BRB No. 95-2195

BILLY W. ALLRED	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CERES MARINE TERMINAL AND CERES GULF, INCORPORATED	)	DATE ISSUED:
	)	
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 and Supplemental Decision and Order (Upon Motion For Reconsideration) of Frank D. Marden, Administrative Law Judge, United States Department of Labor.

Cynthia A. Galvan (Brown, Sims, Wise & White, P.C.), Houston, Texas, for self-insured employer.

Mark Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation, United States Department of Labor.

Before: HALL, Chief, Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order (Upon Motion For Reconsideration) of Administrative Law Judge Frank D. Marden 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).

On June 14, 1990, claimant injured his neck and left shoulder in the course of his employment as a longshoreman for employer. The administrative law judge found claimant was permanently totally disabled and awarded compensation commencing June 14, 1990, and medical benefits. The only issue relevant to this appeal involved employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge found that claimant's pre-existing hypertension, diabetes, 1960 arm injury, 1977 elbow injury, 1979 neck and shoulder injury,[1] and 1982 back injury were pre-existing permanent partial disabilities within the meaning of Section 8(f). The administrative law judge further found that claimant's hypertension and prior back, arm, and elbow injuries were manifest to employer prior to the June 1990 work injury. Finally, the administrative law judge found that employer established that the pre-existing permanent partial disabilities contributed to claimant's ultimate disability because the medical opinions of Drs. Athari, Kant, and Litel established that claimant's current injury was not in and of itself totally disabling. Accordingly, the administrative law judge awarded employer Section 8(f) relief. In a Supplemental Decision and Order on reconsideration the administrative law judge reaffirmed his finding of Section 8(f) entitlement. On appeal, the Director challenges the award of Section 8(f) relief. Employer responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent total disability compensation from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to the employer; and 3) the permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be affirmed, because the medical evidence he relied upon in finding the contribution element met does not provide substantial evidence to satisfy the standard articulated in *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990), which is controlling as this case arises within the appellate jurisdiction of the United States Court of Appeals for the Fifth Circuit. In *Two "R" Drilling*, the court rejected a "common-sense" approach whereby contribution is presumed where a claimant with a history of prior back injuries suffers a final injury to his back resulting in permanent total disability, reasoning that doing so would effectively read the

[1]Although the administrative law judge did not specifically find that claimant's 1979 neck and shoulder injury was a pre-existing permanent partial disability in his discussion of this element of Section 8(f) entitlement, in his discussion of the contribution requirement he listed claimant's pre-existing shoulder injury as one of the pre-existing conditions which contributed to claimant's disability.

contribution element of Section 8(f) out of law by collapsing the first and third elements of Section 8(f) entitlement. *Id.*, 894 F.2d at 750, 23 BRBS at 35 (CRT). Because employer in that case failed to introduce any evidence to affirmatively establish that claimant's current disability was not due solely to the employment injury, the Fifth Circuit held that the contribution element was not satisfied as a matter of law and affirmed the administrative law judge's denial of Section 8(f) relief.

In finding contribution in the present case, the administrative law judge credited the opinions of Drs. Litel, Kant, and Athari. Dr. Litel stated "(t)here is no doubt claimant's degenerative cervical spine disease extant prior to the June 14, 1990 accident, combined with the June 14, 1990, accident and injury resulting in disability which is materially and substantially greater than would have occurred from the June 14, 1990 accident alone." EX-46. Dr. Kant deposed that claimant's work-related injury combined with his pre-existing injuries to contribute to his current condition, CX-15 at 26, 43-44,[2] while Dr. Athari found that claimant would be worse off with a back injury, back surgery, a knee (injury), and a foot (injury) than if he came in with just a neck injury and was otherwise perfectly healthy. CX-19 at 37.[3] Although these medical opinions establish that claimant's pre-existing disabilities in conjunction with the June 1990 work injury resulted in his having greater disability, the contribution requirement is not satisfied merely by showing that the pre-existing condition made the disability worse than it otherwise would have been with only the subsequent injury. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992). Rather, employer is required to present evidence which shows that claimant is not totally disabled by the last work injury alone; the total disability must result from a combination of the pre-existing conditions and the work injury. *See Dominey v. Arco Oil & Gas Co.*, BRBS , BRB No. 94-2471 (August 20, 1996). Because the medical opinions of Drs. Litel, Kant, and Athari do not establish that the June 1990 injury alone would not have caused claimant's permanent total disability as is required under *Two "R" Drilling*, we reverse the administrative law judge's finding of contribution based on these opinions and consequently his award of Section 8(f) relief.[4]

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[2]Specifically, Dr. Kant found that claimant's current condition is a result of both his pre-existing back condition and the work-related injury of June 14, 1990; that in all medical probability claimant's current disability combined with his prior injuries and disabilities to contribute to his current condition today; and that claimant's prior injuries combined with the physical disability that he has today made his current disability materially and substantially greater than that which would have occurred from the June 14th (work-related) injury alone from a whole body standpoint, but that the effect of the other injuries upon his neck injury is unknown. CX-15 at 26, 43-44.

[3]Although Dr. Athari also testified on deposition that claimant's disability was solely due to the last work injury, indicating that "you can't be more dead than you are," CX-19 at 43, the administrative law judge considered but apparently did not credit this testimony. *Compare* Decision and Order at 32 and Decision and Order at 33.

[4]Inasmuch as employer must establish all three elements necessary for Section 8(f) relief, our reversal of the administrative law judge's Section 8(f) contribution finding obviates the need for us to address the Director's allegation that the administrative law judge committed reversible error to the extent he based his Section 8(f) finding on claimant's pre-existing cervical degenerative joint disease because this condition was not manifest.

Accordingly, the administrative law judge's award of Section 8(f) relief is reversed. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order (Upon Motion For Reconsideration) are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge