BRB Nos. 98-340
and 98-340A

KENNETH W. HUNDLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: Nov. 23, 1998
NEWPORT NEWS SHIPBUILDING	)	
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

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

LuAnn B. Kressley (Judith E. Kramer, Deputy Solicitor; Carol A. 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and the Decision and Order on Reconsideration (96-LHC-1018) 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 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 worked as a shipfitter for employer, and on January 10, 1989, he injured his back during the course of his employment. Tr. at 5. Studies revealed an L2-3 herniation as well as a ruptured disc with an extruding fragment. Cl. Ex. 1. Claimant underwent surgery, and his treating physician, Dr. Garner, released him to return to work, setting forth the following restrictions on November 20, 1989: no lifting over 40 pounds, no repeated or continual bending, and no twisting or working in tight spaces. Cl. Ex. 2; Emp. Ex. 12. The parties agree that, under these restrictions, claimant is unable to return to his usual work. Decision and Order at 2; Tr. at 5. Employer paid claimant temporary total and temporary partial disability benefits for various periods between January 11, 1989, and August 4, 1996. Emp. Ex. 1. Claimant sought permanent partial disability benefits from May 26, 1990, and continuing. Tr. at 5.

In April 1990, claimant obtained employment as a recreation aide for the Newport News Parks and Recreation Department. Tr. at 18. In September 1992, he obtained additional part-time work as a school bus driver. Emp. Ex. 6; Tr. at 20. In May 1995, employer requested a report of claimant's earnings. Claimant completed the LS-200 Form on June 16, 1995, reporting only his earnings as a recreation aide from January 1, 1990, through May 17, 1995. After claimant filed a second LS-200 Form in July 1996, employer ceased paying benefits, as it maintained that claimant was no longer disabled within the meaning of the Act. Emp. Exs. 1, 3.

The administrative law judge determined that claimant sustained a work-related injury on January 10, 1989, and that his condition reached maximum medical improvement on May 26, 1990. *See* Cl. Exs. 2-3. Consequently, the administrative law judge found that claimant is entitled to permanent partial disability benefits from May 26, 1990, and continuing. Decision and Order at 6. Using the evidence submitted by claimant regarding the wages of a recreation aide and a school bus driver in 1989, as well as his testimony concerning the number of hours he worked in post-injury employment, the administrative law judge determined that claimant is

entitled to permanent partial disability benefits at the compensation rate of $268.89 from May 26, 1990 to August 31, 1992, and $203.04 from September 1, 1992, and continuing. Decision and Order at 7-8, 14; Decision and Order on Recon. Nevertheless, the administrative law judge concluded that claimant's testimony regarding his reasons for understating his income on the LS-200 Form is not credible, and he found that claimant knowingly and willfully omitted certain of his earnings between January 1, 1990, and May 17, 1995. As a result, the administrative law judge found that claimant must forfeit compensation for the period from September 1, 1992, through May 17, 1995, pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j), and that any forfeitures must be credited against future payments of benefits. The administrative law judge declined to apply the forfeiture provision to the benefits due from January 1, 1990, to August 31, 1992, as earnings during that period were not under-reported. Decision and Order at 9-10, 14. Finally, the administrative law judge found that employer failed to establish a pre-existing permanent partial disability as required by Section 8(f) of the Act, 33 U.S.C. §908(f); therefore, he denied employer relief from the Special Fund. Decision and Order at 12-14. On employer's motion for reconsideration, the administrative law judge reaffirmed his wage-earning capacity calculations. Claimant appeals and employer cross-appeals the administrative law judge's decisions.

Section 8(j)

On appeal, claimant contends he should not be subject to the Section 8(j) forfeiture provisions because he did not willfully under-report his earnings. Alternatively, he argues that if he is subject to the provisions of Section 8(j), the forfeiture time period should be limited to six months pursuant to the "letter and spirit of the Act." Employer responds, arguing that forfeiture is correctly applied to this case and that there is no six-month limit on the forfeiture period. Employer argues, however, that the administrative law judge incorrectly limited forfeiture to that period during which claimant incorrectly reported his earnings as opposed to the entire period for which an earnings report was requested.

Section 8(j) of the Act permits an employer to request a claimant to report his post-injury earnings. Once the inquiry is made, the claimant must complete and return the form within 30 days of receipt whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture if earnings are knowingly omitted or understated. 33 U.S.C. §908(j) (1994); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994) (decision on recon.); 20 C.F.R. §§702.285-702.286. An employer can recover such forfeited compensation only "by a deduction from the compensation payable" in the future. 33 U.S.C. §908(j)(3) (1994). Section 8(j)(1), (2) of the Act 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*.

33 U.S.C. §908(j) (1)-(2) (1994) (emphasis added). In *Moore*, the Board held that the administrative law judge has the authority to adjudicate whether benefits should be suspended. If he so decides, then the district director must consider the claimant's financial situation and establish a forfeiture schedule.[1] *Moore*, 28 BRBS at 183-184; 20 C.F.R. §702.286(b), (c). In its decision in *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997), the Board determined that the phrase "any period during which the employee was required to file such report[,]" can only include those periods during which the employee was "disabled." Thus, under-reporting or omissions which occurred during periods when the employee was not "disabled," do not affect the employer's liability for, or the

[1]The forfeiture provisions contemplate a suspension of prospective benefits and not an action against a claimant for the reimbursement of benefits paid. *Stevedoring Services of America v. Eggert*, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *Moore*, 28 BRBS at 181.

claimant's entitlement to, benefits. *Plappert*, 31 BRBS at 17; *see also Denton v. Northrop Corp.*, 21 BRBS 37 (1988) (Section 8(j) applies only to a disabled employee and not to a surviving spouse).

In this case, claimant contends that the administrative law judge erred in finding he willfully understated his earnings.[2] The facts establish that claimant began working as a recreation aide in April 1990, earning $4 per hour, working variable hours from week to week. Tr. at 18-19. In September 1992, he began working as a school bus driver. *See* Emp. Ex. 5; Tr. at 20. In May 1995, employer requested earnings information from claimant for the period from January 1, 1990, through May 17, 1995. Claimant testified that he understood that employer was asking for a report of his earnings for this period; however, he also stated that he relied on advice from Ms. Smith, employer's office assistant for workers' compensation, and from his attorney, and in so doing, he completed the form, reporting only his earnings from his job with the Parks and Recreation Department.[3] Tr. at 22-23, 33-35, 38. He also testified that he later learned he should have reported earnings from both jobs because he received another LS-200 Form one month later requesting more information, and he received a third request in 1996. On this final form, claimant reported earnings from both jobs for the requested period of May 18, 1995, through July 31, 1996. Emp. Exs. 2-3; Tr. at 24-25.

The administrative law judge rejected claimant's testimony, crediting testimony from Mr. Blazey, a case manager for employer's workers' compensation

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[2]Claimant argues that the administrative law judge does not have the authority to make a determination regarding forfeiture, although he acknowledges that *Moore* appears contrary. We reject claimant's argument, as the Board specifically held in *Moore* that the administrative law judge has the authority to determine the applicability of Section 8(j) and that the district director's authority is limited to establishing the forfeiture schedule. *Moore*, 28 BRBS at 183-184.

[3]Claimant listed his earnings as a recreation aide as follows:

1/1/90 - 12/90	$4.25/hr	$5,286.71
1/1/91 - 12/91	$4.35/hr	$3,945.63
1/1/92 - 12/92	$4.50/hr	$5,558.93
1/1/93 - 12/93	$4.60/hr	$6,002.15
1/1/94 - 12/94	$4.70/hr	$5,573.03
1/1/95 - 5/17/95	$4.80/hr	$2,174.68

Emp. Ex. 2.

program assigned to claimant's case, and from Ms. Smith. Mr. Blazey testified that he attended the informal conference on the matter and that claimant stated therein that he did not report earnings from his job as a school bus driver in answer to the first request because of advice he received from the Office of Workers' Compensation Programs. Mr. Blazey testified that he clearly remembered this statement because of the surprised reaction from claimant's counsel. Further, Mr. Blazey informed the administrative law judge that he is responsible for obtaining earnings information from disabled employees and that the cover letter sent with the LS-200 Form is automatically generated and, thus, does not ask for earnings from a specific job. Tr. at 47, 49, 51-52. Ms. Smith stated that she is in charge of payroll and workers' compensation checks and is not involved with the request for earnings statements; therefore, any questions from claimant concerning his earnings report would have been referred to Mr. Blazey. Ms. Smith also disputed claimant's allegation that he received three LS-200 Forms by showing that there were only two earnings reports in his file (dated June 1995 and July 1996). Tr. at 56-57, 60-61.

Given the contradictory evidence of record, the administrative law judge credited employer's witnesses rather than claimant and concluded that claimant willfully under-reported his earnings on the June 1995 LS-200 Form. As it is within his discretion to determine witness credibility, *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), and as his conclusion is supported by substantial evidence, we affirm the administrative law judge's finding that claimant willfully under-reported his earnings for the period from September 1, 1992, through May 17, 1995. *See Zepeda v. National Steel & Shipbuilding Co.*, 24 BRBS 163 (1991). Thus, the administrative law judge properly found that claimant's disability benefits are subject to forfeiture under Section 8(j).

Claimant contends that if he is subject to the Section 8(j) provisions, the forfeiture period should not exceed six months. Specifically, he avers that forfeiture should be limited to either the six-month period prior to the last date earnings were requested or to the six-month period prior to the date on which claimant submitted the form, and, in this case it should be limited to only those six months, as his 1996 LS-200 Form cured any problems there may have been. In reaching this conclusion, claimant notes that both the Act and the regulations "utilize a six month benchmark" and, whether that benchmark is considered a minimum or a maximum, it serves to guide the application of the forfeiture provisions. Cl. Brief at 15 n.8. Nevertheless, claimant further notes that the language of the Act takes precedence over the language of the implementing regulation and obligates the employee, after a request by the employer, to report "not less than semiannually" his earnings from

employment. 33 U.S.C. §908(j)(1). Thus, claimant reasons, if an employer wishes to take advantage of the Section 8(j) forfeiture provisions, it must request earnings at "somewhat regular intervals[,]" namely, every six months. If it fails to do so, then it cannot invoke Section 8(j) for more than that six-month period. Employer argues that the forfeiture should not be limited to six months. Moreover, it argues that the administrative law judge erred in limiting it to only that period which claimant under-reported, as opposed to the entire period requested.

The Board has not addressed the argument that an employer must request an earnings update every six months in previous cases involving Section 8(j). Rather, it has accorded significance to the remainder of the language of that section and held that the forfeiture period is equivalent to "*any period* during which the employee was required to file such report." 33 U.S.C. §908(j)(2) (1994) (emphasis added). Thus, the "period" changes depending on how often an employer requests the information and on how long a claimant under-reports his income. For example, in *Zepeda*, the Board affirmed the administrative law judge's suspension of benefits for 27.5 months -- the period during which the administrative law judge found that the claimant under-reported his earnings. *Zepeda*, 24 BRBS at 167-168. In *Plappert*, the employer requested earnings information for the period between December 13, 1992, and August 5, 1994, a period of nearly two years. *Plappert*, 31 BRBS at 17 (forfeiture was denied only because the omissions occurred during a period in which the claimant was not disabled).

Claimant bases his argument for a six-month limit on a language conflict between the Act and its implementing regulation. Specifically, while the Act states that an employee may have an obligation to report "not less than semiannually," the implementing regulation states that reporting may not be required "more frequently than semi-annually." *Compare* 33 U.S.C. §908(j)(1) (1994) *with* 20 C.F.R. §702.285(a). Technically, claimant is correct: it is a truism that statutes prevail over conflicting language in their implementing regulations. *Commonwealth of Pennsylvania v. U.S. Dep't of Health & Human Services*, 80 F.3d 796 (3d Cir. 1996); *Finkelstein v. United States*, 29 Fed. Cl. 611 (1993); *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984). However, further research into the legislative history of the Act shows that the language of the regulation better satisfies the intent of Congress in enacting Section 8(j).

In the House Conference Report, H.R. Conf. Rep. 1027, 98th Cong., 2d Sess. 33 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2771, 2783, members of the committee stated under the section entitled "Employee Wage Statements":

> Both the Senate bill and the House amendment included identical

> language authorizing employers to require employees receiving compensation to submit a statement of earnings *not more frequently than semi-annually*.

Id. (emphasis added). Thus, although the Act permits an employer to "inform a disabled employee of his obligation to report to the employer not less than semiannually" his earnings from post-injury employment, the joint explanatory statement leaves no doubt that Congress did not intend that employers would request this information more than twice each year. Moreover, the Act clearly gives employers the discretion to request this information as it states that the "employer *may*" inform an employee of his obligation to report,[4] and to *require* an employer to seek updates every six months from all of its employees receiving compensation, as claimant suggests, would be unduly burdensome. More importantly, despite this so-called six-month benchmark, nowhere in Section 8(j) does it state that forfeiture is limited to six months. Such an arbitrary figure could, for instance, permit a dishonest claimant to misrepresent his earnings for years yet receive only a minimal punishment. Therefore, based on the legislative history, and on the language of the Act and the regulations, we reject claimant's six-month limitation argument, as such an interpretation is not supported by the statute and would contravene the purpose of Section 8(j). *See also Plappert*, 31 BRBS at 17 (one of the purposes of Section 8(j) is to keep an employer informed about an employee's post-injury earnings capacity).

We also reject employer's assertion that the administrative law judge inappropriately limited forfeiture to the period of under-reported earnings as opposed to the entire period it requested. Initially, we note that employer's challenge to this aspect of the administrative law judge's decision arises in its response brief.[5] It is generally impermissible to raise a new issue in a response brief. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989); *Garcia v. National Steel &*

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[4] *See also* 130 Cong. Rec. H9730, H9734 (1984) (emphasis added), wherein Congressman Miller stated:

> Additionally, employers *can* require employees receiving compensation for permanent total or permanent partial disability benefits to submit semiannually a statement of any earnings. Failure or refusal to do so would result in forfeiture of all compensation *for the period of noncompliance*.

[5] The cross-appeal only addresses the wage-earning capacity and Section 8(f) findings.

Shipbuilding Co., 21 BRBS 314 (1988). Nonetheless, the legislative history supports the administrative law judge's determination regarding the period of forfeiture. The joint explanatory statement clearly describes the penalty for non-compliance with Section 8(j)'s reporting requirements, providing:

> An employee who fails to report earnings when requested, or omits or understates such earnings forfeits the compensation to which he was entitled *during the period of non-compliance*.

H.R. Conf. Rep. 1027, 1984 U.S.C.C.A.N. at 2783 (emphasis added); *see also Zepeda*, 24 BRBS at 167-168; 130 Cong. Rec. at H9734, n.4, *supra*. Therefore, where an employer requests earnings information for a lengthy period, and there is a clear demarcation of periods between where an employee reported his earnings correctly and where he made omissions or under-reported them, then it is reasonable to apply the forfeiture provision only to the periods of non-compliance. Consequently, we affirm the administrative law judge's application of the Section 8(j) forfeiture provisions, and we hold that he correctly suspended claimant's benefits from September 1, 1992, through May 17, 1995.[6]

Wage-Earning Capacity

In its cross-appeal, employer contends the administrative law judge erred in assessing claimant's post-injury wage-earning capacity. Specifically, employer asserts that claimant is not disabled because his actual earnings, adjusted back to the date of injury based on increases in the national average weekly wage since the time of the injury, exceed his average weekly wage. Claimant responds, urging affirmance of the administrative law judge's findings.

Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), provides for an award of permanent partial disability benefits based on the difference between a claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Section 8(h), 33 U.S.C. §908(h), provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. If these earnings do not represent the claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a

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[6]Accordingly, the district director must consider claimant's finances and establish the forfeiture schedule. *Moore*, 28 BRBS at 183-184.

dollar amount which reasonably represents the claimant's wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT) (9th Cir. 1997); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). Sections 8(c)(21) and 8(h) of the Act require that wages earned in a post-injury job be adjusted to the wages that job paid at the time of the claimant's injury and then compared with his average weekly wage to compensate for inflationary effects. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 7; *see also Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995) (*Rambo I*) (The Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation).

In this case, claimant presented evidence of the earnings of a recreation aide and a school bus driver in 1989. In January 1989, a recreation aide earned, as starting pay, $4 per hour. Cl. Ex. 7. A school bus driver earned $28.22 per day based on a 182-day year, for the 1988-1989 school year. Cl. Ex. 8; Emp. Ex. 5. Claimant testified that he began part-time work as a recreation aide in April 1990, and that he still works there with his hours ranging from 15-25 (or 26) hours per week. Tr. at 19. He also stated that he began part-time work as a school bus driver in September 1992, that he continues with this job, and that he is now guaranteed between 27.5 and 32 hours per week during the nine months school is in session. Tr. at 21. Employer submitted claimant's W2 forms for his wages earned as a bus driver from 1992 through 1995 and the city payroll reports to establish his earnings as a recreation aide from 1992 through 1995. Emp. Exs. 9-10. It argues that these latter figures are claimant's actual earnings and that they better represent claimant's wage-earning capacity than the figures calculated by the administrative law judge. Employer also argues that, as claimant now earns greater than starting pay for both positions, his current rate should be taken into consideration in relating the wages back to the date of injury. Emp. Ex. 7; Tr. at 18-21. That is, employer argues that 1989 wages for an experienced bus driver should be used rather than 1989 wages for a new hire, as claimant is now an experienced driver.

The administrative law judge credited the 1989 wage information supplied by claimant's two employers and credited claimant's testimony that he works between 15 and 25 hours per week as a recreation aide. Using these figures, the administrative law judge concluded that claimant's wage, related back to the date of injury, for a recreation aide, was $80 per week (using an average of 20 hours per week). For the school bus driver, the letter credited by the administrative law judge

reveals 1989 wages which result in annual earnings of $5,136.04 ($28.22/day x 182 days), for a weekly payment of $98.77. Decision and Order at 7. Based on claimant's average weekly wage in 1989 of $483.33, the administrative law judge determined that claimant sustained a loss of wage-earning capacity of $403.33 per week in 1990 ($483.33 - $80; comp. rate = $268.89) which reduced to $304.56 per week in 1992 ($483.33 - $80 - $98.77; comp. rate = $203.04), when he began his second job. *Id.* at 7-8. On reconsideration of the issue, the administrative law judge rejected employer's arguments and affirmed his previous decision.

We reject employer's arguments and affirm the administrative law judge's wage-earning capacity determination. First, it is the wages of the alternate employment back-dated to the date of injury which are compared with claimant's average weekly wage at the time of the injury to determine loss of wage-earning capacity, if any. *Cook*, 21 BRBS at 7. In this case, claimant's average weekly wage at the time of his injury is $483.33. Further, letters from claimant's two employers clearly state the wages those positions paid in 1989.[7] That the administrative law judge credited claimant's statement of the number of hours he worked is well-within his discretionary powers, despite his conclusion that claimant was not a credible witness concerning the Section 8(j) matter. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, the evidence presented by employer does not include claimant's earnings prior to 1992. Consequently, the administrative law judge acted rationally and in accordance with law by computing a 1989 weekly wage of claimant's post-injury employment and comparing the results to the average weekly wage claimant was earning at the time of his injury. *See generally Rambo I*, 515 U.S. at 300-301, 30 BRBS at 5 (CRT) (it is not necessary to modify benefits with every wage raise);[8] *Guthrie*, 30 BRBS at 48; *Cook*, 21 BRBS at 4.

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[7]For this reason, we reject employer's argument to use the increase in the national average weekly wage to determine claimant's wage-earning capacity. *But see Richardson*, 23 BRBS at 327 (actual wages at date of injury of claimant's post-injury job was unknown).

[8]The Court stated:

> We recognize only that an award in a nonscheduled-injury case may be modified where there has been a change in wage-earning capacity. A change in actual wages is controlling only when actual wages "fairly and reasonably represent . . . wage earning capacity." [citation omitted] Otherwise earning capacity may be determined according to the many factors identified in § 8(h). . . . This circumspect approach does not permit a change in wage-earning capacity with every variation in actual

Section 8(f)

Employer also contends in its cross-appeal that the administrative law judge erred in denying Section 8(f) relief. It argues it established a pre-existing permanent partial disability based on claimant's obesity and on his previous back condition. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance, arguing that employer has failed to meet any of the three requirements 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 a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [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*, 514 U.S. 122, 29 BRBS 87 (CRT) (1995). Employer relies on the report of Dr. Reid, dated October 25, 1996, over seven years after the injury, to establish the Section 8(f) elements. Dr. Reid stated in his report that claimant had a chronic back disability and chronic obesity before his January 1989 injury and that these conditions materially and substantially contributed to claimant's present disability. Emp. Ex. 13.

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wages or transient change in the economy.

We affirm the administrative law judge's denial of Section 8(f) relief. Although there is medical evidence to support the occurrence of previous back injuries which rendered claimant temporarily disabled or required him to work temporarily in a light duty capacity, the administrative law judge rationally found there is no evidence of a pre-existing permanent disability. Indeed, the administrative law judge noted that there is a gap of nearly five years between 1984 and 1989 when claimant required no treatment for a back injury or condition. Emp. Ex. 13. Further, none of the medical reports prior to the injury discusses claimant's weight or its detrimental effect on his condition. As the mere existence of prior injuries is insufficient to establish the existence of a serious lasting physical impairment, *see generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146 (CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), we affirm the administrative law judge's conclusion that claimant did not suffer from a pre-existing permanent partial disability due to either his obesity, *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985); *Brogden v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 259 (1984) (obesity, absent physically disabling symptoms, is not a disability in and of itself), or to his previous back injuries, *see Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT); *Belcher Erectors*, 770 F.2d at 1222, 17 BRBS at 149 (CRT); *Campbell Industries*, 678 F.2d at 840, 14 BRBS at 977. Thus, we affirm the denial of Section 8(f) relief.[9]

Accordingly, 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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[9]The Director also argues, and the administrative law judge stated, that employer failed to quantify the contribution of claimant's pre-existing conditions, as required by *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87 (CRT) (1995). As there is no pre-existing permanent partial disability, we need not address the issue of contribution.

ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge