director based on prior injuries to claimant's knee, back, and chronic lymphedema condition, but did not raise a claim with respect to claimant's mental impairment. Therefore, when employer did raise its Section 8(f) claim based upon claimant's mental impairment before the administrative law judge, the administrative law judge was obligated to credit the Director's absolute defense unless he found that employer could not have reasonably anticipated the liability of the Special Fund on the late-asserted ground at the time employer filed its Section 8(f) claim before the district director.[6] *See Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.* [*Elliot*], 134 F.3d 1241, 31 BRBS 215 (CRT) (4th Cir. 1998).

In the instant case the administrative law judge did not make this finding. Rather, he determined that an employer's timely filing of a Section 8(f) claim on one ground permitted an employer at a later time to argue additional grounds and assert

[6]Section 8(f)(3) provides that a request for relief and a statement of the grounds therefor shall be presented to the district director prior to consideration of the claim by the district director, and that failure to present such a request shall be an absolute defense to the Special Fund's liability unless the employer could not have reasonably anticipated the liability of the Fund prior to issuance of a compensation order. 33 U.S.C. §908(f)(3)(1988); *see also* 20 C.F.R. §702.321(b).

an entirely different basis for Section 8(f) relief. *Id.* However, as the Section 8(f)(3) bar is an affirmative defense, it is the Director's burden to come forward with the necessary evidence to support the claim that the employer failed to comply with Section 8(f)(3), *i.e.*, that employer could have reasonably anticipated the liability of the Special Fund as to claimant's mental condition in this case while the case was before the district director. *See Fullerton v. General Dynamics Corp.*, 26 BRBS 133 (1992); *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1993). In order to address this issue, we would be required to remand the case for findings of fact regarding whether employer could have reasonably anticipated the liability of the Special Fund on the basis of claimant's mental impairment while the case was before the district director. Inasmuch as the Director, in forwarding his alternate rationale for supporting the administrative law judge's ultimate denial of Section 8(f) relief on the grounds of the prior mental condition, is contesting the administrative law judge's adverse finding regarding the absolute defense at Section 8(f)(3), and since consideration of the Director's contention would require remand, and thus, will not maintain the *status quo* of the administrative law judge's decision, his contention should have been raised in a timely filed cross-appeal. 20 C.F.R. §802.205(b)(2); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n. 4; *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984); *King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87, n. 3 at 1-91 (1983). Consequently, we cannot consider the merits of the Director's contention as it is raised in a response brief. *See generally Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989).

Accordingly, the administrative law judge's denial of Section 8(f) relief based upon claimant's alleged pre-existing back injury is affirmed, his denial of Section 8(f) relief based upon claimant's mental impairment is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Denying Section 8(f) Entitlement is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge