BRB No. 06-0975

P.H.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 08/21/2007
	)	
	)	
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 on Second Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Peter B. Silvain, Jr. (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (2000-LHC-2937) 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 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 before the Board. On October 15, 1991, claimant sustained a neck injury during the course of his employment. Employer voluntarily paid temporary total and temporary partial disability benefits and filed a request for Section 8(f), 33 U.S.C. §908(f), relief, which the district director denied. After the case had been referred to the Office of Administrative Law Judges, the parties entered into stipulations resolving claimant's claim for permanent partial disability benefits, and employer renewed its request for Section 8(f) relief. In his decision, the administrative law judge referenced the parties' stipulation to benefits and denied employer's motion to reopen the record to submit additional evidence as well as its request for Section 8(f) relief. Employer appealed the decision. The Director, Office of Workers' Compensation Programs (the Director), filed a motion to vacate the decision and to remand the case for the administrative law judge to enter an award of benefits. The Board vacated the decision and remanded the case accordingly. *[P.H.] v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-791 (June 21, 2004).

On remand, the administrative law judge issued a decision identifying the parties' stipulations, awarding permanent partial disability benefits, and incorporating his previous decision denying Section 8(f) relief due to employer's failure to establish the contribution element. The administrative law judge found that Dr. Tornberg's May 2000 report is "merely a summary" of claimant's medical history with boilerplate language and buzz words. He found that it does not quantify claimant's disability due to the work injury, lacks support and is conclusory. Decision and Order at 4. He also found that Dr. Peach's report does not quantify claimant's level of impairment due to the work injury. *Id.* Employer appealed the administrative law judge's refusal to reopen the record and his denial of Section 8(f) relief. The Board vacated the denial of Section 8(f) relief and remanded the case for consideration of the contribution issue, allowing employer to renew its motion to reopen the record if necessary. *[P.H.] v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 05-194 (Oct. 27, 2005). Specifically, the Board stated that the administrative law judge erred in assessing the sufficiency of Dr. Tornberg's report and that the administrative law judge must reconsider that report, in conjunction with Dr. Peach's report, to determine whether employer satisfied the contribution element necessary for Section 8(f) relief. *Id.*, slip op at 6.[1] The Board also stated that the Director

[1]With regard to the contribution issue addressed by Dr. Tornberg's report, the Board stated, slip op. at 6:

> Dr. Tornberg, in his three-page letter dated May 10, 2000, fully set forth and documented claimant's voluminous medical history. Under these circumstances, we cannot agree with the administrative law judge's

agreed that Dr. Tornberg's report is probably "legally sufficient to meet employer's quantification burden." *Id.*, slip op. at 7. Therefore, the Board ordered the administrative law judge to "determine whether there is a reasoned and documented basis for Dr. Tornberg's opinion, and he must evaluate the opinion in light of the totality of the relevant evidence of record." *Id.*

On second remand, the administrative law judge again denied employer's request for Section 8(f) relief. The administrative law judge stated that Dr. Tornberg's May 10, 2000, report "appears to be an accurate and well represented recitation of the Claimant's medical history. . . ." Decision and Order on Second Remand at 3-4. Without addressing the aspects of Dr. Tornberg's May 2000 report referenced by the Board, he concluded there is "no reliable basis in the record in which to determine the logical underpinnings of Dr. Tornberg's medical opinion." *Id.* at 4. It appears the administrative law judge may have based his conclusion on his findings that Dr. Peach's May 8, 2001, report did not quantify the degree of disability arising from claimant's 1991 injury and that Dr. Tornberg's August 14, 2001, concurrence letter did not quantify claimant's work disability or explain his agreement with Dr. Peach's opinion. *Id.* at 5. Thus, the administrative law judge found that Dr. Peach's letter is insufficient in and of itself or in tandem with Dr. Tornberg's letters and fails to support a finding of contribution.[2] *Id.* at 6. He also rejected employer's assertion that the physical restrictions placed on claimant quantify claimant's impairment, as he found that all they do is demonstrate that claimant had similar restrictions before and after his 1991 work injury. *Id.* at 7. Employer appeals the administrative law judge's decision, and the Director responds, urging affirmance.

> characterization of Dr. Tornberg's letter as 'merely a summary of claimant's medical history produced upon review of his medical records' and that his conclusions are 'conclusory and unsupported.' Dr. Tornberg's multiple-page letter, which enumerates in detail claimant's prior surgeries and the work restrictions imposed prior to claimant's 1991 neck injury, is indicative that he took claimant's prior medical conditions into account in reaching his conclusion that absent those pre-existing conditions, claimant's 1991 injury would have resolved with no permanent disability. Thus, Dr. Tornberg's letter report, considered in its entirety, may provide a basis for discerning the logic underpinning the doctor's conclusion.

[2]The administrative law judge stated that the "Board has instructed" him to be "mindful that the Employer is not required to prove the contribution element by one doctor's opinion alone." Decision and Order on Second Remand at 4. However, he then stated that each medical opinion must stand on its own. *Id.* at 4 n.3. This is incorrect, as the relevant evidence should be addressed in its entirety and not piecemeal.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S. C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, as here, if it establishes that: 1) the claimant had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *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); *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*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). There is no dispute that employer has satisfied the first two elements and that the only issue is whether it has satisfied the third element, the contribution element. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, the employer must quantify the level of the impairment that would ensue from the claimant's work-related injury alone. *Harcum I*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). In *Carmines*, the court further explained that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to make the comparison to determine whether the claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *see also Cherry*, 326 F.3d 449, 37 BRBS 7(CRT); *Ward*, 326 F.3d 434, 37 BRBS 17(CRT). The court also advised that an employer may make its showing of contribution by medical or other evidence. *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT).

On the facts of this case, we hold that the administrative law judge erred in finding that employer did not satisfy the contribution element. Employer submitted claimant's medical history of prior neck, back and shoulder injuries, surgeries and physical restrictions, and the opinions of Drs. Tornberg and Peach that claimant's pre-existing disability made his ultimate condition substantially worse than it would have been if claimant's sole injury had been the 1991 work injury. Dr. Tornberg, an orthopedic surgeon in charge of employer's clinic where claimant was treated, set forth the history of claimant's back problems. According to his May 2000 report, claimant had back

problems dating back to 1950.[3] He strained his back in 1962, 1971, 1973, 1974, 1976, 1977, and 1978. In 1983, studies revealed an interspace narrowing at L4-5 and later that year claimant underwent a myelogram and a partial hemilaminectomy at L4-5, and a foraminotomy a L5-S1 for a herniated disc. Problems continued throughout the 1980s, and by 1988 claimant had permanent restrictions to limit bending, stooping, and climbing, to not lift anything over 35 pounds, and to avoid prolonged hyperextension of the neck and head. *See* Exh. 1 at 33-34. Claimant suffered additional back injuries in 1989 and 1990. In 1991, claimant sustained the injury at issue when he hit his head, whipped his neck backwards and injured his neck and back. In 1993, his doctor restricted him from climbing, performing overhead work, and extending his head and neck, Exh. 1 at 52, and he assessed claimant with 20 percent impairment of the whole person, Exh. 1 at 53-54. Following the 1991 injury, claimant continued to have problems, re-injuring his back and undergoing additional surgeries. Exh. 1 at 60. Dr. Tornberg concluded from claimant's medical history that he had chronic back, neck and shoulder disabilities that pre-dated the 1991 injury and were permanent, serious and manifest to employer. Exh. 1. On the issue of contribution, Dr. Tornberg stated:

> Mr. Hayes' disability is not caused by his October 15, 1991 neck injury alone, but rather his disability is materially contributed to, and made materially and substantially worse by, his pre-existing chronic back, neck, and shoulder disability. Mr. Hayes' October 15, 1991, injury was rather minor, if . . . he had a normal back, neck and shoulder it would have resolved with no permanent disability. However, his October 1991 injury, permanent (sic) and substantially aggravated and worsen (sic) his weak and defective back structure resulting in his current disability.

Exh. 1 at 6. Dr. Peach, claimant's treating neurosurgeon, agreed in a report dated May 8, 2001, that claimant had numerous neurological problems, some that required surgery and restrictions, and that the 1991 injury was a "valid" injury that of itself would not have lead to claimant's current disability. He stated that claimant's inability to perform even restrictive work was due to a combination of factors and not due solely to his October 1991 injury. Exh. 2 at 1. In his letter dated August 14, 2001, Dr. Tornberg concurred with Dr. Peach's opinion that claimant's disability is not due solely to his October 1991 injury. Exh. 4 at 1.

In its second decision, the Board specifically stated that the conclusions reached in Dr. Tornberg's May 2000 report are not "conclusory and unsupported" because he considered claimant's entire history of problems before arriving at his conclusion.

[3]The report is part of employer's application for Section 8(f) relief and is accompanied by 47 supporting medical documents.

[P.H.], slip op. at 6. Moreover, the Board noted that the Director agreed that the May 2000 report, wherein Dr. Tornberg opined that if claimant had a normal back, neck and shoulder, his 1991 work injury would have resolved with no permanent disability, was probably legally sufficient to meet the quantification requirement required by the Fourth Circuit.[4] *Id.*, slip op. at 7 (citing *Cherry*, 326 F.3d 449, 37 BRBS 7(CRT)).[5] Despite the Board's specific reference to Dr. Tornberg's statement that claimant's work injury would have left no permanent impairment, that it materially and substantially aggravated claimant's prior condition, and that his conclusions are not "conclusory and unsupported," the administrative law judge did not discuss these aspects of the report in his decision on Second Remand. Rather, he found that Dr. Peach's report and Dr. Tornberg's August 2001 concurrence letter do not quantify claimant's 1991 injury. This assessment of the latter two reports, standing alone, is reasonable. Although the doctors opined that claimant's disability was not the result of his 1991 work injury alone, their statements in these reports do not satisfy the Fourth Circuit's quantification requirement, as they did not "quantify the type and extent of disability [claimant] would have suffered absent the pre-existing disability." *See Ward*, 326 F.3d at 439, 37 BRBS at 20(CRT); *Carmines*, 138 F.3d at 139, 32 BRBS at 50(CRT).

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[4]In his brief in the current appeal, the Director states that, although Dr. Tornberg's report "arguably does facially address the quantification question . . . , it does not provide any reasoned basis for this conclusion." Dir. Brief at 13. In a footnote, the Director states that the administrative law judge's finding that employer has failed to submit any quantification evidence is harmless error because the administrative law judge made that finding in addition to finding that the reports were conclusory and unreasoned. The Director argues that even legally sufficient evidence may be rejected by the administrative law judge if it is found to lack support. *Id.* at n.4. However, as the Board stated previously, Dr. Tornberg's report does not lack support.

[5]In *Cherry*, Dr. Reid stated that if the claimant "had had a normal back, [his work injury] would have resolved with no permanent disability." *See Cherry*, 326 F.3d at 454, 37 BRBS at 10(CRT). The court stated that this was relevant evidence, but because the court affirmed the administrative law judge's finding that there was no pre-existing permanent partial disability in that case, it concluded that the administrative law judge properly rejected Dr. Reid's statement as "pure conjecture." *Id.* In *Ward*, Dr. Reid asserted that if the claimant had a "normal back when he suffered the 1989 injury, he . . . would have been able to return to light duty Shipyard work." *Ward*, 326 F.3d at 441, 37 BRBS at 18-19(CRT). The court held that this constituted the type of evidence the Fourth Circuit deems relevant for quantification purposes. *Id.* Dr. Reid's statements, however, were considered "generalized," "conclusory," and "lack[ing in] evidentiary support" because Dr. Reid did not refer to any evidence to explain how he arrived at his conclusion. *Ward*, 326 F.3d at 442, 37 BRBS at 19(CRT).

Dr. Tornberg's May 2000 report, however, provides the necessary evidence quantifying the disability resulting from claimant's 1991 injury. *Ward*, 326 F.3d at 441, 37 BRBS at 23(CRT); *Cherry*, 326 F.3d at 454, 37 BRBS at 10(CRT). His conclusion that, absent the pre-existing condition, claimant's 1991 injury would have resolved without permanent impairment was rendered after considering claimant's medical history and the details of the 1991 injury itself based upon his medical experience. Exh. 1 at 4-6. Dr. Tornberg is a credentialed physician[6] and his opinion is not contradicted by any evidence of record. Rather, Dr. Peach, also a credentialed physician,[7] agreed that claimant's current disability was not due solely to his 1991 injury as his inability to perform certain work was due to a combination of factors. Although Dr. Peach did not quantify claimant's disability, his opinion serves to establish that Dr. Tornberg's conclusion is reasonable. Additionally, although the administrative law judge attempted to minimize the evidence of claimant's physical restrictions by stating that it demonstrated only that claimant had similar restrictions before and after the 1991 injury, this finding actually *supports* Dr. Tornberg's opinion that the 1991 injury was "rather minor[.]" That is, the restrictions did not change significantly; logically, therefore, the 1991 injury must have not been severe enough to warrant a change in restrictions. Thus, substantial evidence of record supports Dr. Tornberg's opinion regarding claimant's 1991 injury and its effect on his overall condition. Moreover, Dr. Tornberg stated that claimant's overall condition is not due solely to his 1991 work injury but was made materially and substantially worse by his pre-existing condition. Exh. 1 at 6. The administrative law judge has given no valid reason for rejecting Dr. Tornberg's opinion, and his conclusion is not supported by the record. *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965). Therefore, as Dr. Tornberg's report establishes that claimant's condition is not due solely to his 1991 work injury but was made materially and substantially worse by his pre-existing condition, we hold that employer has satisfied the contribution element to the degree required by the Fourth Circuit. We reverse the administrative law judge's finding to the contrary, and we hold that employer is entitled to Section 8(f) relief. *See generally Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

[6]Dr. Tornberg is the Medical Director at employer's clinic and is a board-certified orthopedic surgeon. Exh. 1 at 6.

[7]Dr. Peach is claimant's neurosurgeon. Exh. 2.

Accordingly, the administrative law judge's Decision and Order is reversed, and employer is entitled relief from continuing compensation pursuant to Section 8(f) of the Act.[8]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[8]In light of our decision, we need not address employer's assertion that the administrative law judge erred in denying its motion to reopen the record.