BRB No. 99-0500

HOWARD J. BARNES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Feb. 10, 2000
	)	
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 8(f) Relief of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-783, 98-LHC-1687, 98-LHC-1688, 98-LHC-1689, 98-LHC-1690) 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 the 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 sustained several back injuries in the course of employment with employer, where he has worked since 1976. Employer imposed a series of permanent restrictions following each injury. Claimant was also assessed as suffering from a 14.1 percent binaural hearing impairment. On June 11, 1993, while working, he injured his right shoulder. Employer listed permanent restrictions as a result of this injury. Emp. Ex. 6A. The parties stipulated to all issues related to claimant's entitlement to disability benefits, including ongoing payments of permanent partial disability compensation. Employer applied for relief from continuing liability for compensation under Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge denied the relief, finding that employer failed to establish that claimant's disability is materially and substantially greater because of his pre-existing chronic back condition and hearing loss. Employer appeals this decision. The Director, Office of Workers' Compensation Programs (the Director), has not participated in the appeal.

On appeal, employer argues that the administrative law judge erred in concluding that it failed to satisfy the contribution element necessary for Section 8(f) relief, asserting that the opinions of Dr. Stiles and Dr. Reid, as well as that of Ms. Lanman, employer's vocational consultant, are sufficient to establish that claimant's ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted from the work injury alone.[1]

In order to obtain Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 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*, 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 this case, employer alleged

[1]The administrative law judge noted that the Director also argued below that employer did not establish a pre-existing permanent partial disability, but found he did not have to reach this issue in view of his disposition of the contribution issue. Decision and Order at 6 n.6.

that claimant's prior back impairment or his hearing loss entitles it to Section 8(f) relief.

In order to satisfy the contribution element, employer must show by medical or other evidence that the ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. We affirm the administrative law judge's conclusion that this standard is not met in this case.[2] Pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, an employer may show that a preexisting disability renders a claimant's overall disability materially and substantially greater by quantifying the disability that ensues from the work injury alone and comparing it to the preexisting disability. *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131(CRT); *see also Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT); *Harcum II*, 131 F.3d at 1082-1083, 31 BRBS at 166-167(CRT); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated in part on other grounds on recon.*, 32 BRBS 283 (1998) ; *Quan v. Marine Power & Equipment*, 31 BRBS 178 (1997), *aff'd sub nom. Marine Power & Equip. v. Dept. of Labor,* F.3d , 2000 WL 95994 (9th Cir. Jan. 31, 2000).

[2]Employer also contends that the administrative law judge wrongly disregarded a stipulation to which claimant and employer agreed, *i.e.,* that claimant's loss of wage-earning capacity is not the result of the June 1993 right shoulder injury alone, but that the pre-existing chronic back condition resulted in materially and substantially greater disability. Employer's contention is rejected, as stipulations between employer and claimant affecting the liability of the Special Fund are not binding on the Fund absent the participation of the Director. *Brady v. J. Young & Co.,* 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985).

In addressing whether employer met this standard, the administrative law judge first determined that the record contained sufficient evidence to quantify the disability due to the right shoulder injury, thus meeting the "quantification of the level of impairment" requirement of *Harcum* and *Carmines*, by comparing Dr. Reid's opinion that following the shoulder injury claimant could still perform available light duty work at the shipyard, Emp. Ex. 2D, and employer's permanent work restrictions following the right shoulder injury. Emp. Exs. 6A, 7. Next, in quantifying the extent to which the back injuries worsened the effect of the right shoulder injury, the administrative law judge compared the restrictions imposed on claimant before and after the shoulder injury. He reasoned that while the shoulder restrictions limit claimant more than back injury restrictions, the only additional restriction resulting from the back injuries is the one limiting forward bending. Emp. Ex. 2 at Ex. 8.[3] The administrative law judge thus concluded that this additional restriction did not establish that the ultimate disability is materially and substantially worse than the disability from the right shoulder alone because the back injuries did little to worsen the effect of the right shoulder injury alone. In reaching this conclusion, the administrative law judge, in addition to considering Dr. Reid's opinion, discredited the report of Ms. Lanman, employer's vocational consultant, characterizing it as internally inconsistent and finding that not only does it not support employer's position, but that in fact it attributes claimant's inability to work at various jobs to claimant's current shoulder injury. Emp. Ex. 4.

We agree that Dr. Reid's opinion that claimant's pre-existing back injury adds to his unemployability is not sufficient to satisfy the contribution element.[4] *See*

[3]The administrative law judge acknowledged that it is possible that the work restrictions for the shoulder take the back injuries into account. The administrative law judge's conclusion that the restrictions resulting from the shoulder injury alone is, however, supported by a form stating that these restrictions result from the right shoulder impairment. Decision and Order at 7 n.7; Emp. Ex. 7.

[4]In *Carmines*, the court stated that a doctor's mere assertion that claimant's ultimate disability was made materially and substantially worse by claimant's pre-existing conditions was not sufficient to warrant Section 8(f) relief. *Carmines*, 138 F.3d at 144, 32 BRBS at 55 (CRT). In the instant case, the fact that claimant's pre-existing back disability was "chronic," also does not establish that this chronic, pre-existing back disability materially and substantially contributed to claimant's ultimate permanent partial disability. *See generally Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *see also John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93, 95 n.2, 12 BRBS 229, 232 n.2 (4th Cir. 1980).

Carmines, 138 F.3d at 134, 32 BRBS at 48 (CRT). The administrative law judge's determination that the opinion of Dr. Stiles is unsupported and unreasoned is likewise affirmed. *See generally Thompson v. Northwest Enviro Services,* 26 BRBS 53 (1992). Consequently, with respect to the pre-existing back condition, the administrative law judge's determination that the evidence did not establish that claimant's ultimate permanent partial disability is materially and substantially greater is affirmed as it is supported by substantial evidence and in accordance with law. *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT); Emp. Ex. 15(d). We, therefore, affirm the administrative law judge's denial to employer of Section 8(f) relief based on that injury.[5]

[5]Employer's reliance on the unpublished decision in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Parkman]*, No. 96-2653 (4th Cir. Sep. 18, 1997), in support of its contentions is misplaced. As the Fourth Circuit has published several cases addressing the issue at hand, those decisions must control. *See* United States Court of Appeals for the Fourth Circuit Local Rule 36(c).

With regard to claimant's pre-existing hearing loss, the administrative law judge noted that Dr. Reid asserted in a conclusory opinion that claimant's pre-existing hearing loss materially and substantially worsened the disability that would have resulted from the right shoulder alone, because due to his 14.1 percent binaural hearing impairment claimant cannot work as telephone solicitor. The administrative law judge rejected this conclusion, as employer presented no evidence indicating how this problem affects claimant's overall employability. Employer's vocational expert, Ms. Lanman, did not identify a telephone solicitor job as suitable for claimant, nor did she rule out telephone solicitor jobs or any type of job due to claimant's pre-existing hearing loss. *See* Decision and Order at 9; Emp. Ex. 4. Thus, as to the pre-existing hearing loss, the administrative law judge's determination that employer did not present sufficient evidence to establish that claimant's ultimate permanent partial disability is materially and substantially greater due to that condition is affirmed.[6] *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT)*; Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT)*; Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT). *Compare Farrell,* 32 BRBS at 121 (vocational expert's testimony that the claimant's pre-existing mental impairment increased the number of jobs no longer available to him is sufficient, if credited, to meet *Harcum II* standard).

Accordingly, the administrative law judge's Decision and Order Denying 8(f) relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]Employer alleges a conspiracy in the Office of Administrative Law Judges in Newport News to reject all Section 8(f) applications and opinions of Dr. Reid, based on *Carmines,* on orders from the Office of the Solicitor. In view of our holding that the administrative law judge's findings in this case are supported by substantial evidence, we need not address this allegation.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge