BRB No. 96-1083

FRANCIS L. SHUELL	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED: 9/18/99
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

Mark Reinhalter (Henry L. Solano, Solicitor of Labor; Carol 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (95-LHC-2287) of Administrative Law Judge David W. Di Nardi 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).

Claimant, who began working for employer on August 18, 1958, sustained injuries to his back and leg as a result of tripping over train tracks while on the job on February 13, 1981. Claimant was examined by Dr. Sculco on May 11, 1981, who, as a result of his diagnosis of extensive radiculitis with motor deficit, briefly excused claimant from work, and referred him to a neurosurgeon, Dr. Scoville. Dr. Scoville's examination revealed that claimant suffered from spinal stenosis of moderate degree and posterior protrusion at L3/4 for which he recommended a bilateral laminectomy. A worsening of claimant's symptoms caused him to miss periods of work, and to completely stop working on January 23, 1982. He ultimately took "early retirement" on March 14, 1983. Claimant eventually underwent multiple surgeries culminating in a lumbar spinal fusion procedure on May 18, 1988.

In his decision, the administrative law judge awarded claimant periods of temporary total disability compensation under Section 8(b), 33 U.S.C. §908(b), as well as permanent total disability benefits commencing on June 24, 1983, in accordance with Section 8(a), 33 U.S.C. §908(a), and all reasonable and necessary medical benefits related to claimant's work injury on February 13, 1981, up until his death on January 11, 1996. In addition, the administrative law judge found that employer did not establish that claimant suffered from a pre-existing permanent partial disability that contributed to his total disability as required by Section 8(f) of the Act, 33 U.S.C. §908(f), and therefore denied employer relief from the Special Fund.

Employer appealed the administrative law judge's decision to the Board and the case was assigned BRB No. 96-1083. On April 10, 1997, the Board issued an Order dismissing and remanding the appeal to the district director for reconstruction of the record or in the alternative, to remand the case to the Office of Administrative Law Judges for a new hearing. A reconstructed record was received on May 3, 1999, and the case was reinstated by Order dated May 21, 1999.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

Employer argues that contrary to the administrative law judge's finding, the evidence of record clearly establishes that claimant suffers from a pre-existing permanent partial disability, in the form of a long-lasting back condition, which contributed to his total disability. Specifically, employer avers that claimant's medical records document that his back condition was in existence for over twenty years prior to his work-related injury and that this evidence, in conjunction with Dr. Browning's testimony that claimant had at least a

ten percent permanent partial impairment of the lumbar spine, directly contradicts the administrative law judge's finding. In addition, employer maintains that Dr. Browning's testimony that claimant's overall disability was made materially and substantially greater because of his pre-existing degenerative back condition sufficiently satisfies the contribution requirement of Section 8(f).

Section 8(f) shifts 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. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *see also Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993). In order to constitute a pre-existing permanent partial disability for Section 8(f) purposes, claimant must have a serious, lasting physical condition which pre-existed the work injury. *See, e.g., Director, OWCP v. General Dynamics Corp.* [*Bergeron*], 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992). In order to meet the contribution requirement for Section 8(f) relief, employer must show that the subsequent injury alone did not cause claimant's permanent total disability. *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT).

In the instant case, the administrative law judge's denial of Section 8(f) relief is premised upon his findings that claimant did not suffer from any pre-existing permanent impairment, and that therefore his total disability is due solely to his February 13, 1981, severe back injury. In addressing the first requirement for Section 8(f) relief, *i.e.*, that claimant suffered from a pre-existing permanent impairment, the administrative law judge determined that although the evidence establishes that claimant suffered from spondylosis, sciatica and degenerative changes of his lumbar spine, these conditions did not result in any permanent impairment as he was able to perform all of his assigned duties. Specifically, the administrative law judge found that while employer's Yard hospital records reflect back pain as early as June 15, 1962, low back pain on October 10, 1975, and treatment by Dr. Wilson for flareups of sciatica, claimant was able to continue working and did not miss any time for his injury until May 20, 1981.

For purposes of Section 8(f) relief, the pre-existing condition need not result in an economic disability to be a pre-existing permanent partial disability. *Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988). Consequently, the fact that claimant did not miss any time from work because of his pre-existing back conditions is not, alone, sufficient to rule out that claimant did not have any pre-existing permanent impairment given the other evidence in this case. *Id.* In addition, the

administrative law judge did not consider certain evidence relevant to whether claimant suffered from a pre-existing permanent partial impairment. In particular, the administrative law judge did not address Dr. Sculco's opinion that claimant had a pre-existing twelve percent permanent impairment of the lumbosacral spine attributable to his pre-existing stenosis, or Dr. Browning's testimony that at the time of his February 13, 1981, work-related injury, claimant already suffered from at least a ten percent permanent partial impairment of the lumbar spine based upon multiple episodes of back pain, the findings on x-ray and the records of physicians who treated him at that time. In addition, the administrative law judge did not consider evidence that claimant's low back condition restricted him, for some period of time, from climbing on boats. The administrative law judge's finding that claimant did not suffer from any pre-existing permanent impairment must therefore be vacated, and the case remanded. *White v. Peterson Boatbuilding Co.*, 29 BRBS 1 (1995).

With regard to the administrative law judge's consideration of the contribution element, the administrative law judge did not consider Dr. Browning's testimony that claimant's surgery in 1982, and presumably the resulting disability, is not due solely to the February 13, 1981, work-related injury, but rather is occasioned by his pre-existing problems and by the fall in 1981, *see Luccitelli,* 964 F.2d at 1303, 26 BRBS at 1 (CRT); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). We therefore vacate the administrative law judge's finding that claimant's total disability is due solely to his February 13, 1981, severe back injury.

Finally, we note that the administrative law judge did not discuss whether employer's evidence in the instant case is sufficient to establish the requisite manifest requirement. The manifest requirement of Section 8(f) may be satisfied either by employer's actual knowledge of the pre-existing condition or by medical records from which claimant's condition could be objectively determined and which were in existence prior to the subsequent injury. *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992).

On remand, therefore, the administrative law judge must reconsider employer's entitlement to Section 8(f) relief in light of all of the relevant evidence of record. If he finds that employer established the requisite pre-existing permanent partial disability, he must then consider whether that pre-existing condition was manifest to employer and if so, then reconsider whether claimant's current permanent total disability is not due solely to the subsequent work injury. *Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT).

Accordingly, the administrative law judge's denial of Section 8(f) relief to employer is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge