BRB No. 07-0772

A. S.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
FOSS MARITIME COMPANY	)	DATE ISSUED: 06/12/2008
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Supplemental Order on Remand Denying Subsection 8(f) Special Fund Relief of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

Peter B. Silvain, Jr. (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Order on Remand Denying Subsection 8(f) Special Fund Relief (Order) (2004-LHC-0790) of Administrative Law Judge Gerald M. Etchingham 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).

This case is before the Board for the second time. To recapitulate, claimant injured his back while working for employer on July 20, 2000, and, as a result, stopped working on August 6, 2000. Employer voluntarily paid temporary total disability benefits from August 7, 2000, through February 28, 2003, and claimant thereafter sought additional benefits for his back injury. In response, employer requested Section 8(f) relief, 33 U.S.C. §908(f). The district director denied the application for Section 8(f) relief, and the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

The administrative law judge accepted the parties' stipulations, and he therefore awarded claimant temporary total disability benefits from July 21, 2000, through December 17, 2002, and ongoing permanent partial disability benefits thereafter. 33 U.S.C. §908(b), (c)(21). The administrative law judge denied employer's request for Section 8(f) relief as he found that claimant's prior back, leg, and right finger injuries did not result in manifest, pre-existing permanent partial disabilities. Employer appealed the administrative law judge's denial of Section 8(f) relief.

The Board held that substantial evidence supported the administrative law judge's conclusion that employer did not establish the existence of a manifest pre-existing permanent partial disability related to claimant's back and leg conditions, and thus affirmed the administrative law judge's denial of Section 8(f) relief on those bases. [*A. S.*] *v. Foss Maritime Co.*, BRB No. 05-0534, slip op. at 5-7 (Mar. 13, 2006) (unpublished). The Board reversed the administrative law judge's finding that claimant's right index finger amputation, which occurred in 1958, is not a manifest, pre-existing permanent partial disability for purposes of establishing entitlement to Section 8(f) relief. The Board remanded the case for consideration of whether employer established that the contribution element was satisfied. *Id*., slip op. at 7-8.

On remand, the administrative law judge credited the opinion of claimant's treating physician, Dr. Arguelles, to find the claimant's June 2000 back injury was by itself totally disabling, and he denied employer's request for Section 8(f) relief on this basis as employer did not establish that claimant's pre-existing right-hand condition contributed to his total disability. Assuming, *arguendo*, that claimant could perform work within Dr. Reese's work restrictions, the administrative law judge found that employer failed to establish that the right hand disability precluded claimant from performing any jobs identified as suitable alternate employment. Thus, the administrative law judge found that claimant's current disability is not materially and

substantially greater than that which claimant would have incurred from the back injury alone. Accordingly, the administrative law judge denied employer's request for Section 8(f) relief based on claimant's pre-existing right index finger amputation.

On appeal, employer challenges the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds that the case should be remanded for the administrative law judge to reweigh the evidence because the administrative law judge mischaracterized Dr. Reese as having been retained by employer when, in fact, the Office of Workers' Compensation Programs (OWCP) arranged for Dr. Reese to examine claimant. Employer has filed a reply brief.

Section 8(f) of the Act 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 cases where claimant is permanently partially disabled, as here, and employer establishes the existence of a manifest pre-existing permanent partial disability, employer also must show that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone.[1] 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep't of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9th Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

[1] In his initial decision, the administrative law judge accepted the private parties' stipulation that claimant is permanently partially disabled due to his work injury and awarded benefits accordingly. The Board specifically remanded the case for the administrative law judge to address whether claimant's pre-existing finger amputation contributed to his permanent partial disability. In his brief on remand to the administrative law judge, the Director contended that employer failed to show entitlement to Section 8(f) relief irrespective of whether claimant's work injury resulted in permanent total disability or permanent partial disability. Director's Post-Remand Brief at 6-10. The Director, however, did not contend that the private parties' agreement as to permanent partial disability was erroneous. On remand, the administrative law judge addressed Section 8(f) as it relates to an award of both permanent total and permanent partial disability awards. In his response to employer's appeal, the Director now contends that the administrative law judge erred in addressing the issue of whether claimant is totally disabled in the context of Section 8(f) relief. As the underlying permanent partial disability award to claimant is not at issue, the administrative law judge's focus in addressing Section 8(f) should be restricted to the contribution standard applicable in permanent partial disability cases, and we will address the administrative law judge's findings in these terms.

Employer contends that the administrative law judge erred by crediting the opinion of Dr. Arguelles that claimant's disability is due solely to his work-related back injury over the opinions of Drs. Reese and McCollum on the basis that Dr. Arguelles is claimant's treating physician. In his order on remand, the administrative law judge stated that the Ninth Circuit, in whose jurisdiction this case arises, held in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999), that the fact-finder must give "special weight" to a treating physician's opinion. The administrative law judge summarily found that Dr. Arguelles's opinion that claimant is disabled due to his work injury alone therefore is controlling. Order at 3.

We cannot affirm this finding. In *Amos*, the court held that greater weight may be accorded to a treating physician's opinion regarding treatment options since he is employed to cure and has a greater opportunity to know and observe the patient as an individual. *Amos*, 164 F.3d at 1054, 32 BRBS at 147(CRT) (internal citations omitted). The court further held that, on the facts of that case, the administrative law judge was required to credit the claimant's treating physician since his opinion is entitled to special deference and since it was not shown by the testimony of other doctors to be unreasonable. The court's holding, therefore, is based on two factors: the doctor was the treating physician and the other medical evidence of record did not show his opinion to be unreasonable. Accordingly, in weighing a treating physician's opinion, the administrative law judge may accord determinative weight to the opinion but he also must consider its underlying rationale, as well as the other medical evidence of record. *See Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001); *see also Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). In this case, the administrative law judge's crediting of Dr. Arguelles does not reflect consideration of any factor other than his status as claimant's treating physician, and the administrative law judge found his opinion "controlling" for this reason alone. Order at 3. We, therefore, agree with employer that the administrative law judge erred by crediting Dr. Arguelles's opinion that claimant is disabled due to his work injury alone without considering its underlying rationale or addressing his opinion in view of the other evidence of record. *See Brown*, 34 BRBS at 200-201. Accordingly, we vacate the administrative law judge's finding that claimant is disabled due to the work injury alone. On remand, the administrative law judge must reconsider the weight to be accorded Dr. Arguelles's opinion in view of its rationale and the other medical evidence of record.

Employer also challenges the administrative law judge's finding that it failed to establish that claimant's right finger amputation precluded him from performing the jobs it identified as evidence of suitable alternate employment. Employer may establish the contribution element by establishing that the pre-existing disability foreclosed some employment that otherwise would be suitable if claimant had sustained only the work-

related back injury, and if the result was a materially and substantially greater disability. *Quan*, 203 F.3d 664, 33 BRBS 204(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997). Employer asserts that it submitted such evidence consistent with the work restrictions of Dr. McCollum. Dr. McCollum opined that claimant could work full-time with a mixture of standing, sitting, and walking, no repetitive bending, climbing, and crawling, isolated lifting up to 35 pounds, and no repetitive lifting over 25 pounds. FX 4 at 1. Employer submitted positions as a bench assembler, assembly tech, manufacturing support, and production worker that it asserts are within Dr. McCollum's restrictions for claimant's back condition. FX 6 at 1-4. Employer further submitted letters from vocational consultants Merrill Cohen and Gary Peterson in which they opined that claimant would be unable to perform the handling and fingering tasks required by the identified positions. FXs 5, 6 at 5-6. Employer contends that the administrative law judge erred by crediting the opinions of Drs. Arguelles and Reese as to claimant's work restrictions and in rejecting those restrictions placed by Dr. McCollum, in part, for the reason that he was the second orthopedist retained by employer to examine claimant and to render an opinion on the extent of claimant's disability. In his response brief, the Director moves to remand the case to the administrative law judge, asserting that he erred in finding that Dr. McCollum was the second orthopedist retained by employer and must therefore clarify whether the weight accorded the medical evidence is altered once this error is corrected.

The administrative law judge discussed the initial work restrictions placed by Dr. Arguelles, those placed by Dr. Reese, who the administrative law judge stated was the first medical expert employer retained to examine claimant, and those of Dr. McCollum, who the administrative law judge stated was employer's second retained medical expert. The administrative law judge credited Dr. Reese's restrictions limiting claimant to part-time sedentary work because his opinion is more similar to that of Dr. Arguelles's initial opinion and to claimant's own assessment of his work capacity. Moreover, the administrative law judge reasoned that Dr. Reese's opinion is entitled to more weight than that of Dr. McCollum since the latter is the second medical examiner secured by employer in the same medical specialty (orthopedic surgeon); therefore, he rejected the opinion, finding that employer was "doctor shopping." Order at 5. The administrative law judge stated that, under these circumstances, he would credit Dr. McCollum's opinion only if Dr. Reese's opinion was shown to be erroneous, and he found that no such showing was made in this case. *Id.* The administrative law judge also found that the jobs employer produced as evidence of suitable alternate employment were not within Dr. Reese's restrictions, and were thus not suitable because of claimant's low back restrictions alone. Order at 6; *see* FX 6 at 1-5.

We agree with the Director and employer that the administrative law judge erred by rejecting Dr. McCollum's opinion on the basis that he was the second medical expert retained by employer to assess claimant's medical condition. The record shows that Dr. Reese was retained by the OWCP, and that Dr. McCollum was the sole physician retained by employer. FXs 3, 4. Accordingly, we vacate the administrative law judge's findings as to claimant's work restrictions, and we grant the Director's motion to remand. On remand, the administrative law judge must reweigh the medical evidence and determine claimant's restrictions. Should the administrative law judge credit Dr. McCollum's work restrictions, he must then compare these restrictions to all the specific positions employer identified that it contends claimant could perform but for his pre-existing right finger amputation. The administrative law judge must make specific findings as to whether claimant's permanent partial disability is materially and substantially greater due to pre-existing right finger disability.[2] *See generally Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

[2]Employer also argues that the administrative law judge erred by failing to consider evidence of two part-time positions that it contends are within Dr. Reese's restrictions. Specifically, employer contends it submitted a clerk position that required no lifting over 20 pounds and a ticketing agent job that involved no lifting over 10 pounds. In this regard, employer states that its evidence is located at "EX 14 at p. 170-171." There is no indication that the administrative law judge admitted into evidence any exhibits from employer enumerated "EX." In his initial decision, the administrative law judge stated that he admitted into evidence "ALJ EX 1, 3" and employer's exhibits "FX 1-6, CTR and MTR." Decision and Order at 2. In his Order on remand, the administrative law judge stated that he additionally admitted into the record "ALJ EX 4-5." Order at 1. The administrative file contains exhibits labeled "EX," but it does not include any numbered as "EX 14." The administrative law judge also cited to "CX 19." *Id.* at 3. The briefs of employer and the Director refer to multiple exhibits enumerated as "CX" and "EX." On remand, the administrative law judge must determine which exhibits were admitted into evidence. Should the administrative law judge find that the record includes the part-time positions employer contends establish that claimant's disability is partial, the administrative law judge must address employer's contention that claimant's partial disability is materially and substantially greater than that which would have resulted from the work injury alone. *See generally Quan*, 203 F.3d 664, 33 BRBS 204(CRT).

Accordingly, the Director's motion to remand is granted. The administrative law judge's denial of Section 8(f) relief is vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge