BRB No. 02-0284

JEFFREY McCUSKER Claimant v. MIDWEST ENERGY RESOURCES COMPANY and FRANK GATES ACCLAIM Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED:Nov. 15, 2002 DECISION and ORDER

Appeal of the Decision and Order-Denying §8(f) Relief of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Gregory P. Sujack (Garafalo, Schreiber & Hart, Chartered), Chicago, Illinois, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Denying §8(f) Relief (2001-LHC-0158) of Administrative Law Judge Rudolf L. Jansen 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).

On March 16, 1999, claimant was operating a bulldozer when he drove over an embankment, dropping approximately four feet. Claimant was jostled around the cab and injured his back. Claimant sought treatment and was diagnosed with a right S1 radiculopathy and a right-sided L5-S1 herniated disc. On April 22, 1999, claimant underwent surgery, and was eventually released to return to work with restrictions. J. Ex. 3 at 6. The parties agreed that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), and medical benefits have been paid. *See* 33 U.S.C. §907. Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C §908(f).

In his decision, the administrative law judge evaluated employer's request for Section 8(f) relief and found that claimant previously suffered an injury to his back on May 2, 1988, which resulted in a five percent whole body impairment. In addition, the administrative law judge found that Drs. Budd and Hindle diagnosed a pre-existing degenerative condition. Therefore, the administrative law judge found that the evidence establishes that claimant suffered from a pre-existing permanent partial disability. In addition, the administrative law judge found that while employer did not have actual knowledge of claimant's pre-existing permanent partial disability, medical records existed which diagnosed protruding and bulging disks, and thus claimant's pre-existing condition was manifest to employer. However, the administrative law judge found that Dr. Hindle's opinion that claimant's pre-existing condition accounts for a small portion of his disability establishes only that claimant's pre-existing condition had a small effect on his current permanent partial disability and not a material and substantial effect as required by Section 8(f) of the Act. Thus, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer contends that claimant was disabled prior to the injury in March 1999 and that the administrative law judge erred in finding that claimant's pre-existing permanent partial disability did not contribute to his current disability. Thus, employer contends that the administrative law judge erred in denying Section 8(f) relief. The Director, Office of Workers' Compensation Programs, (the Director) has not responded to this appeal.

Section 8(f) shifts liability for payment of compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. *See* 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 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 but is materially and substantially greater than that which would have resulted from the subsequent injury alone. 33 U.S.C. '908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp.*, [*Johnson*] 129 F.3d 45, 31 BRBS 155(CRT)(1st Cir. 1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT)(5th Cir. 1997); *Two "R" Drilling Co., Inc.*

v. Director, OWCP, 894 F.2d 748, 23 BRBS 34(CRT)(5th Cir. 1990); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

In the present case, the administrative law judge found that claimant suffered from a manifest pre-existing permanent partial disability. These findings are not challenged on appeal. With regard to contribution, the administrative law judge found that Dr. Hindle's opinion establishes that the existence of claimant's pre-existing condition had a small effect, not a material and substantial effect, on claimant's current disability. Decision and Order at 7-8. Dr. Hindle responded to employer's interrogatories as follows:

> To a reasonable degree of medical certainty, I feel the injury of March 99 was a significant contributing factor to the patient's current disability.
>
> The pre-existing degenerative changes in the patient's lumbar back would have contributed only a small part to the patient's current disability.

Emp. Ex. 1. In addition, the administrative law judge found that no physician opined that claimant's current level of disability is materially and substantially greater than that which would have resulted from the current injury alone. Decision and Order at 7.

Contrary to employer's contention on appeal, employer, as the party seeking Section 8(f) relief, bears the burden for establishing all of the requisite elements for entitlement to Section 8(f) relief, including producing substantial evidence that claimant's current overall disability is materially and substantially effected by the pre-existing disability. *See generally Lewis*, 202 F.3d 656, 34 BRBS 55(CRT); *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Louis Dreyfus*, 125 F.3d 884, 31 BRBS 141(CRT); *Two "R" Drilling*, 894 F.2d 748, 23 BRBS 34(CRT). While medical evidence is not required, employer must produce vocational or other evidence establishing that claimant's current disability is materially and substantially greater due to the effects of the prior condition. *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT). Such evidence is absent here.

Employer relies on evidence regarding the severity of claimant's pre-existing disability, asserting that claimant had permanent work restrictions as a result of the 1988 injury, that he received a state compensation award for this injury and that his work was restricted thereafter. Evidence regarding claimant's pre-existing condition alone cannot meet employer's burden, as it does not establish the degree of contribution of the pre-existing disability to claimant's current problems; such a showing requires quantification of the level of impairment due to the subsequent work-related injury. *Id.* The mere existence of a prior disability does not establish that it materially and substantially contributed to claimant's current disability.

In this case, the administrative law judge properly considered the relationship between claimant's pre-existing disability and his current injury. His finding that Dr. Hindle's opinion was not sufficient to establish that claimant's current disability is materially and substantially affected by his pre-existing condition is supported by the doctor's conclusion that claimant's pre-existing condition contributed only a small part to his current disability. Moreover, the administrative law judge found that claimant testified that he had no work restrictions when he began working for employer and was relatively asymptomatic. J. Ex. 8 at 22-23, 27. As the administrative law judge reviewed the evidence of record and employer has demonstrated no reversible error in his decision, we affirm the administrative law judge's finding that the evidence is insufficient to establish that claimant's pre-existing condition materially and substantially contributed to his current level of disability. Thus, we affirm the denial of Section 8(f) relief. *Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000).

[1] Contrary to employer's contention, Dr. Budd did not impose work restrictions following claimant's injury in 1988. Claimant testified that Dr. Budd recommended that he "watch" himself, which claimant understood to mean to be guarded and restricted. J. Ex. 8 at 25. Furthermore, the administrative law judge did not err in not specifically addressing claimant's self-imposed limitations, as such evidence is insufficient to meet employer's burden.

Accordingly, the administrative law judge's Decision and Order denying employer relief from continuing compensation liability pursuant to Section 8(f) is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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PETER A. GABAUER, JR.
Administrative Appeals Judge