BRB No. 02-0318

MARGARET M. SUMLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 9, 2002
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Granting Benefits to the Claimant and Denying Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

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

Whitney R. Given (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Burke Wong, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Granting Benefits to the Claimant and Denying Section 8(f) Relief (1999-LHC-2199, 2499, 2500) of Administrative Law Judge Richard K. Malamphy 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 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).

This case is before the Board for the second time. The Board held oral argument on the issues presented in Newport News, Virginia, on August 20, 2002.

Claimant filed three separate claims for compensation under the Act as a result of three work-related injuries allegedly sustained while working for employer.[1] Claimant initially injured her back and neck on February 8, 1984, while painting bathroom partitions. At the time of the 1984 injuries, claimant was employed in employer=s paint department, painting structures at employer=s shipyard such as bathrooms, office buildings, transformers, trailers, decks, and lines on the pier. Following her 1984 injury, claimant returned to light duty work for employer in its air conditioning department, where she cut, delivered, and changed air conditioner filters used in buildings at employer=s shipyard. On November 8, 1988, claimant sustained a hernia injury while she was delivering filters to the air conditioning unit in employer=s land level building. Following hernia repair surgery, claimant returned to her light duty position in employer=s air conditioning department. On March 15, 1990, claimant experienced severe pain in her neck, shoulder and arm while pulling filter cages apart in order to change filters in an air conditioning unit on the roof of employer=s welding school building. Claimant has not returned to work since the date of this last incident. She underwent surgery on February 10, 1992, for relief of her right thoracic outlet syndrome.

[1]Employer voluntarily paid claimant temporary total disability and temporary partial disability compensation during various periods of time following each of the three injuries for which compensation was sought. Employer terminated its voluntary compensation payments on June 20, 1999, on the basis that claimant did not meet the status requirement of Section 2(3) of the Act, 33 U.S.C. ' 902(3).

In his initial Decision and Order dated March 23, 2000, the administrative law judge first set forth the stipulations entered into by claimant and employer, but he did not expressly accept those stipulations; in this regard, claimant and employer stipulated, *inter alia,* that claimant sustained three injuries, occurring on February 8, 1984, November 8, 1988 and March 15, 1990, while in the course and scope of her employment with employer, and that, if the status requirement of Section 2(3) is found to have been met, claimant is entitled to permanent partial disability compensation.[2] Next the administrative law judge summarily determined that claimant was not covered under Section 2(3) of the Act, 33 U.S.C. ' 902(3), because her duties were not uniquely maritime. Consequently, the administrative law judge denied the benefits sought by claimant without considering the remaining issues. Thereafter, claimant appealed to the Board, challenging the administrative law judge=s finding that she did not meet the status requirement of Section 2(3) of the Act.

[2]The Director, Office of Workers= Compensation Programs, who did not appear at the hearing, did not participate in the stipulations. Thus, the stipulation between claimant and employer that claimant sustained three work-related injuries cannot be used against the Director with respect to the liability of the Special Fund under Section 8(f) of the Act, 33 U.S.C. ' 908(f). *See E.P. Paup Co. v. Director, OWCP,* 999 F.2d 1341, 27 BRBS 41(CRT)(9th Cir. 1993).

On appeal, the Board determined that the legal standard for Section 2(3) coverage applied by the administrative law judge was erroneous, stating that the status inquiry does not concern whether claimant=s duties were more maritime specific than those conducted in non-maritime settings. The Board held that, pursuant to the decision of the United States Supreme Court in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989),[3] the correct standard is whether claimant=s painting and air conditioning work at employer=s shipyard facilities were integral to the ship construction process, *i.e.*, whether employer=s ship construction process could continue without claimant=s function. The Board thus vacated the administrative law judge=s Decision and Order and remanded the case for the administrative law judge to reconsider the coverage issue consistent with *Schwalb,* emphasizing that the standard to be applied is whether claimant=s painting and air conditioning work at employer=s shipyard facility was essential to the building and repairing of ships. *See Sumler v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 00-0678 (March 30, 2001)(unpublished).

In his Decision and Order on Remand issued on December 18, 2001, the administrative law judge determined that claimant=s work changing air conditioning filters in employer=s shop buildings where fabrication activity occurred was integral to the operation of these buildings and, accordingly, he found the status requirement to be satisfied. Next, having implicitly found that claimant had a pre-existing permanent partial disability which was manifest to employer, the administrative law

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[3]In *Schwalb,* the Supreme Court upheld coverage for three employees, two of whom worked at a loading terminal performing housekeeping and janitorial services and one employee whose job was to maintain and repair loading equipment. The two employees engaged in housekeeping and janitorial services were responsible for cleaning spilled coal from loading equipment in order to prevent equipment malfunctions as well as ordinary janitorial services. Holding all three employees covered, the Court reasoned that employees Awho are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act.@ *Schwalb,* 493 U.S. at 47, 23 BRBS at 99(CRT). The Court stressed that coverage Ais not limited to employees who are denominated >longshoremen= or who physically handle the cargo,@ *id.,* and held that Ait has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity . . . will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel.@ 493 U.S. at 45, 23 BRBS at 98(CRT); *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 272-274, 6 BRBS 150, 165 (1977). In addressing the janitorial work performed, the Court further stated that Aequipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work.@ 493 U.S. at 48, 23 BRBS at 99 (CRT).

judge determined that the contribution element of Section 8(f) of the Act, 33 U.S.C. '908(f), was not met. In this regard, the administrative law judge found that claimant=s disability after March 15, 1990 was a natural progression of her 1984 work-related injury. Thus, the administrative law judge denied employer=s request for Section 8(f) relief. Based upon the foregoing, the administrative law judge awarded claimant permanent total disability compensation commencing October 2, 1990 and continuing.[4]

On appeal, employer challenges the administrative law judge=s finding that the Section 2(3) status requirement was satisfied, arguing that the administrative law judge erred in finding that claimant=s work in its air conditioning department was integral to the shipbuilding and ship repair functions performed at its facilities. Employer also contests the denial of Section 8(f) relief, contending that the administrative law judge erred in finding that the contribution requirement was not met. Claimant responds, urging affirmance of the administrative law judge=s status determination. The Director, Office of Workers= Compensation Programs (the Director), urges affirmance of both the administrative law judge=s finding of status and his determination that the contribution requirement necessary for Section 8(f) relief to be awarded had not been satisfied.

Section 2(3) Status

Section 2(3) provides that Athe term >employee= means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .@ 33 U.S.C. '902(3)(1998). Generally, a claimant satisfies the Astatus@ requirement if she is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. '902(3); *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1019 (1998). To satisfy the status requirement, a claimant need only Aspend at least some of [her] time in indisputably longshoring operations.@ *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 273, 6 BRBS 150, 165 (1977).

In two recent cases involving maintenance employees, the Board addressed the issue of whether those employees met the Section 2(3) status requirement;

[4]Although claimant and employer originally stipulated that claimant was entitled to permanent partial disability benefits, the administrative law judge stated that employer now takes the position that claimant has been permanently totally disabled since October 2, 1990. Employer does not challenge the administrative law judge=s finding of total disability in its appeal to the Board.

specifically, the Board considered whether, consistent with the Supreme Court=s holding in *Schwalb,* the employees= functions were essential to employer=s shipbuilding process. In *Watkins v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 21 (2002), the Board held that the claimant, who spent four hours every day emptying, from ships= sides, 55 gallon drums filled with shipbuilding debris was covered under the Act pursuant to *Schwalb.* Although the record in *Watkins* contained no direct evidence that claimant=s failure to perform her job would be an impediment to employer=s shipbuilding operations, the Board held that the administrative law judge erred in failing to draw the only rational inference based on the evidence presented, which is that claimant=s failure to remove the debris eventually would lead to such a build-up of trash that work on the ships could not continue. *Watkins,* 36 BRBS at 23-24. Consistent with the Supreme Court=s statement in *Schwalb* that Ait is irrelevant that an employee=s contribution to the loading process is not continuous or that repair or maintenance is not always needed,@ *Watkins*, 36 BRBS at 24, *quoting Schwalb,* 493 U.S. at 47, 23 BRBS at 99(CRT), the Board concluded Athat the trash=s impediment to shipbuilding may not be immediate does not compel the conclusion that claimant=s work removing shipbuilding debris is not integral to the shipbuilding process.@ *Watkins,* 36 BRBS at 24. The Board accordingly held that the claimant=s work emptying trash barrels from the ship=s sides met the status test as it was integral to the employer=s shipbuilding and repair operations. *Id.*

In *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002), the Board applied the rationale contained in its decision in *Watkins* in reversing the administrative law judge=s finding that the claimant was not covered under Section 2(3). Specifically, in *Ruffin,* the Board held that the claimant=s duties, which entailed the removal of metal shavings, discarded metal and other debris from around machinery while the machines were in operation, was integral to the employer=s shipbuilding and repair process. The Board reasoned that, consistent with the concept set forth in *Schwalb* and *Watkins* that the impediment to shipbuilding need not be immediate, the evidence in *Ruffin* established that eventually the shipbuilding process would be impeded by the accumulation of detritus around the machines.[5] *Ruffin,* 36 BRBS at 55; *see also Graziano v. General Dynamics Corp.,* 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Ry. Co.,* 618 F.2d 1059 (4th Cir. 1980).

[5]The Board stated, in this regard, that although the record does not establish the rate at which the debris accumulated, under the facts of this case, it would defy logic and the *Schwalb* decision to require the claimant to demonstrate specifically how quickly the debris accumulates and the potential effects of claimant=s failure to perform her job. *Ruffin,* 36 BRBS at 55.

In the instant case, the administrative law judge, on remand, first set forth the parties= contentions and summarized the evidence of record relevant to the issue of whether claimant=s work was integral to employer=s ship construction and repair process. He then concluded that claimant satisfied the Section 2(3) status requirement, stating:

> The undersigned has reviewed the decisions cited by the Board as well as those mentioned by the parties. *Schwalb* speaks of work integral to the construction and repairing of vessels. Dyke testified that Sumler changed filters on occasion and that the filters in the fabrication shops had to be replaced more often than in other places.
>
> In addition, *Caputo* holds that an employee need only spend some of her time in indisputably longshoring operations. The fabrication shop clearly meets the longshore definite (sic) of status. The claimant=s changing of filters was integral to the operation of the fabrication shop.
>
> Therefore, the claimant has met the longshore criteria for Astatus.@

Decision and Order on Remand at 4-5.

After thoroughly considering the arguments raised by employer on appeal, we affirm the administrative law judge=s finding that the Section 2(3) status requirement was satisfied in the case at bar, and his consequent finding that claimant is a covered employee, as the uncontroverted evidence of record supports his conclusion that claimant=s work, changing air conditioning filters in the fabrication shops in employer=s shipyard, was integral to the operation of those shops.[6] *See Schwalb,* 493 U.S. at 47, 23 BRBS at 99(CRT); *Ruffin,* 36 BRBS at 55; *Watkins,* 36 BRBS at 23-24. The uncontradicted record evidence in this case establishes that in the course of claimant=s work in employer=s air conditioning department, claimant cut, delivered, and helped to change air conditioning filters used in employer=s buildings throughout the shipyard. Significantly, it is uncontroverted that claimant delivered filters to buildings where ship construction work was being performed. *See* Tr. at 16-18, 21-24, 36-41; *see also* Ex. 9 at 11-13. A.R. Dyke, employer=s air

[6]While not addressed by the administrative law judge on remand, claimant=s work as a painter at the time of the 1984 injury is covered pursuant to the Fourth Circuit=s decision in *Price v. Norfolk & Western Ry. Co.,* 618 F.2d 1059 (4th Cir. 1980), as her uncontradicted testimony establishes that her job involved painting shipyard structures. Tr. at 21.

conditioning department supervisor, who was claimant=s most recent supervisor, testified that the air conditioning filters with which claimant worked were used for the ventilation of employer=s shipyard buildings, stating that all of the buildings in which claimant worked were inside the shipyard where the ships are actually constructed. *See* Tr. at 37-39. Mr. Dyke further testified that the frequency with which filters were changed varied according to the location of the air conditioners, with filters in some buildings being changed as frequently as once a week and in other buildings once a month. *See id.* at 39. Having testified that filters needed to be changed more frequently in buildings in which actual ship construction activity was performed than in other shipyard buildings, Mr. Dyke acknowledged that the filters in shop buildings where parts for the ships were actually being fabricated would also be changed frequently. *See id*.

In challenging the administrative law judge=s finding that claimant=s work changing air conditioning filters was integral to employer=s shipbuilding operations, employer avers that there is no evidence to suggest that ventilation in its fabrication facilities would be impeded without the claimant to occasionally change the filters and that air conditioning itself is merely a comfort measure, incidental to the shipbuilding process.[7] To the contrary, as set forth in the preceding summary of the

[7]In addition, employer interprets the administrative law judge=s statement that Athe fabrication shop clearly meets the longshore definite (sic) of status,@ Decision and Order at 5, as an indication that the administrative law judge erroneously merged the situs and status inquiries. It is undisputed, however, that claimant satisfied the Section 3(a), 33 U.S.C. '903(a), situs test. In context, the administrative law judge=s statement can also be interpreted as finding that the work performed in fabrication shops involved covered shipbuilding work. We thus reject employer=s contention that the administrative law judge equated the location of claimant=s work activity with her actual function.

Furthermore, in arguing that claimant=s air conditioning work does not constitute maritime employment, employer also relies on the support services rationale set forth in *Dravo Corp. v. Banks,* 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977). Employer avers that claimant=s duties have no traditional maritime characteristics, but, rather, are typical of the Asupport services@ performed in any industrial setting. Employer=s reliance on this reasoning regarding support services is misplaced, as this rationale has been rejected as a test for coverage. *See Ruffin v. Newport News Shipbuilding & Dry Dock Co.,* 36 BRBS 52, 53 (2002); *see also Graziano v. General Dynamics Corp.,* 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Jackson v. Atlantic Container Corp.,* 15 BRBS 473, 474 (1983). Moreover, the Board, in its earlier decision in this case, expressly stated that the

evidence of record, employer=s own witness, Mr. Dyke, testified that claimant=s work duties included the continuous changing of filters in employer=s shipyard buildings where ship fabrication and construction was performed. He further testified that the filters in those areas of the shipyard where fabrication occurred were changed on a frequent basis.[8] This evidence, credited by the administrative law judge, supports his conclusion that claimant=s work was integral. In contrast, there is no evidence that claimant=s work was not necessary to the operation of shipyard equipment. We hold, therefore, that on the basis of this uncontradicted evidence the administrative law judge properly determined that claimant=s work changing the filters in the fabrication shops was integral to employer=s shipbuilding and ship repair process.

Moreover, we reject employer=s contention that Mr. Dyke=s testimony that air conditioning was first introduced in employer=s shipyard in the 1950's, *see* Tr. at 37, demonstrates that air conditioning is merely a comfort measure, and is thus merely incidental to the shipbuilding process. As argued by both the Director and claimant, it defies common sense to suggest that employer would have incurred the considerable expense of installing and maintaining an air conditioning system for the past fifty years if such a system were not required in order for employer to operate a competitive shipbuilding operation in the Commonwealth of Virginia. Employer=s reliance on testimony that air conditioning was first introduced in its facilities in the 1950's fails to account for any technological advances or innovations in its shipbuilding operations introduced during or subsequent to the 1950's which would require the use of air conditioning. Furthermore, employer=s reliance on only that portion of Mr. Dyke=s testimony that the shipyard operated without air conditioning until the 1950's does not take into account Mr. Dyke=s further testimony, that the filters in areas in which construction occurs need to be changed more frequently than in other areas of the shipyard; this testimony clearly supports the inference that a properly maintained air conditioning, or ventilation, system in employer=s production areas is essential to employer=s shipbuilding operations.

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standard for coverage does not concern whether claimant=s duties were more maritime specific than those conducted in non-maritime settings, *see Sumler,* BRB No. 00-0678, slip op. at 4, and this holding represents the law of the case. *See generally Ion v. Duluth, Missabe & Iron Range Ry. Co.,* 32 BRBS 268 (1998).

[8]Employer reiterates in its reply brief, *see* Reply Br. at 2, an assertion originally made in its Petition for Review, *see* P/R at 6, that Mr. Dyke testified that even if no one changed the air conditioning filters, the air conditioning units would continue to function and provide ventilation. Although employer cites Mr. Dyke=s testimony at p.37 of the hearing transcript, nowhere on that page or elsewhere in his testimony did Mr. Dyke make such a statement.

Next, we reject employer=s contention that the evidence does not establish that ventilation in the fabrication shops would be impeded without claimant=s work changing the filters in those areas.[9] It would be inconsistent with the Supreme Court=s decision in *Schwalb* to require claimant to demonstrate with specific evidence, such as the level of particulates in the air in the shipyard fabrication shops or the frequency with which air conditioning filters require changing, the effects of claimant=s failure to perform her job. *See Ruffin,* 36 BRBS at 55. Moreover, claimant is not required to demonstrate that the effect on the air conditioning system would be immediate were she not to replace the filters; rather, her work is considered essential if her failure to replace the filters would eventually impede the operation of the air conditioning system. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT); *Ruffin,* 36 BRBS at 55; *Watkins,* 36 BRBS at 23-24; *see also Price,* 618 F.2d at 1062 n.4. As the only evidence of record supports the conclusion that claimant=s work was essential to the continued functioning of the employer=s shipyard=s air conditioning system, and that this system was integral to employer=s shipyard operations, the administrative law judge=s finding of Section 2(3) coverage is affirmed. *See Schwalb,* 493 U.S. at 48, 23 BRBS at 99(CRT); *Ruffin,* 36 BRBS at 55; *Watkins,* 36 BRBS at 23-24.[10]

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[9]In this regard, employer additionally avers that claimant=s work changing filters in the fabrication shops cannot be considered essential to employer=s shipbuilding process because it was performed by claimant only on an occasional basis. We disagree. As the administrative law judge acknowledged in his decision, the Supreme Court=s decision in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 273, 6 BRBS 150, 165 (1977), holds that to satisfy the status requirement, a claimant need only Aspend at least some of [her] time in indisputably longshoring operations.@ *See* Decision and Order on Remand at 5. *See also Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1019 (1998). In the instant case, the evidence of record establishes that claimant was regularly assigned to change filters and that this work was neither momentary nor episodic; therefore, claimant=s work changing filters in the fabrication shops could not be viewed, on the basis of the record evidence, as so *de minimis* as to defeat coverage. *See Shives,* 151 F.3d at 170, 32 BRBS at 130(CRT). Moreover, although the administrative law judge confined his analysis of claimant=s Section 2(3) status to her work changing filters in the fabrication shops, the remainder of her work in employer=s air conditioning department, which entailed cutting, delivering, and changing filters throughout the shipyard, arguably also constitutes maritime employment.

[10]In light of our affirmance of the administrative law judge=s finding of Section 2(3) status, we need not address the Director=s contentions with regard to the application of the Section 20(a), 33 U.S.C. '920(a), presumption to the issue of coverage as resolution of this issue is not necessary to decide this appeal.

Section 8(f) - Contribution

Lastly, employer challenges the administrative law judge=s denial of its request for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability or death 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 claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. '908(f); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [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 on other grounds,* 514 U.S. 122, 29 BRBS 87(CRT)(1995); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). A work-related aggravation of a pre-existing condition will suffice as contribution to the total disability, whereas Section 8(f) is not applicable where the claimant=s disability is the result of a natural progression of the pre-existing disability. *See Lockhart v. General Dynamics Corp.,* 20 BRBS 219, 223 (1988), *aff=d sub nom. Director, OWCP v. General Dynamics Corp.,* 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992); *Vlasic v. American President Lines,* 20 BRBS 188, 192 (1987).

In the present case, employer sought Section 8(f) relief based on claimant=s pre-existing 1984 injuries to her neck and back which, it contends, combined with claimant=s subsequent 1990 work-related injuries to her neck, shoulder and arm to result in her ultimate permanent total disability. The administrative law judge, after implicitly finding that claimant had a pre-existing permanent partial disability which was manifest to employer, determined that the contribution element was not satisfied. In this regard, the administrative law judge accepted the Director=s position that claimant=s disability after March 15, 1990, was a direct result and natural consequence of her 1984 work-related injury and that, pursuant to the Board=s decision in *Vlasic,* 20 BRBS at 192, Section 8(f) is not applicable. In rendering this determination, the administrative law judge specifically found that the record does not contain medical records between mid-March and mid-April 1990, and he thus determined that the nature and extent of claimant=s March 1990 injury is in doubt. Further stating that Drs. Harmon, McAdam and Winfrey focused on claimant=s post-1990 impairment as being related to her 1984 injury, the administrative law judge concluded that the 1984 injury was the source of claimant=s totally disabling impairment.

In challenging these findings on appeal, employer avers that claimant=s present disability is based on her original injury plus her re-injury, or aggravation, in 1990. In support of this position, employer contends that the medical evidence of record establishes that the 1990 injury was a minor injury, in and of itself, having a significant impact on claimant=s total disability only because of her pre-existing condition. The Director responds, asserting that the administrative law judge=s factual findings that employer failed to establish that an injury occurred in 1990 and that claimant=s post-1990 symptoms were simply a natural progression of her 1984 injury are supported by substantial evidence.[11]

We cannot affirm the administrative law judge=s finding that employer failed to establish the contribution requirement of Section 8(f), as our review of the record reveals that the administrative law judge=s implicit conclusion that claimant did not suffer a work-related aggravation in March 1990 was based on a mischaracterization of the medical evidence of record. *See, e.g., Cairns v. Matson Terminals, Inc.,* 21 BRBS 252 (1988). First, the administrative law judge stated that the absence of medical records from mid-March to mid-April 1990 casts doubt on the nature and extent of an injury occurring in March 1990. *See* Decision and Order on Remand at 13. The record in this case, however, does contain medical records from that period of time. Specifically, the record includes Dr. Stiles= office notes reflecting that following a 2 2 year period in which claimant did not see Dr. Stiles, she called regarding shoulder pain on March 19, 1990 and was seen on March 22, 1990, where she was found to have an acute muscle spasm and pain in the right neck, received injections, and was taken off work. *See* CX 2. On April 5, 1990, claimant returned to Dr. Stiles with a severe headache, pain in her right shoulder and arm and numbness in her right arm, and was referred to Dr. McAdam, a neurosurgeon, who had not seen claimant for several years. *See* CX 2; EX 18. Moreover, although the administrative law judge=s Decision and Order contains summaries of Dr. Stiles= April 1992 report stating that claimant suffered a work-related aggravation of her neck and shoulder condition in March 1990, Dr. Parent=s September 1997 report relating claimant=s present condition to her 1990 work injury, and Dr. Reid=s March 1999 report stating that claimant=s March 1990 work-injury was an aggravation of her prior injury, the administrative law judge failed to make explicit credibility findings regarding these physicians= conclusions. *See* Decision and Order at 8-11; CXs 4, 5; EX 7. Furthermore, the administrative law judge=s statement that the reports of Drs. Harmon, McAdam and Winfrey attribute claimant=s post-1990 impairment to her 1984 injury is not completely accurate. *See* Decision and Order on Remand at 13-14. Although Dr. Harmon did attribute claimant=s post-1990 impairment to her

[11]As the Director does not challenge the administrative law judge=s determination that claimant had a pre-existing permanent partial disability which was manifest to employer, it is affirmed.

1984 injury, *see* EX 22, the reports of Drs. Winfrey and McAdam do not address the cause of claimant=s 1990 condition. *See* EXs 18, 19.

The Board is not bound to accept an ultimate finding or inference of an administrative law judge if the decision discloses that it was reached in an invalid manner. *See Howell v. Einbinder,* 350 F.2d 442, 444 (D.C. Cir. 1965); *Cairns,* 21 BRBS at 254 n.1. Because the administrative law judge did not accurately characterize, analyze and discuss the evidence relevant to a determination of whether claimant suffered a work-related injury, or aggravation, in 1990 or whether her post-1990 condition is the result of a natural progression of her 1984 injury, we must vacate his finding that the contribution element is not satisfied, and remand the case for further consideration. *See generally Shrout v. General Dynamics Corp.,* 27 BRBS 160, 165 (1993)(Brown, J., dissenting). On remand, the administrative law judge must specifically determine whether a claimant sustained a new injury, or aggravation, in March 1990, based on all the relevant evidence of record. *See Lockhart,* 20 BRBS at 223; *Vlasic,* 20 BRBS at 192. If he finds that claimant did sustain an injury, however minor, in 1990, he must analyze the contribution element under the appropriate legal standard; to wit, whether employer has shown that claimant=s ultimate permanent total disability is not due solely to the subsequent work-related injury. *See Harcum II,* 131 F.3d at 1081, 31 BRBS at 166(CRT); *Harcum I,* 8 F.3d at 185, 27 BRBS at 130(CRT).

Accordingly, the administrative law judge=s finding that claimant satisfied the status test of Section 2(3), and his consequent award of disability benefits to claimant, is affirmed. The administrative law judge=s determination that employer did not meet the contribution element of Section 8(f) is vacated, and the case is remanded for further consideration of that issue consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge