BRB No. 00-0294

JOANN ARTIS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 31, 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 Awarding Benefits and Denying 8(f) of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Laura Stomski (Henry L. Solano, Solicitor of Labor, Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Denying 8(f) (98-LHC-2304) 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 conclusions of law of the administrative law judge if they 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 and employer stipulated that claimant sustained a work-related injury to both wrists and hands, diagnosed as thoracic outlet syndrome. The parties further stipulated that claimant is entitled to temporary total disability benefits from March 22, 1996 through August 31, 1997, 33 U.S.C. §908(b), permanent total disability benefits from September 1, 1997 through December 18, 1997, 33 U.S.C. §908(a), and permanent partial disability benefits from December 19, 1997, and continuing pursuant to 33 U.S.C. §908(c)(21). Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer contended that claimant's thoracic outlet syndrome is materially and substantially worsened by a pre-existing back disability.

The administrative law judge found that a back injury claimant sustained at work in 1991 resulted in a serious, lasting physical condition such that it constitutes a manifest pre-existing permanent partial disability for purposes of Section 8(f). With regard to the contribution element, the administrative law judge found that the vocational and medical evidence of record does not establish that claimant's current permanent partial disability is materially and substantially worse due to the pre-existing back impairment. Thus, the administrative law judge denied employer's claim for Section 8(f) relief. Employer appeals this finding, and the Director, Office of Workers' Compensation Programs, responds, urging affirmance.

In order to establish entitlement to Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant has a manifest pre-existing permanent partial disability, that the current disability is not due solely to the subsequent injury, and that the current disability is materially and substantially worse due to the pre-existing disability than it would be from the subsequent injury alone. *Director, OWCP v. Newport News & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 185-86, 27 BRBS 116, 130(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). Employer may establish the contribution element by "medical evidence or otherwise," *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997), but first must quantify the level of the impairment that would ensue from the work-related injury alone, so that the administrative law judge may have a

basis for determining if the ultimate permanent partial disability is materially and substantially greater due to the contribution of the pre-existing disability. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 138-39, 32 BRBS 48, 50(CRT) (4th Cir. 1998).

After consideration of employer's contentions, we affirm the administrative law judge's finding that employer did not satisfy the contribution element, as it rational, supported by substantial evidence, and in accordance with law. Gary Klein, a vocational rehabilitation consultant, testified that with only the thoracic outlet syndrome, claimant could earn approximately $6 to $7 per hour in retail positions and in some assembly positions. Tr. at 9. He further stated that when the back condition is considered as well, claimant's wage-earning capacity would decrease to barely above minimum wage. *Id*. at 12.

The administrative law judge found that Mr. Klein's testimony, if credited, is sufficient to quantify the level of claimant's disability with and without the pre-existing condition. *See Harcum II*, 131 F.3d at 1079, 31 BRBS at 164(CRT); *see generally Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000). He concluded, however, that Mr. Klein's testimony is not supported by the medical evidence of record. The administrative law judge found that the functional capacities assessment mentions back pain in only one place in a ten-page report, *i.e.*, the note that claimant could bend over only for 25 seconds before discontinuing due to back pain. Decision and Order at 6; EX 3i. The administrative law judge found that Dr. Mein, based on the functional capacity assessment, determined that claimant has a zero percent permanent partial disability rating and has "no restrictions" for bending. EXs 4a, 5. Although Dr. Mien was asked to place restrictions on claimant due to her thoracic outlet syndrome, *id.*, there is no evidence of record concerning any restrictions placed on claimant due to her back condition.[1] Thus, the administrative law judge concluded that Mr. Klein's opinion regarding restrictions due to claimant's back condition is unfounded. Employer bears the burden of producing sufficient evidence to support its claim for Section 8(f) relief. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). The administrative law judge's weighing of the evidence is rational. Moreover, his finding that Mr. Klein's testimony lacks a medical foundation is supported by substantial evidence. We therefore affirm the finding that employer has not established the contribution element through Mr. Klein's testimony.

[1]Mr. Klein surmised that restrictions on twisting, kneeling and squatting were not placed due to the thoracic outlet syndrome. Tr. at 12-13. Dr. Mien did not place any restrictions on claimant's ability to squat. EX 5. He did place restrictions on claimant's ability to kneel, but claimant sustained a prior knee injury, as well as a prior back injury, and the therapist performing the tests stated that claimant had to stop the kneeling test due to knee pain. EXs 3i, 5. The therapist did not test claimant's ability to twist. EX 3i.

We also reject employer's contention that the administrative law judge erred in finding that Dr. Reid's opinion is insufficient to establish that claimant's current disability is not due solely to the subsequent injury. Dr. Reid stated that claimant can perform available light duty and sedentary work given her bilateral hand injuries. He further stated that she would not be hired for jobs requiring heavy manual labor due to her back injury. EX 9d. The administrative law judge stated that inasmuch as Dr. Reid initially stated claimant was limited to light and sedentary work as a result of her hand injuries, the fact that the back injury also would limit claimant to light duty work contributes nothing to the disability due to the hand injuries alone. The administrative law judge's interpretation of Dr. Reid's report is rational, as is his resultant conclusion that Dr. Reid's opinion establishes that the work injury alone has resulted in claimant's current level of disability. *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT). Thus, as the contribution element is not satisfied, we affirm the administrative law judge's denial of Section 8(f) relief.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge