BRB No. 97-0875

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

Appeal of the Decision and Order on Remand of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

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

Laura Stomski and Joshua Gillelan II (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, 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:

Employer appeals the Decision and Order on Remand (90-LHC-2153) of Administrative Law Judge Frederick D. Neusner 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). The Board held oral argument in this case in Seattle, Washington, on September 17, 1997.

This case is before the Board for the second time, and the facts are not in dispute. 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 claimant's work was subsequently restricted to jobs with limited public contact because of his concern over his facial paralysis.

Claimant injured his right shoulder on June 7, 1983, 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 with regard to his shoulder injury on May 7, 1986. Due to the physical limitations imposed by claimant's physician for his shoulder injury, claimant was unable to return to his work as a ship scaler.

In his Decision and Order dated December 16, 1991, Administrative Law Judge Steven E. Halpern found claimant entitled to temporary total disability benefits from August 8, 1984 through May 7, 1986, permanent total disability benefits from May 8, 1986 through February 13, 1988, permanent partial disability benefits from February 14, 1988 through April 26, 1991, based on a weekly loss in wage-earning capacity of $454.37, and thereafter permanent partial disability benefits based upon a weekly loss in wage-earning capacity of $341.19. Judge Halpern further determined that employer was entitled to Section 8(f) relief, 33 U.S.C. §908(f).

On appeal, the Director, Office of Workers' Compensation Programs (the Director), challenged Judge Halpern's determination that employer is entitled to Section 8(f) relief. In its decision, the Board vacated Judge Halpern's grant of Section 8(f) relief, holding that he did not apply the proper standard for determining the contribution element of Section 8(f). The Board remanded the case for reconsideration of the relevant evidence at Section 8(f) pursuant to the standard set out by the United States Court of Appeals for the Ninth Circuit in *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1333 (1997). *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996).[1]

[1]The Director also appealed Judge Halpern's adjustment of claimant's post-injury wage-earning capacity for inflation. The Board remanded the case for consideration of this issue consistent with its decision in *Richardson v. General Dynamics Corp.*, 23 BRBS

On remand, Administrative Law Judge Frederick D. Neusner (the administrative law judge) determined that while employer established that claimant's pre-existing conditions could have contributed to his overall disability, employer did not demonstrate that the full extent of his disability due to the contribution of his pre-existing conditions is materially and substantially greater than that which would have resulted from the work injury alone. Accordingly, the administrative law judge denied employer's request for Section 8(f) relief. Employer now challenges the administrative law judge's denial of Section 8(f) relief. The Director responds, urging affirmance.

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 claimant suffers from a manifest pre-existing permanent partial disability, and shows, 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*, 86 F.3d at 895, 30 BRBS at 49(CRT); *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*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995); *Quan*, 30 BRBS at 124. In this case, it is not disputed that claimant's Bell's palsy and depressive reaction are manifest pre-existing permanent partial disabilities; thus, only the requirement that claimant's current disability result from the combination of the pre-existing permanent partial disability and subsequent work injury is in dispute. More specifically, the dispute in the instant case centers around the interpretation of the degree of proof necessary to establish the "materially and substantially greater" requirement for Section 8(f) relief.

Employer initially argues that the Board's instructions which required a comparison of wage rates on remand constituted an impermissible reweighing of the evidence because Judge Halpern's conclusion that employer established the contribution element was based upon substantial evidence. Employer maintains that the Board failed to consider in its initial decision that Judge Halpern's decision to grant Section 8(f) relief in the instant case was not based upon the 1986 and 1991 labor market surveys, but rather upon the expert vocational testimony that a broad spectrum of work is removed from possible alternative employment due to the emotional component relating to claimant's Bell's palsy.

In its prior decision, the Board vacated Judge Halpern's conclusion that claimant's depressive reaction due to the Bell's palsy "significantly affected his ability to compete in the open labor market and has rendered him materially and substantially more

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327 (1990). On remand, Judge Neusner recalculated claimant's post-injury wage-earning capacity, and that finding is not challenged on appeal.

economically disabled than he would have been as a result of [his shoulder injury] alone," Halpern Decision and Order at 4, because Judge Halpern had "not clearly delineate[d] 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." *Quan*, 30 BRBS at 127. Thus, the Board held that Judge Halpern's finding of Section 8(f) relief did not comport to the standard required by Section 8(f)(1). *Id.* Specifically, the Board stated that Judge Halpern's discussion of the evidence regarding the contribution element for purposes of establishing Section 8(f) relief was incomplete in that he had not discussed whether claimant's shoulder injury alone would cause the same degree of lost wage-earning capacity as that due to the contribution of claimant's pre-existing Bell's palsy, and had not rendered specific findings regarding whether the delivery driver and parking attendant positions would otherwise have been suitable for claimant given his subsequent shoulder injury. *Id.* In light of these omissions, we reject employer's contention that Judge Halpern's prior findings with regard to Section 8(f) should have been affirmed as based upon substantial evidence; the Board provided proper reasons for remanding the case for further consideration.

Employer next contends that the administrative law judge failed to correctly apply the standard set forth by the United States Court of Appeals for the Ninth Circuit in *Sproull*. Specifically, employer argues that the administrative law judge misstated the standard of *Sproull* by requiring it to "show that claimant's impairment due to the combination of the pre-existing condition and the work-related injury was materially and substantially greater than the loss of wage-earning capacity that would have resulted from the work injury alone, and that the latest injury alone did not cause claimant's permanent partial disability." Neusner Decision and Order on Remand at 3.

The Ninth Circuit in *Sproull* stated that the contribution element of Section 8(f) need not be based on medical evidence, but may be established through "medical or other evidence." 86 F.3d at 900, 30 BRBS at 52(CRT). Thus, employer is correct in asserting that there is no specific requirement in *Sproull* that disability for purposes of Section 8(f) equate to loss of wage-earning capacity. *See generally Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). However, as the Director notes, the court's decision in *Sproull* stands for the proposition that an employer may rely on medical or "other" evidence to establish the contribution element at Section 8(f). Since the evidence relating to the contribution element in this case is solely vocational in nature, the administrative

law judge's decision to look at evidence regarding the effect of claimant's pre-existing condition and subsequent injury on his wage-earning capacity is in accordance with *Sproull*.[2]

[2]We note, however, that the administrative law judge did erroneously state that under *Sproull* the standard for establishing the contribution element at Section 8(f) *should be* in terms of loss of wage-earning capacity. This statement alone does not demonstrate reversible error, given the administrative law judge's full consideration of the evidence and application of the proper standard.

The Ninth Circuit, however, has not provided specific guidance as to the degree of quantification necessary to meet the "materially and substantially greater" standard in cases where claimant is permanently partially disabled following the subsequent injury. Both parties in this appeal argue for differing standards for establishing the contribution element under Section 8(f). Employer, in essence, contends that general evidence that claimant's pre-existing condition forecloses a great number of otherwise viable employment options clearly establishes the requisite contribution element under Section 8(f).[3] In contrast, the Director's more stringent approach would require employer to present specific evidence regarding the (non)availability of actual jobs based upon his pre-existing condition(s) and subsequent injuries. We need not attempt to state a specific formula in this case for determining what is necessary to meet the "materially and substantially greater" standard, as the administrative law judge's finding that the standard was not met in the instant case is supported by substantial evidence. 33 U.S.C. §908(f)(1); *See generally Director, OWCP v. Bath Iron Works Corp. [Johnson]*, F.3d ,1997 WL 679661 (1st Cir. Nov. 6, 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.* [*Ladner*], F.3d , 1997 WL 612743 (5th Cir., Oct. 21, 1997); *Harcum*, 8 F.3d at 175, 27 BRBS at 116 (CRT) (cases state that employer must show a quantification of the level of impairment that would ensue from the work injury alone in order to determine if the pre-existing disability renders the ultimate partial disability materially and substantially greater).

On remand, the administrative law judge followed the Board's directives in remanding the case. He "specifically discuss[ed] the evidence of available jobs" and considered "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

[3]Employer specifically asserts that the administrative law judge's finding on remand that claimant's Bell's palsy and depressive syndrome did not impair claimant's wage-earning capacity after his discharge from the Navy is not supported by substantial evidence. Employer contends that the evidence establishes that claimant was a Navy airplane mechanic for fifteen years, but that after developing Bell's palsy and depressive reaction, claimant could no longer work as a jet mechanic and became a dishwasher at the Navy Exchange. Employer maintains that all of claimant's employment since he developed Bell's palsy were low skilled and poor paying and that this downward progression in wage-earning capacity is clear evidence of the contributing nature of claimant's pre-existing condition. As the Director concedes, clearly there is a disparity in wage-earning capacities between claimant's employment as an airplane mechanic and a ship scaler which is attributable to his Bell's palsy and resultant depression. However, this fact alone is insufficient to establish employer's entitlement to Section 8(f) relief, as it demonstrates only that claimant's wage-earning capacity was reduced prior to his last work-related injury. The appropriate inquiry here is whether the ultimate reduction in wage-earning capacity following the injury for which he is compensated under the Act is materially and substantially greater than it would have been had claimant not suffered the pre-existing injury.

through the contribution of the pre-existing permanent partial disability."[4] *Quan*, 30 BRBS at 127. The administrative law judge concluded that the jobs identified as unsuitable for claimant in both the 1986 and 1991 labor market surveys were eliminated because their physical requirements went beyond claimant's physical capacity as a result of his shoulder injury, and not because of his fear of work with public contact attributable to his pre-existing conditions. Decision and Order on Remand at 5-6. Additionally, the administrative law judge rendered specific findings regarding whether the delivery driver and parking attendant positions would otherwise have been suitable for claimant given his subsequent shoulder injury. Based in large part upon the credible testimony of claimant's vocational expert, the administrative law judge determined that the physical limitations imposed on claimant as a result of his shoulder injury, as well as his pre-existing conditions, precluded those positions from being suitable for claimant. The administrative law judge credited the testimony of claimant's vocational expert, Ms. Bertino, that claimant was in the lower ten percent of the population in general aptitude, eye/hand coordination and form perception and that claimant was below average in spatial perception and manual dexterity. The administrative law judge then found it doubtful that claimant would be able to perform the driver or parking attendant positions after suffering his shoulder injury because of his materially impaired eye/hand coordination and manual dexterity. *Id.* at 6.

[4]The Board's explicit instructions for remand led the administrative law judge to a query of claimant's disability and the contribution element of Section 8(f) in terms of the effect on claimant's post-injury wage-earning capacity, with and without consideration of his pre-existing disability. When the inquiry regarding the contribution element involves, as in the instant case, solely economic evidence, the scope of the administrative law judge's inquiry into claimant's wage-earning capacity in a permanent partial disability case includes, as the Board noted in its prior decision, a consideration of whether claimant's post-injury wage-earning capacity would be the same, with or without his pre-existing disability, and thus, whether those conditions materially and substantially affect his post-injury wage-earning capacity. Thus, contrary to employer's contention, consideration of claimant's wage-earning capacity with or without his pre-existing disability is a relevant and proper exercise for the administrative law judge to have undertaken in this case.

The administrative law judge further determined through a comparison of the relevant wage rates, that while claimant's Bell's palsy and depression may have prevented him from accepting certain jobs, he was able to perform in suitable alternate employment that paid him about the same wage as the positions that his pre-existing impairments disabled him from taking. The administrative law judge focused on the hourly rates for the two positions which Judge Halpern had previously found precluded because of claimant's pre-existing conditions, that of delivery driver and parking attendant identified in the 1986 labor market survey which paid between $5.00 and $6.50, and compared them to the hourly rates for the two positions identified in 1991 as security guard and room attendant which ranged from $6.00 to $6.85, and which were found to be suitable alternate employment. The administrative law judge observed that after factoring for inflation, the four jobs paid essentially the same hourly rate. Accordingly, the administrative law judge concluded that the evidence did not establish that claimant's pre-existing disability "materially and substantially" affected his post-injury wage-earning capacity, as he found that claimant had virtually the same wage-earning capacity with only the shoulder injury that he would have had with only the pre-existing conditions.

Inasmuch as it is rational, in accordance with the Board's remand order, and supported by substantial evidence, we affirm, based on the facts presented in this case, the administrative law judge's determination that employer failed to demonstrate that claimant's disability due to the contribution of Bell's palsy and depression is materially and substantially greater than that which would have resulted from the work-related shoulder injury alone and the consequent denial of Section 8(f) relief. *See generally* 33 U.S.C. §908(f)(1); *Johnson* , F.3d , 1997 WL 679661 at *6-7; *Ladner*, F.3d , 1997 WL 612743 at *4.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge