U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 14-0335
and 14-0335A

GIUSEPPE CUTIETTA	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
	)	
Self-Insured	)	DATE ISSUED: July 8, 2015
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and the Order Granting Motion for Reconsideration of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Eric A. Dupree and Paul R. Myers (Dupree Law, APLC), Coronado, California, for claimant.

Roy D. Axelrod (Law Office of Roy Axelrod), Solana Beach, California, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order and the Order Granting Motion for Reconsideration (2011-LHC-00473) of Administrative Law Judge Paul C. Johnson, 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a cumulative trauma injury to his lower back over the course of his decades-long work for employer as a shipwright through September 29, 2003. Claimant's treating chiropractor, Dr. Moyer, directed claimant to remain off work until February 20, 2004, while Dr. Close opined, on December 1, 2003, that claimant was temporarily and totally disabled. Subsequently, Drs. Luciano, Previte, Cleary and Adsit all found claimant incapable of returning to his usual work or performing any work involving heavy lifting. These physicians, however, each opined that claimant was capable of light-duty work with varying restrictions.

Claimant never returned to work as a shipwright after September 29, 2003. He testified that he worked with a vocational counselor and participated in real estate and computer applications vocational rehabilitation training programs from July 25, 2005 to April 6, 2006, but did not find gainful employment following the work injury. Claimant stated that he has not searched for work since 2006 and that he is now retired. He added that since April or June 2009, he has been receiving rental income from two apartments he owns. Claimant filed a claim seeking permanent total disability and medical benefits for his lower back injury. Employer controverted claimant's claim, raising, *inter alia*, issues pertaining to the extent of claimant's disability, the applicability of Sections 3(e) and 8(j), 33 U.S.C. §§903(e), 908(j), and its entitlement to Section 8(f) relief, 33 U.S.C. §908(f).

In his decision, the administrative law judge found that claimant's work-related back injury rendered him incapable of returning to his usual work for employer as of September 30, 2003, and that employer established the availability of suitable alternate employment as of March 1, 2005. The administrative law judge, therefore, found claimant entitled to temporary total disability benefits from September 30, 2003 to November 16, 2004, permanent total disability benefits from November 17, 2004 to February 28, 2005, and from July 25, 2005 to April 6, 2006, and to periods of permanent

partial disability benefits from March 1, 2005 up to the present.[1] The administrative law judge, however, found that claimant forfeited his right to compensation from October 13, 2010 to August 27, 2013, pursuant to Section 8(j) as he failed to report his rental earnings. The administrative law judge also found employer entitled to a Section 3(e) credit for payments it made to the California Employment Development Department (EDD) in reimbursement for payments the EDD made to claimant. The administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's finding that it is not entitled to Section 8(f) relief. BRB No. 14-0335. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Employer has filed a reply brief. Claimant, in his cross-appeal, challenges the administrative law judge's findings that employer established the availability of suitable alternate employment, that he forfeited his right to compensation pursuant to Section 8(j) from October 13, 2010 to April 27, 2013, and that employer is entitled to a Section 3(e) credit for its payments to the EDD. BRB No. 14-0335A. The Director responds in agreement with claimant's position that the administrative law judge erred in awarding employer a credit under Section 3(e) for payments it made to the EDD. Employer responds, challenging the timeliness of claimant's appeal but otherwise urging rejection of the issues raised in claimant's cross-appeal. Claimant has filed a reply brief.

Timeliness of Claimant's Cross-Appeal

Employer, in its response brief, contends that the Board's Order, dated August 21, 2014, concluding that claimant's cross-appeal, post-marked July 21, 2014, was timely filed is erroneous. Initially, we agree with claimant that employer failed to file a timely motion for reconsideration of the Board's August 21, 2014 Order. 20 C.F.R. §802.219(i).[2] Nonetheless, employer's contention of error is without merit.

[1]The administrative law judge awarded claimant permanent partial disability benefits from March 1, 2005 to July 24, 2005, and continuing from April 7, 2006, at the rate of $316.90 per week. The administrative law judge awarded claimant total disability benefits from July 25, 2005 to April 6, 2006, pursuant to *Abbott v. Louisiana Ins. Guar. Ass'n*, 27 BRBS 192 (1993), *aff'd*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), as claimant was enrolled in a vocational rehabilitation program during that time. This award is not contested. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9th Cir. 2005).

[2]20 C.F.R. §802.219(i) states, in pertinent part:

Section 802.205(b) of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.205(b), provides that a Notice of Cross-Appeal must be filed within 14 days of the date on which the first Notice of Appeal was filed or within 30 days from the date on which the Decision and Order was filed in the Office of the District Director. Section 802.207(b) provides that if a Notice of Appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, the appeal will be considered to have been filed as of the date of mailing.[3] 20 C.F.R. §802.207(b). Moreover, Section 802.221(a) provides that "in computing *any* period of time" under these Rules, whenever the last day of the filing period falls on a Saturday, Sunday or legal holiday, the time for filing an appeal shall be extended to the next day that is not a Saturday, Sunday or legal holiday. 20 C.F.R. §802.221(a) (emphasis added).

The record establishes that the administrative law judge's Decision and Order was filed on May 19, 2014, and his Order Granting Motion for Reconsideration was filed on June 19, 2014. The thirtieth day after June 19 was Saturday, July 19, 2014. Applying Sections 802.205(b), 802.207(b) and 802.221(a), the Board determined that the filing period concluded on July 21, 2014, and thus, that filing was required by that date. It therefore accepted claimant's cross-appeal, dated and post-marked July 21, 2014, as timely filed and accordingly, denied employer's motion to dismiss claimant's appeal. As Section 802.221(a) applies to "any period of time," it thus operates in conjunction with Sections 802.205 and 802.207 to extend the designated filing period by the weekend/holiday rule, as well as, when appropriate, the date of mailing rule. Both rules applied to the facts in this case, thereby making claimant's cross-appeal, mailed on July 21, 2014, a timely-filed appeal. Consequently, we again reject employer's contention that claimant's cross-appeal was untimely filed.

The Extent of Claimant's Disability from March 1, 2005

Claimant contends the administrative law judge erred in finding that employer established the availability of suitable alternate employment as of March 1, 2005, because he did not accurately assess claimant's ability to perform the jobs identified in terms of the physical requirement that claimant lie down after no more than three to four hours of activity. Claimant also contends the administrative law judge erred by crediting the reports and opinions of employer's vocational expert, Joyce Gill, over those of his own

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> Any party adversely affected by any interlocutory order issued under paragraph (g) or (h) may file a motion to reconsider, vacate or modify the order within 10 days from its filing, stating the grounds for such request.

[3]The date appearing on the United States Postal Service postmark shall be prima facie evidence of the date of mailing. 20 C.F.R. §802.207(b).

expert, Tracy Remas, who explicitly stated that it is more probable than not that claimant was unemployable due to his objective medical condition.

Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to return to his usual employment due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996). The administrative law judge must compare claimant's restrictions to the physical requirements of the jobs relied upon by employer in order to determine their suitability for claimant. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Hernandez v. Nat'l Steel & Shipbuilding Co.,* 32 BRBS 109 (1998).

Assessing claimant's restrictions as of March 1, 2004, when employer identified alternate jobs, the administrative law judge found that claimant had post-injury physical restrictions of no heavy work, no repetitive bending or stooping, and no lifting over 25 pounds. Decision and Order at 41. In reaching this determination, the administrative law judge adopted some of the restrictions imposed by Dr. Cleary, i.e., those which were consistent with the opinions of Drs. Luciano and Previte, but rejected Dr. Cleary's restrictions regarding walking on uneven surfaces, how long claimant could sit, stand and walk without changing positions, and his need for frequent breaks, as they are inconsistent with the surveillance footage,[4] are excessively based on claimant's self-described limits, and appear contrary to claimant's demonstrated capacity to successfully complete vocational training and home study. The administrative law judge then found, having reviewed the vocational reports of Ms. Gill and Mr. Remas, Decision and Order at 26-32, 41-44, that the positions identified by Ms. Gill as a merchant patroller, telephone solicitor, general clerk, and cashier II are appropriate for claimant given his age,

[4]The administrative law judge found that the surveillance footage shows claimant getting in and out of his car, walking, performing errands, gardening, and standing in his yard. Decision and Order at 32; EX 71. Dr. Adsit testified that the footage shows claimant "essentially" performing "normal activities of daily living," and that "he appears to do so comfortably." HT at 306-307.

education, work experience and work restrictions. In reaching this conclusion, the administrative law judge accorded limited weight to the opinion of Mr. Remas, that claimant was incapable of performing this work, because, contrary to the bases of Mr. Remas's opinion, the record reflects that claimant had significant training in computer programs which are still the standard in the business world, and the requisite customer service skills to successfully perform the duties associated with this work. HT at 170, 175, 184-185. As these positions were identified by Ms. Gill on March 1, 2005, the administrative law judge concluded that employer demonstrated the availability of suitable alternate employment as of that date.

It is well established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses, to weigh the evidence, and to draw his own inferences and conclusions from the evidence, and that the Board is not empowered to reweigh the evidence. *See, e.g., Hawaii Stevedores,* 608 F.3d 642, 44 BRBS 47(CRT). In this case, the administrative law judge rationally identified claimant's work restrictions, addressed the employment positions identified by employer, explained the basis for his credibility determinations, and rationally concluded that employer established the availability of suitable alternate employment as of March 1, 2005, which claimant did not diligently pursue.[5] *Id.* These findings are affirmed as they are supported by substantial evidence, rational and in accordance with law. *Rhine v. Stevedoring Services of America,* 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *V.M. v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd mem.*, 388 F.App'x 695 (9th Cir. 2010). Accordingly, we affirm the administrative law judge's finding that claimant's disability became partial on March 1, 2005, except for the period claimant was enrolled in the vocational rehabilitation program. *See* n. 1, *supra*.

Section 8(j)

Claimant challenges the administrative law judge's finding that he forfeited his right to benefits pursuant to Section 8(j). Claimant contends that while the administrative law judge accurately found that he did not report the income he received from his renting out two dwelling units located on the property where he lived, there is no evidence to show that claimant willfully or knowingly omitted or underreported his rental income. Alternatively, claimant contends he performed only limited services for his rental

[5]The administrative law judge found that claimant did not engage in a diligent job search because claimant, by his own admission, did not seek work in any of the job fields identified as suitable by Ms. Gill, nor had he looked for any work since 2006. HT at 84, 86, EX 73. This finding is affirmed as it is unchallenged on appeal. *See generally Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

property such that no parts of his rental income should be considered "earnings" within the meaning of Section 8(j).

Section 8(j) permits an employer to request that a disabled claimant report his post-injury earnings. If a claimant fails to report earnings from employment or self-employment, or knowingly and willfully omits or understates his earnings, he forfeits his disability benefits for the period of noncompliance. 33 U.S.C. §908(j);[6] *Delaware River Stevedores, Inc. v. DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT) (3d Cir. 2006); *Briskie v. Weeks Marine, Inc.*, 38 BRBS 61 (2004), *aff'd mem.*, 161 F. App'x 178 (2d Cir. 2006); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); *Freiwillig v. Triple A South*, 23 BRBS 371 (1990); 20 C.F.R. §§702.285, 702.286. The employer bears the burden of establishing that a violation of Section 8(j) has occurred. 20 C.F.R. §702.286(b); *Young v. Newport News Shipbuilding & Dry Dock Co.*, 45 BRBS 35 (2011).

An employer may establish a Section 8(j) violation with specific evidence of an employee's earnings during the period in question or via "any other evidence showing

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[6]Section 8(j), 33 U.S.C. §908(j), provides:

> (1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.
>
> (2) An employee who-
>
> (A) fails to report the employee's earnings under paragraph (1) when requested, or
>
> (B) knowingly and willfully omits or understates any part of such earnings,
>
> and who is determined by the deputy commissioner to have violated clause (A) or (B) of this paragraph, forfeits his right to compensation with respect to any period during which the employee was required to file such report.
>
> (3) Compensation forfeited under the subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the deputy commissioner.

earnings[.]" 20 C.F.R. §702.286(b). Although Section 8(j) does not define "earnings," the implementing regulation does. Section 702.285(b) provides:

> 'earnings' is defined as *all monies received from any employment* and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and *all revenue received from self-employment* even if the business or enterprise operated at a loss or if the profits were reinvested.

20 C.F.R. §702.285(b) (emphasis added). Section 8(j) contemplates a claimant's reporting "all monies" from "any employment" and "all revenue" from "self-employment," as well as "fees for services." In addition, the regulation specifically states that the earnings are "not limited to" the list given. 20 C.F.R. §702.285(b).

With regard to whether claimant's rental income constituted earnings from self-employment, the administrative law judge found, based on his review of the surveillance footage and claimant's testimony, that claimant plays a significant role in managing the property such that he engaged in self-employment and should have reported the rental payments as self-employment earnings.[7] Decision and Order at 47-48. The administrative law judge's recitation of the evidence accurately reflects the record. *See* HT at 64, 72, EX 73. Thus, as the administrative law judge could reasonably infer from this evidence that claimant's activities relating to his rental properties constitute self-employment, *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), we affirm his finding that claimant was required to report his rental income as "earnings" pursuant to Section 8(j) of the Act.[8] 33 U.S.C. §908(j); 20 C.F.R. §702.285(b); *Zepeda v. National*

[7]The administrative law judge relied on claimant's testimony that he: does not have a property manager; investigates potential tenants; arranges and pays for repairs; responds to tenant concerns; hires, supervises and inspects contractor work; and, in running the property, utilizes the skills he learned in the property management class. The administrative law judge further found that surveillance footage showing claimant performing upkeep on the grounds supports a finding that he is actively involved in the management of the property.

[8]We note that the amount of rental income deemed "earnings" under Section 8(j) is arguably limited to that portion attributable to claimant's "personal management or endeavor" in that business, as opposed to any portion which merely represents claimant's ownership interest in the property. *See generally Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). Nonetheless, a claimant who "knowingly and willfully omits or understates *any part of such earnings*," is subject to forfeiture under Section 8(j); the penalty is the same regardless of the amount of the omission or understatement.

Steel & Shipbuilding Co., 24 BRBS 163 (1991) (summarily stating that rental income from houses the claimant built and owns is subject to Section 8(j)).

Nonetheless, we must vacate the administrative law judge's conclusion that claimant forfeited his right to disability payments for the period of October 13, 2010 through April 27, 2013. Claimant filed seven LS-200 reports between October 11, 2011 and April 27, 2013, covering periods between October 13, 2010 and April 27, 2013. EX 78. On these forms, claimant stated he had no earnings during each of the periods. The administrative law judge applied Section 8(j)(2)(A), which states that a claimant forfeits the right to compensation for any period where the claimant, upon request, "fails to report" earnings from employment or self-employment. As the administrative law judge found that claimant was required to report his rental earnings and "failed to report" them, claimant forfeited his right to benefits. However, the regulation implementing Section 8(j)(2)(A), 20 C.F.R. §702.286(a), states that a claimant forfeits his benefits if he "fails *to submit the report* on earnings from employment or self-employment. . . or, . . . knowingly and willingly (sic) omits or understates any part of such earnings. . . ." Section 702.286(a), by differentiating between those who fail to file the report at all and those who file but knowingly and willfully omit or understate any part of their earnings, gives meaning to both subparts of Section 8(j)(2). In contrast, the administrative law judge's reading of Section 8(j)(2), i.e., claimant's recording of "zero" earnings on the LS-200 forms he filed makes Section 8(j)(2)(A) applicable, renders superfluous that part of Section 8(j)(2)(B) regarding the omission of earnings.[9] As it is a tenet of statutory construction that superfluous language be avoided, we hold that the regulatory language of 20 C.F.R. §702.286(a) gives meaning to all parts of Section 8(j)(2). *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997); *Sierra Club v. Johnson*, 436 F.3d 1269 (11th Cir. 2006); *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427 (9th Cir. 1991); *Towe v. Ingalls Shipbuilding, Inc.*, 34 BRBS 102 (2000). Thus, pursuant to 20 C.F.R. §702.286(a), we hold that Section 8(j)(2)(A) applies when the claimant "fails to submit the report on earnings" when requested to do so, whereas Section 8(j)(2)(B) applies when claimant files the report but "knowingly and willfully omits or understates any part of such earnings" in that filing.

In this case, claimant complied with employer's requests to file LS-200 forms. EXs 76, 78. Those documents, however, state that claimant had "zero" earnings for each of the pertinent time periods. *Id.* Given claimant's submissions, the administrative law judge should have addressed whether claimant "knowingly and willfully" omitted his earnings on those reports pursuant to Section 8(j)(2)(B). Accordingly, we remand the case for the administrative law judge to address whether, pursuant to Section 8(j)(2)(B),

[9]"Omit" is defined as "to leave out." *Webster's II New Riverside University Dictionary* (1984).

claimant's omission of his earnings was knowing and willful for each period, thereby subjecting him to forfeiture of his right to compensation during the periods in question. *Hundley*, 32 BRBS 254.

Section 3(e)

Claimant contends the administrative law judge erred in finding that employer is entitled to a credit pursuant to Section 3(e) for EDD benefits paid to claimant and then repaid to the EDD by employer. The Director agrees with claimant that the plain language of Section 3(e) precludes a credit for employer in this case because the EDD benefits were not paid pursuant to a workers' compensation law.

Claimant filed a claim under the Act on February 19, 2004, alleging disability as of September 30, 2003. Employer did not accept the claim or pay any benefits. Claimant filed for and received short-term disability benefits through the EDD. Employer subsequently began paying claimant benefits under the Act and reimbursed the EDD $5,317.88 for the payments it made to claimant. Employer sought a credit in that amount pursuant to Section 3(e), so that claimant would not receive a double recovery of benefits during the period from October 7, 2003 through January 3, 2004. The administrative law judge awarded claimant total disability benefits during this period, but also found employer entitled to a Section 3(e) credit for the amount of the EDD payment.

Section 3(e) of the Act provides that "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. §903(e). Thus, Section 3(e) specifically provides an employer liable for benefits under the Act with a credit against amounts paid to the claimant under another workers' compensation scheme for the same injury or disability. *See, e.g., D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993); *see also Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980). In *Todd Shipyards Corp. v. Director, OWCP [Clark]*, 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988), *aff'g Clark v. Todd Shipyards Corp.*, 20 BRBS 30 (1987), the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, affirmed the denial of a credit to the employer for disability payments the claimant received from the Veterans Administration. Analyzing the legislative history of Section 3(e) with regard to the phrase "workers' compensation law," the circuit court noted the House Committee's statement "that the offset applies not only in instances in which the employee receives state workers' compensation, but also in those in which he receives benefits under the Federal Employees' Compensation Act (FECA)." *Id.*, 848 F.2d at 128, 21 BRBS at 116(CRT). The Ninth Circuit reasoned that because the legislative history referenced FECA but not other federal disability acts, the congressional intent was to limit the credit doctrine under Section 3(e) to payments

received under state and federal workers' compensation laws, as well as under the Jones Act, and to not include other forms of state or federal benefits. *Clark*, 848 F.2d at 128, 21 BRBS at 116(CRT); *see also Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000) (no credit for settlement under Federal Employer's Liability Act); *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986) (no credit for unemployment compensation). The party claiming the credit bears the burden of proof under Section 3(e). *Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007).

We reverse the administrative law judge's award to employer of a Section 3(e) credit. On the facts of this case, employer has not satisfied its burden of showing that the EDD payments to claimant and employer's reimbursement of those payments to the EDD constituted an amount paid "pursuant to a workers' compensation law" as required by Section 3(e). *Clark*, 848 F.2d at 128, 21 BRBS at 116(CRT). California has a state disability insurance program, administered by the state's EDD, which provides short-term disability payments to disabled workers. Cal. Un. Ins. Code §2601 *et. seq.* This program is state-mandated and funded, in part, through employee payroll deductions. Cal. Un. Ins. Code §984(a)(1). While the EDD is required to pay benefits to a worker who is unemployed due to a disability, an individual is not eligible for these benefits for any day of disability for which he has received or is entitled to receive disability benefits "for the same injury or illness under the workers' compensation law of this state, any other state, or the federal government." Cal. Un. Ins. Code §2629(a), (b)(2), (3). Where disability benefits are paid by the EDD to an individual who is later determined to be eligible for workers' compensation benefits, the EDD is authorized to recover any overpayment by filing a lien against the individual's state workers' compensation benefits. Cal. Labor Code §§4903(f), (g), 4904(b)(1), (2).

In this case, the administrative law judge based his conclusion that employer is entitled to a Section 3(e) credit for its reimbursement of the payments made by EDD to claimant on his finding that "when the employer made a payment to the EDD, it was in effect indirectly making a payment to the claimant pursuant to the workers' compensation laws of the State of California." Decision and Order at 50. This underlying premise is not supported by the facts in this case. The administrative law judge cannot find that the EDD payment and corresponding reimbursement constituted an indirect payment under the state workers' compensation laws, when there is no evidence that claimant filed any claim for state workers' compensation benefits. In addition, employer has not shown that the EDD payments themselves were made pursuant to a workers' compensation law. Employer has thus not met its burden to show that the short-term disability payments

were amounts paid to claimant "pursuant to any other workers' compensation law."[10] *See Barscz*, 486 F.3d 744, 41 BRBS 17(CRT). Consequently, we reverse the administrative law judge's award of a Section 3(e) credit. *See generally Hunter v. Huntington Ingalls, Inc*., 48 BRBS 55 (2104).

Section 8(f)

Employer contends the administrative law judge erred in concluding that it is not entitled to Section 8(f) relief, because, contrary to the administrative law judge's findings, it presented evidence sufficient to establish the contribution element. Employer also contends the administrative law judge erred in failing to address its contention that claimant's last work injury aggravated a manifest disability resulting from claimant's prior work injuries, such that it is entitled to Section 8(f) relief on this basis.

Section 8(f) of the Act, 33 U.S.C. §908(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. §944. In a claim for permanent partial disability benefits, Section 8(f) of the Act limits employer's liability to 104 weeks if employer establishes that the claimant suffers from a manifest pre-existing permanent partial disability, and shows, by medical evidence or otherwise, that the claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the work injury alone did not cause the claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *Marine Power & Equip. v. Dep't of Labor* [*Quan*], 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000), *aff'g Quan v. Marine Power & Equip.*, 31 BRBS 178 (1997); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). The Ninth Circuit has not found it necessary to precisely define the degree of quantification necessary to meet the "materially and substantially greater" standard under Section 8(f), *Quan*, 203 F.3d at 668, 33 BRBS at 207(CRT), but has found that evidence that the current level of disability is the result of a combination of the pre-existing condition and the work injury may be sufficient to establish the contribution element. *Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT) (9th Cir. 1998). Employer also must establish that the current disability is not due solely to the work injury. 33 U.S.C. §908(f)(1); *Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

The administrative law judge initially found that the evidence establishes that claimant suffered from an existing, permanent partial disability which was manifest to

[10]We also note that while double recovery is generally to be avoided, the Supreme Court has stated that such is not absolutely prohibited by the Act. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997).

employer. Specifically, claimant had an "enlarged right transverse process" at L5, which is a congenital condition;[11] claimant also had a degenerative spinal condition. Addressing the contribution element,[12] the administrative law judge credited the opinion of Dr. Cleary that 100 percent of claimant's current disability is related to the work stresses and zero percent to the pre-existing congenital unilaterally sacralized L5 vertebra, over the opinion of Dr. Adsit that 74 percent of claimant's present condition stems from genetic and hereditary factors, while 26 percent stems from the occupational harm to claimant's back. The administrative law judge found Dr. Cleary "grounded his opinion in specific and objective medical findings," whereas Dr. Adsit "excessively relied" on general principles elicited from a scholarly article and failed to analyze it in conjunction with claimant's specific medical and occupational situation. Decision and Order at 53. In this regard, the administrative law judge found that while Dr. Cleary explicitly addressed what claimant's condition would be like if he had the congenital issue without the work experience,[13] Dr. Adsit instead relied upon a scholarly article by Dr. Battie, which attributes 74 percent of the development of degenerative changes in the lumbar spine to hereditary and genetic factors and the normal stresses of upright posture in life, without explaining how that information relates to the facts of claimant's case. Consequently, based on the "well-reasoned and well-documented" opinion of Dr. Cleary, the administrative law judge found that employer did not establish that claimant's current disability is not due solely to the work-related injury. Accordingly, he concluded that employer did not establish the requisite contribution element and, thus, denied employer's request for Section 8(f) relief.

[11]In his response brief, the Director concedes that these conditions satisfy the pre-existing permanent partial disability and manifest elements necessary for establishing entitlement to Section 8(f) relief.

[12]Claimant was entitled to total disability benefits at the time he reached maximum medical improvement on November 17, 2004, but entitled to partial disability benefits at the time the Special Fund might assume liability for the payment of those benefits pursuant to Section 8(f), i.e., in November 2006, 104 weeks from November 17, 2004. While the administrative law judge correctly set out the standard for awarding Section 8(f) in cases involving a permanent partial disability, he nonetheless analyzed the contribution element by considering the less stringent standard applied in cases involving a claim for permanent total disability benefits, i.e., only whether employer proved that claimant's current disability is not solely due to his work injury.

[13]Dr. Cleary explained that "many people go through life with claimant's congenital anomaly without becoming symptomatic," and that it "only presents as a problem in patients who do heavy lifting, repeated bending and stooping in the course of their work as was the case with [claimant]." Decision and Order at 53 (citing EX 7 at 52).

The record reflects that the administrative law judge accurately set forth the opinions of Drs. Cleary and Adsit and adequately explained his rationale for crediting the opinion of Dr. Cleary over the contrary opinion of Dr. Adsit. Decision and Order at 52-54; *see also* EXs 1-7, 22, 59, 70, 72. The administrative law judge's decision to credit the opinion of Dr. Cleary over that of Dr. Adsit is rational and supported by substantial evidence. Consequently, as it is supported by substantial evidence of record, we affirm the administrative law judge's denial of employer's claim for Section 8(f) relief based on claimant's congenital spinal condition. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *Neff v. Foss Maritime Co.*, 41 BRBS 46 (2007).

The administrative law judge, however, did not address employer's contention, raised in its Application for Section 8(f) Relief, its post-hearing brief, and now on appeal, that it is entitled to Section 8(f) relief based on claimant's having sustained prior permanently disabling back injuries while in its employ. Employer's evidence, generally reviewed by the administrative law judge, *see* Decision and Order at 25, shows that claimant had a series of low back pain complaints, and/or sustained back injuries, during his work for employer.[14] EX 49. A work-related condition may constitute a manifest, pre-existing, permanent partial disability for purposes of Section 8(f). *Electric Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2d Cir. 2007). Thus, an employer is eligible for Section 8(f) relief where the employee's pre-existing disability and second injury both arise from the same course of employment with the same employer. *Id.* Employer must also establish that claimant sustained a "second" injury, i.e., an aggravation; that claimant's disability is not due solely to that second injury; and that claimant's disability is materially and substantially greater due to the pre-existing disability. *Id.; Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). As the administrative law judge did not address this theory of employer's claim for Section 8(f) relief, we must remand the case for him to do so. *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002).

[14]The record contains: first reports of injury filled out by employer regarding incidents on April 5, 1989 (soreness in lower back and sides), and July 21, 1995 (low back sprain); claimant's report of a work injury on November 21, 2000 (progressive lower back pain from every day work activities): and medical clinic notations documenting lower back pain related to claimant's work on September 6, 1995, December 4 and 13, 2000, and January 2001. EX 49.

Accordingly, we vacate the administrative law judge's finding of forfeiture pursuant to Section 8(j) and the denial of Section 8(f) relief, and the case is remanded for further proceedings consistent with this opinion. We reverse the administrative law judge's finding that employer is entitled to a Section 3(e) credit for the amount of the short-term disability payment made by the EDD. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge