BRB No. 92-0861

JOHNNY QUAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARINE POWER & EQUIPMENT COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Mary Alice Theiler (Theiler, Douglas, Drachler & McKee), Seattle, Washington, for claimant.

Russell A. Metz (Metz, Frol & Jorgensen, P.S.), Seattle, Washington, for employer/carrier.

Karen B. Kracov (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 Programs, United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (90-LHC-2153) of Administrative Law Judge Steven E. Halpern 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).

Claimant retired from the Navy in 1970 due to Bell's palsy and a resulting depressive reaction. As a result of his condition, claimant received a forty percent disability rating from the Veteran's Administration in 1974, and his work was subsequently restricted to jobs with limited public contact because of his concern over his facial paralysis.

On June 7, 1983, claimant injured his right shoulder in the course of his employment as a ship scaler for employer and as a result underwent surgery for a rotator cuff repair. Claimant reached maximum medical improvement on May 7, 1986. Due to the physical limitations imposed by claimant's physician, claimant was unable to return to his work as a ship scaler.

Employer proffered 1986 and 1991 labor market surveys by a vocational expert, Lawrence Kent Shafer. In his initial report, Mr. Shafer determined that claimant was qualified to work as a delivery driver, small parcel delivery driver, parking attendant, electro-mechanical assembler, production technician, and custodian. Mr. Shafer, however, testified that in conducting that labor market survey "there wasn't much emphasis or much consideration given to the Bell's palsy." HT at 80, 88. Upon factoring in claimant's aversion to public contact due to his Bell's palsy, Mr. Shafer concluded that the delivery driver and parking attendant positions would not be appropriate.

Mr. Shafer updated the job market survey in 1991, taking into consideration claimant's Bell palsy and depressive reaction as well as the physical limitations imposed on claimant as a result of his shoulder injury. The jobs found to be appropriate were as an assembler, telemarketer, machine operator, security guard, room attendant and janitor.

In his Decision and Order dated December 16, 1991, the administrative law judge found that claimant was temporarily totally disabled from August 8, 1984 through May 7, 1986. Additionally, the administrative law judge determined that claimant was permanently totally disabled from May 8, 1986 through February 13, 1988. The administrative law judge further found that from February 14, 1988 through April 26, 1991, claimant was permanently partially disabled based on a weekly loss in wage-earning capacity of $454.37. During this time claimant worked on a part-time basis as a security guard on weekends at the rate of $38.00 a day, *i.e.*, $76.00 per week. As of April 27, 1991, the administrative law judge found that the full-time positions of security guard and room attendant were suitable alternative employment opportunities. The administrative law judge found that these jobs paid $240 per week. Accordingly, claimant was awarded permanent partial disability benefits from that time forward, based upon a weekly loss in wage-earning capacity of $341.19.

Lastly, the administrative law judge determined that employer was entitled to Section 8(f) relief, 33 U.S.C. §908(f). Consequently, the administrative law judge found employer liable for the first 104 weeks of permanent disability compensation and that thereafter liability falls to the Special Fund. On appeal, the Director challenges the administrative law judge's determination that employer is entitled to Section 8(f) relief. In addition, the Director contends that the administrative law judge improperly adjusted claimant's post-injury wage-earning capacity to account for inflation. Employer responds, urging that the administrative law judge's decision awarding Section 8(f) relief be affirmed. Claimant responds in support of the Director's position that the administrative law judge erroneously adjusted claimant's post-injury wage-earning capacity for inflation.

The Director initially asserts that the administrative law judge failed to fully consider the contribution requirement of Section 8(f). The Director maintains that where claimant has a permanent partial disability, as opposed to total disability, employer must demonstrate that the pre-existing disability "materially and substantially" contributed to claimant's overall loss of wage-earning capacity.[1] In the instant case, the Director asserts that the administrative law judge erred by not considering whether the jobs that employer's vocational expert ruled were inappropriate as a result of his palsy and depressive state, notably the delivery driver and parking attendant positions, would otherwise have been suitable for claimant given his subsequent shoulder condition. Consequently, the Director argues that the administrative law judge failed to fully determine whether the pre-existing disability "materially and substantially" contributed to claimant's overall disability.

The Director further contends that as of April 27, 1991, claimant had virtually the same post-injury wage-earning capacity, with or without consideration of his palsy and depressive state. In support of his assertion, the Director notes that the delivery driver and parking attendant positions found inappropriate by employer's vocational expert due to claimant's pre-existing condition paid approximately from $5.00 to $6.50 per hour in 1986, whereas the two job categories the administrative law judge deemed suitable alternative employment in 1991, the security guard and room attendant, paid a salary range of from $6.00 to $6.85 per hour. The Director therefore argues that even after an adjustment for inflation, the evidence does not reflect that claimant's pre-existing disability materially and substantially affected his post-injury wage-earning capacity.

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[1]In support of his contention, the Director maintains that the proper legal standard for determination of the contribution element under Section 8(f) was set out by the United States Court of Appeals for the Second Circuit in *Director, OWCP v. Luccittelli*, 965 F.2d 1303, 1305-1306, 26 BRBS 1, 5-6 (CRT)(2d Cir. 1992). In *Luccittelli*, the Second Circuit held that "in order to limit its liability and obtain Section 8(f) relief, an employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's *total* permanent disability." *Id.* [emphasis added]. As the instant case involves permanent partial rather than permanent total disability, employer must show that 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 last injury alone did not cause claimant's permanent partial disability. *Sproull v. Director, OWCP*, F.3d , Nos. 94-70906, 94-70914 (9th Cir. June 17, 1996).

In considering the applicability of Section 8(f) in the instant case, the administrative law judge initially found that claimant had a manifest, pre-existing permanent partial disability - his Bell's palsy and resulting depressive reaction.[2] The administrative law judge then considered the contribution element of Section 8(f) in the following manner:

> Indeed, as is evident from the expert vocational testimony, jobs which would bring claimant into contact with the general public are not suitable for him because of said emotional component. This removes from possible alternative employment a broad spectrum of work.
>
> Thus, in the overall context of this case, claimant's depressive reaction, as manifested by an emotional aversion to work involving public contact, constituted a serious pre-existing disability which significantly affected his ability to compete in the open labor market and has rendered him materially and substantially more economically disabled than he would have been as a result of the subject injury alone.

Decision and Order at 4. In light of this finding, the administrative law judge concluded that employer is entitled to relief under Section 8(f) of the Act.

In order to establish the contribution element for purposes of Section 8(f) relief where the employee is permanently partially disabled, employer must show by *medical evidence or otherwise* that 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 last injury alone did not cause claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *Sproull v. Director, OWCP*, F.3d , Nos. 94-70906, 94-70914 (9th Cir. June 17, 1996); *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds,* U.S. , 115 S.Ct. 1278 (1995). Consequently, it is insufficient for employer to show that the pre-existing disability rendered the subsequent disability greater. *Id.* In *Sproull*, the United States Court of Appeals for the Ninth Circuit, which has appellate jurisdiction in the instant case, explicitly held that the Act does not require employers to submit "medical opinions" to establish the contribution requirement of Section 8(f). Noting that an employer is entitled to establish the contribution element by medical or *other* evidence, the Ninth Circuit held that the administrative law judge permissibly relied on claimant's testimony regarding the effects of his injuries in performing his work to establish the contribution requirement. Consequently, the Ninth Circuit reinstated the administrative law judge's grant of special fund relief.

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[2]Employer is entitled to Section 8(f) relief if it establishes that claimant has a manifest pre-existing permanent partial disability and that claimant's current disability is due to the combined effects of the pre-existing disability and the work injury under the standard discussed herein. *See generally Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir 1982), *cert. denied*, 459 U.S. 1104 (1983). The existence of a manifest pre-existing permanent partial disability is not at issue in this case.

The instant case does not include medical evidence which establishes the contribution element. Rather, the "other" evidence relied upon by employer and, consequently, the administrative law judge, is economic in nature. Specifically, that evidence consists of the two labor market surveys and accompanying testimony of employer's vocational expert, which show an aversion to public contact by claimant due to his pre-existing Bell's palsy and depressive reaction, which the administrative law judge found limits claimant's possible alternative employment.

In the instant case, while the vocational evidence supports the conclusion that claimant's palsy and depressive reaction limit his opportunity for suitable alternative employment, the administrative law judge has not clearly delineated whether the ultimate permanent partial disability is *materially and substantially* greater due to claimant's prior conditions than it would be as a result of claimant's subsequent work-related shoulder injury. In arriving at his determination, the administrative law judge did not specifically discuss the evidence of available jobs or consider whether claimant's shoulder injury alone would cause the same degree of loss of wage-earning capacity as that manifested in the ultimate permanent partial disability through the contribution of the pre-existing permanent partial disability. As the Director correctly notes, the administrative law judge did not render specific findings regarding whether the delivery driver and parking attendant positions would otherwise have been suitable for claimant given his subsequent shoulder injury. We therefore remand this case for reconsideration of the contribution element under Section 8(f) pursuant to the standard set out by the Ninth Circuit in *Sproull*. Additionally, on remand, the administrative law judge must address the Director's contention and determine through a comparison of the relevant wage rates whether claimant's post-injury wage-earning capacity would be the same, with or without consideration of his pre-existing disability, and thus, whether claimant's Bell's palsy and resultant depressive condition materially and substantially affected his post-injury wage-earning capacity.

Lastly, the Director asserts that the formula used by the administrative law judge to adjust claimant's post-injury wage-earning capacity for inflation fails to fully reflect the true inflationary scale. The Director urges that given the absence of evidence in the record on this point, the Board should require the administrative law judge to use the percentage change in the National Average Weekly Wage (NAWW)[3] as the most reasonable approximation of the inflationary rate.

An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4, 6 (1988). Sections 8(c)(21) and 8(h) require that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at

[3]The NAWW is based on the national average earnings of production or nonsupervisory workers on private nonagricultural payrolls and represents the average of these earnings during the three consecutive calendar quarters ending on June 30 of each particular year as obtained from the Bureau of Labor Statistics. LHCA Bulletin No. 90-1 (Oct. 1, 1989). *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

the time of claimant's injury.[4] *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir. 1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In calculating for inflation, the administrative law judge used the percentage rate that the minimum wage has increased from the time of injury in 1983 until 1991, when employer established claimant's post-injury wage-earning capacity. We, however, agree with the Director's contention that the NAWW should be used in the instant case. In *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990), the Board rejected the administrative law judge's use of the Consumer Price Index to adjust claimant's post-injury wages for inflation, stating that in the absence of evidence concerning the wages paid in the post-injury job at the time of injury, the administrative law judge should use the percentage increase in the NAWW to make this calculation. *Id.* Following *Richardson*, we hold that inasmuch as the NAWW is a more accurate reflection of the increase in wages over time than the percentage increase in the minimum wage, the percentage increase in the NAWW for each year should be used in this case to adjust the claimant's post-injury wages downward. *Id*. The administrative law judge's determination regarding claimant's post-injury wage-earning capacity is therefore vacated and the administrative law judge is instructed, on remand, to recalculate claimant's post-injury wages by using the percentage increase in the NAWW.

[4]This insures that a claimant's wage-earning capacity is considered on an equal footing with the determination under Section 10 of average weekly wage at the time of injury. 33 U.S.C. §910.

Accordingly, the administrative law judge's grant of Section 8(f) relief and determination of claimant's post-injury wage-earning capacity are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge