BRB No. 04-0640

ELTON I. CRUMP	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:APR 14, 2005
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for self-insured employer.

Lori Karin (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Second Remand (99-LHC-2497) of Administrative Law Judge Fletcher E. Campbell, 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 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 is the third time this case has been appealed to the Board.[1] Claimant, a sheet metal worker, injured his back during the course of his employment on October 15, 1985, and underwent a laminectomy at the L5-S1 level; he returned to restricted work with employer but, after suffering a series of aggravations, ceased working for employer on March 6, 1989. Claimant receives permanent partial disability benefits pursuant to the parties' stipulations that claimant's residual wage-earning capacity is $134.00 per week.[2] Stip. 6. Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).[3]

Relevant to the current appeal, in its second decision the Board affirmed the administrative law judge's finding that the opinions of Drs. Reid and Garner are insufficient to satisfy the contribution element. The Board, however, remanded the case

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[1] The procedural history of this case is detailed in the Board's prior decisions. *Crump v. Newport News Shipbuilding & Dry Dock Co. [Crump II]*, BRB No. 02-0164 (Oct. 29, 2002)(unpublished); *Crump v. Newport News Shipbuilding& Dry Dock Co. [Crump I]*, BRB No. 00-0139 (Oct. 3, 2000)(unpublished).

[2] As of February 1995, the parties stipulated that claimant was capable of performing minimum wage jobs for 40 hours per week; the minimum wage at the time of injury was $3.35 per hour. Stip. 6.

[3] Section 8(f) relief is available to employer in the case where a claimant suffers from a permanent partial disability if it establishes: (1) that claimant had a pre-existing permanent partial disability; (2) that the pre-existing disability was manifest to 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. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (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) (1989). It is uncontested that the first two elements are satisfied by virtue of a back injury claimant sustained on January 29, 1979, and a right arm disability claimant sustained in a motorcycle accident in 1982. EX 6.

for the administrative law judge to address the contribution element in light of the vocational assessment of Edith Edwards, as well as to consider any new evidence admitted into the record on remand.[4] *Crump v. Newport News Shipbuilding & Dry Dock Co. [Crump II]*, BRB No. 02-0164 (Oct. 29, 2002)(unpublished), slip op. at 7.

In his Decision and Order on Second Remand, the administrative law judge found that employer established the contribution element based upon the opinions of Dr. Apostoles and William Kay, a vocational expert. Dr. Apostoles examined claimant, and he testified that claimant's prior arm injury restricts his range of motion and reduces his grip strength. He opined that claimant could not perform assembly line work which requires repetitive motion. Tr. at 15-16. Mr. Kay testified that claimant is currently capable of earning only the minimum wage of $5.15 per hour with his present back and arm conditions but that absent claimant's arm injury, he could earn $7.00 to $9.00 per hour doing assembly line work.[5] Tr. at 18-20. The administrative law judge found this evidence sufficient to establish the contribution of claimant's pre-existing disabilities to his current permanent partial disability, pursuant to *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997). Accordingly, the administrative law judge awarded employer relief pursuant to Section 8(f).

On appeal, the Director contends that the evidence the administrative law judge relied on is insufficient to establish the contribution element because it fails to provide the necessary quantification attributable to claimant's 1985 injury alone and also is based on previously discredited evidence. Employer responds, urging affirmance of the award of Section 8(f) relief.

In order to satisfy the contribution element of Section 8(f) in a case where the claimant is permanently partially disabled, employer must show that the disability is not due solely to the subsequent injury and, by medical evidence or otherwise, that the ultimate partial disability materially and substantially exceeds the disability which would

[4] The Board further stated that the administrative law judge may reconsider the opinions of Drs. Garner and Reid based on any new evidence admitted into the record on remand. *Crump II*, slip op. at 7 n 4.

[5] Ms. Edwards similarly opined that if claimant's only injury were to his back he would be capable of performing tool repair and assembly line work with a wage-earning capacity of between $5.50 and $8.00 per hour while his arm injury limited claimant to minimum wage jobs at $4.25 per hour as of December 25, 1995. EX 7.

have resulted from the work-related injury alone. *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). Employer must quantify the level of impairment that would result from the work-related injury alone. *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131(CRT). A vocational rehabilitation specialist's report discussing wage rates available to claimant with and without the pre-existing disability may satisfy the quantification criterion and thus establish the contribution element of Section 8(f). *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated on other grounds on recon*., 32 BRBS 282 (1998); *see also Marine Power & Equip. v. Dep't of Labor*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997).

We reject the Director's contention that the evidence of claimant's earnings potential with and without his pre-existing disabilities is legally insufficient to establish the contribution element. Under the standard set forth by the Fourth Circuit in *Harcum II*, the opinion of a vocational expert that a claimant would be able to earn more per hour without his pre-existing injury may be sufficient to establish the contribution element of Section 8(f). Indeed, the court stated that this type of evidence "presented exactly the quantification of evidence that this court envisioned in *Harcum I*," and is in no way deficient. *Harcum II*, 131 F.3d at 1082, 31 BRBS at 167(CRT).[6] In this case, the administrative law judge relied upon the testimony of Mr. Kay that claimant currently is restricted to minimum wage jobs, whereas he could be earning between $7.00 to $9.00 an hour if he suffered only the restrictions arising out of his work-related back condition. Tr. at 18-20. This testimony provides the administrative law judge with a basis for determining whether claimant's ultimate permanent partial disability is materially and substantially greater than his work injury disability alone. The administrative law judge properly compared the relevant wage rates provided by Mr. Kay to determine whether claimant's post-injury wage-earning capacity would be the same, with or without consideration of his pre-existing disability. His finding that claimant's pre-existing impairment materially and substantially affected his post-injury wage-earning capacity is rational, supported by substantial evidence, and in accordance with law. *Harcum II*, 131 F.3d at 1082, 31 BRBS at 167(CRT); *Farrell*, 32 BRBS 118.

[6] The evidence held to be sufficient in *Harcum II* is very similar to that presented by employer in the instant case. Specifically, Ms. Edwards opined that without the pre-existing cervical spine injury, Harcum would have been capable of earning $6.00 per hours in 1984 dollars, but with the injury was capable of earning only $3.80 per hour. In addition, she stated that due to the pre-existing injury, telephone solicitation jobs were unsuitable for the claimant. *Harcum II*, 131 F.3d at 1082, 31 BRBS at 166(CRT).

Moreover, we reject the Director's contention that Mr. Kay's vocational assessment relies too heavily on the opinions of Dr. Reid and Ms. Edwards which the administrative law judge found, in and of themselves, were insufficient to meet employer's burden. The administrative law judge fully addressed this contention and rationally concluded that the additional opinion of Dr. Apostoles, which the administrative law judge found to be adequately reasoned,[7] cures any deficiencies in Mr. Kay's reliance upon the opinions of Dr. Reid and Ms. Edwards. The administrative law judge thoroughly reviewed all of the evidence and although he concluded that certain individual pieces of medical evidence were insufficient to meet employer's burden, the totality of the medical and vocational evidence satisfies the contribution element. The Fourth Circuit has emphasized that it is the fact-finder's prerogative to determine the sufficiency of employer's evidence in support of its application for Section 8(f) relief. *See Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). The Director has not identified any errors in the administrative law judge's consideration of the evidence, and the administrative law judge's finding that the contribution element is satisfied is rational, supported by substantial evidence and in accordance with law. *Harcum II*, 131 F.3d at 1082, 31 BRBS at 167(CRT). Therefore, the award of Section 8(f) relief is affirmed.

[7] Dr. Apostoles personally examined claimant and opined that the 1985 injury caused a permanent back impairment but one which allowed claimant to continue light-duty work at the shipyard; the subsequent aggravations rendered claimant unable to perform even this light-duty work. Tr. at 11-13. Moreover, Dr. Apostoles opined that the permanent impairment to claimant's right arm and elbow restricted him from performing assembly line work which he would otherwise have been capable of performing. Tr. at 16.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge