BRB No. 11-0640

MICHAEL W. HUTCHINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL, INCOPORATED	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 04/27/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order Awarding Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Raymond H. Warns, Jr. (Holmes Weddle & Barcott, P.C.), Seattle, Washington, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-LDA-0516) of Administrative Law Judge Russell D. Pulver 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 began working in Iraq in December 2005 as a heavy truck driver for employer. He was based at Camp Anaconda, north of Baghdad, and his job required that he drive supplies in convoys to U.S. troops outside the Camp Anaconda boundaries, wearing body armor, a helme,t, and ballistics goggles for protection from attacks. On March 28, 2006, claimant injured his back, neck, and other body parts when his vehicle rear-ended the truck in front of him. Claimant was examined and found to be injured, but was told he would have to terminate his contract and return to the U.S. at his own expense to get medical treatment. Although claimant tried to continue working, he was unable to do so; upon finding him at fault for the accident, employer terminated claimant's contract and flew him home. Emp. Ex. 1; Tr. at 37-40, 50-53. Claimant testified he obtained less rigorous employment as a truck driver for Swift Transportation in the United States in February 2007.[1]

Employer voluntarily paid claimant temporary total disability benefits at a rate of $500 per week from May 16, 2006, through June 19, 2007, and it paid his medical expenses. After it terminated those benefits, claimant filed a claim for additional benefits under the Act. The administrative law judge calculated claimant's average weekly wage as $1,777.27, based only on claimant's actual earnings with employer. The administrative law judge found that claimant is entitled to temporary total disability benefits from May 16, 2006, through February 8, 2007, at the maximum compensation rate of $1,073.64. He also found that claimant is entitled to temporary partial disability benefits from February 9, 2007, through January 23, 2008, and permanent partial disability benefits from January 24, 2008, and continuing, at a rate of $713.42 per week.

[1]Claimant stated that, although "lifting" is in the job description, he does not have to lift anything, as he was in a "special division" of the company that permits him to drive and drop the trailer after a haul. He also stated that he shared these duties with his wife, who is his driving partner. Tr. at 61-63, 128-130.

The administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. Decision and Order at 33-34. Employer appeals the administrative law judge's decision, and claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

Employer first contends the administrative law judge erred in finding claimant to be a credible witness and, therefore, in finding he is unable to return to his usual work. Employer asserts that claimant gave differing statements regarding his ability to return to his work to different doctors, and as he told four doctors he could work without restrictions, it is erroneous to conclude otherwise. Claimant testified, and the record supports, that he was examined by four Department of Transportation examiners after he returned to the United States and that he did not tell them about his injury in Iraq or his subsequent limitations. Emp. Ex. 19; Tr. at 57-58. Claimant testified that he was working in his post-injury truck driving job and that it was not as strenuous as his job in Iraq. He also stated that the doctors spent only about five minutes each with him and that these examinations merely were to determine whether he was fit to perform his trucking job under the rules of the Department of Transportation. Tr. at 58. He also testified that his current job falls within the restrictions his doctor, Dr. Long, gave him following the injury overseas and that there is no lifting involved.[2] Cl. Ex. 1 at 59; Tr. at 59-60.

Although the administrative law judge did not condone claimant's decision to withhold information from the physicians, he acknowledged that claimant did so in order to keep working. He also acknowledged that, while claimant may have had a dispute with a former post-injury employer, the dispute was not one which called into question the veracity of claimant's statements regarding his injury and residual restrictions. Based on the facts of this case, the administrative law judge found that claimant's credibility was "generally acceptable." Accordingly, he credited claimant's testimony that he was able to perform the job he had at the time of the hearing but he was no longer able to perform the work as a truck driver in Iraq. The administrative law judge found that the work in Iraq was much more difficult because it involved danger and the need for heavy protective gear, and it required claimant to lift greater weights and drive trucks that were in disrepair. Decision and Order at 22-23. Questions of witness credibility are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I.

[2]Dr. Long permanently restricted claimant from lifting, pushing or pulling anything over 35 pounds repetitively, and he limited the time claimant should spend bending, twisting, stooping, squatting, kneeling, and climbing. Cl. Ex. 1 at 51; *see* Decision and Order at 20.

1969). The administrative law judge's credibility determinations here are not "inherently incredible or patently unreasonable." *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, as they are supported by substantial evidence, we affirm the administrative law judge's findings that claimant is a credible witness and that he cannot return to his usual work in Iraq because of the restrictions resulting from the work injury. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *see also Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

Next, employer contends the administrative law judge erred in calculating claimant's average weekly wage and post-injury wage-earning capacity. Specifically, employer argues that because claimant was a truck driver before, during, and after his stint in Iraq, his average weekly wage should be calculated using a blending of the wages he earned before his injury in the U.S. and in Iraq. Alternatively, employer asserts that because claimant did not intend to stay in Iraq beyond his contracted period, any benefits he receives should be two-tiered. Specifically, employer asserts that claimant's benefits should be based on his average weekly wage in Iraq until the date he was to leave that country and any additional benefits he receives should be based on the difference between his pre-Iraq and post-Iraq wages, so as to account for the natural decrease in wages upon his return to the United States. Claimant and the Director urge the Board to reject employer's contentions by applying the law set forth in its decisions in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009), *Proffitt v. Service Employers Int'l, Inc.*, 40 BRBS 41 (2006), and *Raymond v. Blackwater Security Consulting, L.L.C.*, 45 BRBS 5 (2011). Employer asserts that these cases are distinguishable.

Contrary to employer's assertion, the circumstances in *Simons*, *Proffitt*, and *Raymond* are not legally distinguishable from those in this case. That is, in all the cases, the claimants were retained by the employers to work overseas in dangerous areas. They were enticed by significantly higher wages, they worked under one-year renewable contracts, and they were injured during the course of their contracted work. None of the claimants intended to relocate permanently; however, they intended to complete their contracts. For the reasons set forth in *Simons* and *Proffitt*, we reject employer's assertions that on these facts it was erroneous to calculate claimant's average weekly wage using only his higher overseas wages. *Simons*, 43 BRBS 18; *Proffitt*, 40 BRBS 41. The blended approach has been rejected in these situations. *Simons*, 43 BRBS at 21 n.5; *c.f. Jasmine v. Can-Am Protection Group, Inc.*, __ BRBS __, BRB No. 11-0610 (April 19, 2012). Further, for the reasons set forth in *Raymond*, we reject employer's contention that claimant's benefits should be calculated using a two-tiered approach, as under these

facts there is no legal support in either the Act or the case law for such an award.[3] *Raymond*, 45 BRBS at 6-7. Accordingly, we affirm the administrative law judge's average weekly wage calculation and the award of disability benefits calculated therefrom.

Lastly, employer contends the administrative law judge erred in denying its request for Section 8(f) relief. Employer argues that the administrative law judge erred in finding that claimant did not have a pre-existing permanent partial disability, as claimant has a pre-existing back condition and prior knee impairment. The Director responds, acknowledging the prior permanent partial disability to claimant's knee but arguing that employer failed to challenge the administrative law judge's findings that the manifest and contribution elements were not satisfied. Thus, the Director contends the denial of Section 8(f) relief should be affirmed. Employer replies, asserting it challenged the overall denial of Section 8(f) relief and arguing that the administrative law judge also erred in finding that the manifest and contribution elements are not satisfied.

Section 8(f) of the Act shifts 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. §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 permanent partial disability is not due solely to the subsequent work injury and is materially and substantially greater than it would have been absent the pre-existing disability. 33 U.S.C. §908(f); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). A condition need not be economically disabling to constitute a permanent partial disability under Section 8(f), but it must be such a serious physical disability that a cautious employer would be motivated to discharge the employee because of a greatly increased risk of compensation liability. *Lockheed Shipbuilding*, 951 F.2d 1143, 25 BRBS 85(CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990). To establish the contribution element, an employer must establish that the claimant's current disability is not due solely to the subsequent work injury and is materially and substantially greater due to the manifest pre-existing permanent partial disability than it would be from the second injury alone. *Marine*

[3]Employer asserts that the issue of a two-tiered award should be remanded because the administrative law judge did not address it. The administrative law judge's failure to address the issue is harmless in light of the Board's holding in *Raymond*, 45 BRBS at 7. *See also* 33 U.S.C. §908(c)(21); *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004) (speculative future events are irrelevant to calculating wage-earning capacity).

Power & Equipment v. Dep't of Labor [Quan], 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000).

In this case, the record establishes that claimant began having problems with his back after an injury in 1986 when he was working for a furniture company. He injured his right knee in 1989 while skiing and again in 1992 while working, receiving a 30 percent impairment rating from a doctor in 1992. In 1997 and 1998, claimant had back spasms and low back pain, and in 1998 a doctor diagnosed "chronic back problems." Emp. Ex. 26. The administrative law judge did not mention the prior knee condition in his discussion of whether claimant had a pre-existing permanent partial disability, and with regard to claimant's prior back condition, the administrative law judge acknowledged it but found that claimant had been able to return to work without restrictions after each injury or flare-up. Decision and Order at 33. The Director concedes that claimant had a pre-existing permanent partial disability to his right knee. Dir. Resp. Brief at 5. Moreover, a pre-existing permanent partial disability, as that term applies in Section 8(f), need not have an economic impact on the claimant. *Mayes*, 913 F.2d 1426, 24 BRBS 25(CRT). Rather, a condition may constitute a pre-existing permanent partial disability if it is a serious, long-lasting condition. *Lockheed Shipbuilding*, 951 F.2d 1143, 25 BRBS 85(CRT); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). As claimant's back condition has been affecting him since the mid-1980s, it arguably could constitute a serious long-lasting condition within the meaning of Section 8(f). *Id.*

Although employer may be correct with regard to the administrative law judge's findings as to any pre-existing permanent partial disabilities, we agree with the Director that employer failed to set forth any arguments alleging error in the administrative law judge's findings regarding the second and third elements necessary for Section 8(f) relief until it did so in its reply brief. Accordingly, these findings are affirmed as unchallenged. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007); *Plappert v. Marine Corps Exchange*, 31 BRBS 109, *aff'g on recon. en banc* 31 BRBS 13 (1997). Moreover, if we were to address employer's reply brief arguments in conjunction with its overall challenge to the administrative law judge's findings on Section 8(f), we would conclude that the administrative law judge correctly found that employer failed to establish the contribution element.

The administrative law judge found there is "no medical evidence or opinion on record that establishes that Claimant's current restrictions are contributed to by any preexisting conditions. Certainly, there is no medical opinion in the record establishing that Claimant's current restrictions are more severe than he would otherwise have without any history of back pain." Decision and Order at 33. Employer sets forth only Dr. Giuliani's opinion in support of its argument. Dr. Giuliani's report states that claimant's

MRI shows "degenerative changes with radicular pain that [he] feel[s] is directly related to the injury and trauma causing significant irritation to his back and spine." Emp. Ex. 26 at exh. 3.7. At best, this opinion appears to confirm that the work injury aggravated or exacerbated claimant's pre-existing degenerative condition and, thus, that the two conditions may have combined. However, nothing in it demonstrates that claimant's current condition is "materially and substantially greater" than it would have been absent the pre-existing back condition or that the current permanent partial disability is not due solely to the work injury. Further, there is no evidence of record establishing that claimant's prior knee condition materially and substantially contributed to his current disability.[4] Therefore, the administrative law judge properly found that employer has not established the contribution element. *See Quan*, 203 F.3d 664, 33 BRBS 204(CRT). The denial of Section 8(f) relief is affirmed.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[4]In its reply brief, employer cites to no evidence but alleges only that "claimant's preexisting knee condition limited [him] to a desk job at one time, and could have potentially combined with his alleged March 28 2006, injury and caused a materially and substantially greater disability than should have arisen alone." Emp. Reply Br. at 9 n.2.