BRB No. 06-0895

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Claimant-Respondent

v.

MONTAGE, INCORPORATED

and

CNA INTERNATIONAL

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent</td><td>)
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DECISION and ORDER</td></tr>
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Appeal of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Kathleen H. Kim (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-0394) of Administrative Law Judge William Dorsey rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' 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 findings of fact and 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, an HVAC technician, was employed to supervise the heating and air conditioning phase of construction of an United States embassy building located in Budapest, Hungary, when he was hit by a falling pile of sheet metal on February 25, 2003. He suffered injuries to his lower extremities, arms and lower back but continued performing light-duty work until he returned to the United States for medical treatment on April 12, 2003. Claimant has not worked since his return from Budapest.

In his Decision and Order, the administrative law judge found that claimant cannot return to his usual job duties and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge found that claimant was temporarily totally disabled from February 25, 2003 to July 19, 2004, and permanently totally disabled thereafter. Additionally, the administrative law judge found that employer failed to establish that claimant's work-related injury alone was not totally disabling and denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer appeals, contending that the administrative law judge erred in finding that claimant is totally disabled and that it is not entitled to relief under Section 8(f). The Director, Office of Workers' Compensation Programs, (the Director) responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief, to which employer has replied. Claimant has not responded to this appeal.

Employer contends that the administrative law judge erred in awarding total disability benefits as claimant maintains some residual earning capacity. Employer asserts that it established that claimant has a post-injury earning capacity by demonstrating the availability of suitable alternate employment. The parties do not dispute that claimant is incapable of returning to his former job duties; he has therefore established a *prima facie* case of total disability. The burden thus shifts to employer to demonstrate the availability of suitable alternate employment, which requires that it demonstrate the realistic availability of jobs which claimant is capable of performing given his age, physical restrictions, and educational and vocational background. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981).

In this case, employer submitted the report of Dr. Haag, Ph.D., a vocational consultant, who testified as to claimant's employability.[1] In finding these positions to be unsuitable for claimant, the administrative law judge relied upon claimant's testimony regarding the effects of his medications and pain upon his ability to perform any job. Although claimant conceded that on a "good day" he could do any of the proffered jobs, HT at 45, he also testified that he generally experiences "bad days" with persistent pain and the inability to concentrate. HT at 40-41. The administrative law judge concluded that claimant's inability to determine what days he would be able to work and/or concentrate preclude his ability to perform any of the jobs. Decision and Order at 12.

Employer argues that the administrative law judge erred in relying upon claimant's testimony regarding his inability to work, especially in light of Dr. Stark's approval of these positions as within claimant's physical restrictions. Employer also contends that claimant has a long history of functioning while taking medication, due to his pre-existing conditions. Although Dr. Stark opined that the identified positions are within claimant's physical restrictions, EX 12, he also stated that claimant's medications and pain would result in diminished cognition and limited concentration which would affect his employability. EX 9 at 24. Moreover, Dr. Haag conceded that problems with pain and concentration would impede claimant's ability to perform any of the jobs he identified. HT at 89-90. With regard to the medication, Dr. Stark noted that following the work injury claimant now requires increased narcotics for his pain, *i.e.,* Methadone, which was not prescribed before the February 25, 2003, injury. EX 12.

The administrative law judge's role as fact-finder requires that he review the requirements of any positions identified as alternate work and determine whether claimant can perform the positions given his physical restrictions, age, education, and work experience. *See Stratton v. Weedon Engineering Co.,* 35 BRBS 1 (2001)(*en banc)*; *see generally Bunge Corp. v. Carlisle,* 227 F.3d 934, 34 BRBS 79(CRT) (5th Cir. 1996). In the instant case, the administrative law judge rationally found that claimant cannot perform any of proposed jobs based on claimant's testimony regarding his pain and medications which he found supported by the opinion of Dr. Stark and the concession of Dr. Haag. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). As the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment is rational and supported by substantial evidence, we affirm the administrative law judge's award of benefits for total disability. *Mijangos,* 948 F.2d 941, 25 BRBS 78(CRT).

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[1] Dr. Haag identified part-time sedentary work which he believed claimant could perform as a telemarketer, telephone recruiter, unarmed security guard, and cashier. HT at 89-90; EX 13.

Employer also appeals the administrative law judge's finding that it is not entitled to relief under Section 8(f). Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from 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 totally disabled, if it establishes that the claimant had a manifest, pre-existing, permanent partial disability and that his current permanent total disability is not due solely to the subsequent work injury.[2] 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli,* 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *see also Gulf Best Electric, Inc. v. Methe,* 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994).

In this case, employer sought Section 8(f) relief based upon claimant's prior injuries to his back, which, it contends, combined with claimant's subsequent 2003 work-related injuries to result in his current permanent total disability.[3] The administrative law judge found that claimant's pre-existing back condition constitutes a manifest, pre-existing permanent partial disability. With regard to the contribution element, the administrative law judge found that it is not satisfied as employer failed to establish that the 2003 injury, in and of itself, did not cause claimant's total disability. Employer contends that the administrative law judge did not discuss the opinions of Drs. Stark and Filbrandt, which, it avers, establish that claimant's work injury is not the sole cause of claimant's total disability. Dr. Filbrandt stated that the work accident aggravated claimant's back condition and that his back condition following the work accident was not "dramatically different" in June 2003 than it had been in December 2002. EX 14 at 19, 33. Dr. Stark stated that the prior disabling condition contributed "quite substantially" to claimant's current disability and that claimant would be more employable if he had suffered only the effects of his 2003 injury. EX 17 at 13. He also stated that claimant's current back condition is "far worse" because of the pre-existing back injury. EX 10 at 36.

While the administrative law judge correctly stated that evidence that claimant's condition is worse due to the combination of the pre-existing condition and the work injury is insufficient to establish that the current disability is not due solely to the work accident, *see Jaffe New York Decorating,* 25 F.3d 1080, 28 BRBS 30(CRT), we must

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[2] Because we affirm the administrative law judge's finding that claimant is totally disabled, we need not address employer's arguments concerning the contribution standard when a claimant is partially disabled.

[3] The record reflects that claimant suffered several prior back injuries and had surgery on his back in 1996 and 2002.

remand the case for the administrative law judge to address these medical opinions. Employer can satisfy the contribution requirement in cases where the pre-existing disability combines with the current injury to increase what would otherwise have been a partial disability into a totally disabling one. *Ceres Marine v. Director, OWCP [Allred],* 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997). The administrative law judge must resolve this issue based on factors such as the severity of the pre-existing disability and the current one as well as the strength of the relationship between them. *Id.; Pennsylvania Tidewater Dock Co. v. Director [Lewis],* 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *see generally Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). In this case, the administrative law judge did not address the totality of the relevant evident, and particularly Dr. Stark's opinion, regarding the effect of the pre-existing disability on claimant's employability. Therefore, we vacate the administrative law judge's finding that employer is not entitled to Section 8(f) relief and we remand the case for further findings. *See, e.g., Wheeler v. Newport News Shipbuilding & Dry Dock Co*., 39 BRBS 49 (2005) .

Accordingly, the administrative law judge's Decision and Order awarding claimant permanent total disability benefits is affirmed. The denial of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge