BRB No. 94-2471

JAMES N. DOMINEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ARCO OIL AND GAS COMPANY	)	
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	DATE ISSUED:_____
	)	
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 James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Jeff P. Murphrey and Suzanne A. Schlicher (Tekell, Book, Matthews, & Limmer, L.L.P.), Houston, Texas, for employer/carrier.

Mark Reinhalter (J. Davitt McAteer, Acting 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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (92-LHC-3617) of Administrative Law Judge James W. Kerr, 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). The Board held oral argument in this case in Washington, D.C., on June 27, 1996.

The facts of this case are not in dispute. On December 24, 1989, claimant slipped and fell, injuring his back, while working on an offshore oil rig. Prior to this fall, claimant had undergone three back surgeries: laminectomy and disk excision (1979); disk excision (1982); and disk fusion (1988). Emp. Exs. 1 at 28, 5. After the 1988 surgery, Dr. McCarthy determined that claimant has a 15 percent permanent impairment. Emp. Exs. 1 at 37, 5 at 13-14. Following the 1989 fall, claimant and employer agree that claimant is permanently totally disabled. The administrative law judge awarded claimant benefits and granted employer's request for Section 8(f), 33 U.S.C. §908(f), relief from the Special Fund.

Before addressing the testimony pertinent to Section 8(f) relief, the administrative law judge concluded that the term "disability" in Section 8(f) is not one which is solely economic in nature; therefore, claimant's physical condition must be considered. Decision and Order at 10; *see also Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1306, 26 BRBS 1, 7 (CRT) (2d Cir. 1992) (contribution may be shown by "medical or other evidence"). He then considered the case in light of *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990), wherein the United States Court of Appeals for the Fifth Circuit rejected the "common sense" test, which presumes that a history of back injuries precludes a current disability from being the result of the most recent injury alone, and held that an employer must show that a claimant's current disability is not due solely to his work injury. The administrative law judge further noted that the Fifth Circuit's language in *Two "R" Drilling* indicates that if an employer presents medical evidence concerning the contribution issue then it has met a threshold burden of showing that the current disability was not caused by the most recent injury alone. Decision and Order at 12. Finally, in light of the testimony of Drs. McCarthy and Selby, he concluded that, contrary to the situation in *Two "R" Drilling* where the employer presented no medical evidence, employer in this case presented sufficient evidence establishing that claimant's total disability is not due to the 1989 work injury alone. *Id.*

After drawing this conclusion, the administrative law judge noted that Dr. Selby was unable to testify with any degree of medical probability as to whether claimant's work injury alone would have resulted in an economic disability, and he determined that such a requirement would create an impossible burden to fulfill. Decision and Order at 13. Based on Dr. Selby's opinion, the administrative law judge found that the 1989 injury would have been a one- or two-disk injury at most and claimant could have returned to work but for his prior disk problems which resulted in the present four-disk disabling condition, and the administrative law judge concluded that claimant's inability to return to work is the result of his combined injuries; therefore, employer is entitled to Section 8(f) relief. *Id.* at 14.

On appeal, the Director contends the administrative law judge erred in awarding employer Section 8(f) relief. He argues that employer failed to establish the contribution element necessary for such relief because employer failed to demonstrate that claimant's total disability was not caused by the 1989 fall alone. Specifically, the Director contends the administrative law judge eased

employer's burden of proof by relieving it of showing that claimant has an economic disability, as that term is defined in Section 2(10), 33 U.S.C. §902(10), and as it is applied in Section 8(f), which was not caused by the 1989 injury alone. Further, he argues that the administrative law judge improperly used the "common sense" presumption. Employer responds, urging the Board to uphold the administrative law judge's decision because there is substantial evidence to support his findings and because acceptance of the Director's position would impose an impossible burden on all employers. Employer requested oral argument because it believes there is a conflict among the circuits with regard to the nature, quality, and scope of the evidence necessary to support a Section 8(f) award.

Initially, we shall address employer's conflict argument. 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 a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent total disability is not due solely to the subsequent work injury.[1] 33 U.S.C. §908(f)(1); *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *Two "R" Drilling*, 894 F.2d at 748, 23 BRBS at 34 (CRT). Other circuits have stated that an employer must prove entitlement to Section 8(f) relief by showing that "but for" the pre-existing disability the claimant would be employable rather than by merely showing that the claimant's pre-existing condition compounded his present condition. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). As employer states, the Courts of Appeals have phrased employer's burden of proof using either "not due solely" terminology or "but for" terminology. Section 8(f) of the Act specifically states:

> In all other cases of total permanent disability or of death, *found not to be due solely to that injury*, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under subsections (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

33 U.S.C. §908(f)(1) (emphasis added). While the "not due solely to" language comes directly from the Act, we believe the "but for" language is simply descriptive of acceptable evidence which will satisfy the statutory mandate.

For example, in *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992), the United States Court of Appeals for the Second Circuit vacated the award of Section 8(f) relief because the administrative law judge found that Bergeron's current disability resulted from a combination of his pre-existing back condition and his 1985 work injury to

[1]Employer and the Director stipulated that claimant has a manifest pre-existing permanent partial disability; therefore, employer has satisfied the first two elements necessary for Section 8(f) relief. *See* Decision and Order at 9.

his back and leg. The court remanded the case for the employer to show that Bergeron would not have been permanently totally disabled solely by reason of his 1985 back injury. In *Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT), the United States Court of Appeals for the First Circuit determined that the employer did not meet its burden because Legrow's three previous back injuries did not result in a permanent impairment and because there was no evidence which demonstrated that "but for" the pre-existing injuries Legrow would not have been rendered totally disabled by the most recent work-related back injury. In *Jaffe*, 25 F.3d at 1080, 28 BRBS at 30 (CRT), the claimant, who was an alcoholic, was paralyzed when he fell at work. The employer conceded permanent total disability and sought Section 8(f) relief, alleging the claimant was not employable due to the work injury and the pre-existing alcoholism. The administrative law judge found that alcoholism was a pre-existing permanent partial disability but denied Section 8(f) relief because he found that the work injury alone caused the total disability. The court agreed with the denial of Section 8(f) relief because the evidence supported the administrative law judge's finding that the employer failed to "show that `but for' the pre-existing disability the claimant would be employable." *Jaffe*, 25 F.3d at 1085, 28 BRBS at 35 (CRT). Thus, the two variations pronounced by the Courts of Appeals have the same implications: a claimant's total disability must have been caused by both the work injury and the pre-existing condition. Unless an employer can demonstrate such, it may not receive Section 8(f) relief.

In the case presently before the Board, the administrative law judge properly applied the standard as set forth in *Two "R" Drilling*. He did not excuse employer from meeting its burden of proof even though he divided "disability" into "economic" and "physical" elements and stated that employer need not show that claimant's "economic" disability was not the result of his 1989 work injury alone. The law, as correctly recited by the administrative law judge, requires employer to present evidence which shows that claimant's total disability is not the result of his 1989 work injury alone. This evidence may be either medical or "other" which is to be interpreted and weighed by the administrative law judge. *See Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT); *see also Sproull v. Director, OWCP*, 86 F.3d 895 (9th Cir. 1996) (Where claimant is permanently partially disabled, his testimony about the effects of his injuries may satisfy the contribution element). In applying the law, the administrative law judge considered the medical evidence and credited it accordingly. Therefore, we reject the Director's argument that the administrative law judge applied an incorrect legal standard for obtaining Section 8(f) relief from the Special Fund.

The disposition of this case rests on the testimony of two doctors, both of whom were credited by the administrative law judge. Dr. McCarthy, claimant's treating physician from approximately 1988 through 1990, stated several times in his deposition that he believes claimant's present pain and condition are not the result of an isolated incident. Emp. Ex. 5. For example, Dr. McCarthy stated: "[P]art of [claimant's] current disability is related to the fact that he has multilevel degenerative disk disease in his back. . . ." *Id.* at 24. He also testified: "I think in all medical probability [claimant's] current condition is not entirely related to that [1989] fall." *Id.* at 41. Dr. Selby, to whom Dr. McCarthy referred claimant in May 1990, stated: "In terms of medical probability though, [the 1989 fall] wouldn't have caused four levels [of disk problems]. It would have caused maybe one or two levels." Emp. Ex. 2 at 28. Despite the Director's reference to other statements made by both doctors which could be interpreted as indicating some uncertainty with regard to the extent of disability caused by claimant's 1989 injury alone, the administrative law judge clearly reviewed all the testimony and credited this portion of their testimony, as is within his discretion as the trier-of-fact.[2] *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). As there is credible evidence which demonstrates that claimant's total disability was the result of his pre-existing condition and his 1989 work injury, the administrative law judge's findings are rational and must be affirmed. *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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[2]We thus reject the Director's argument that the administrative law judge relieved employer of satisfying its burden by improperly applying the "common sense" presumption. The administrative law judge specifically noted that the "common sense" test had been rejected, and he interpreted the two-disk/four-disk evidence, as he has discretion to do. *See Two "R" Drilling*, 894 F.2d at 748, 23 BRBS at 34 (CRT).

JAMES F. BROWN
Administrative Appeals Judge