BRB No. 90-1825

GEORGE B. GREENE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
J. O. HARTMAN MEATS	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

John C. Duncan, III and William S. Sands (McChesney, Duncan & Dale, P.C.), Washington, D.C., for employer/carrier.

Michael S. Hertzig (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (81-DCW-421) of Administrative Law Judge Robert J. Feldman granting employer relief from continuing compensation liability 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.* (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973)(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).

This case is before the Board for a second time. Claimant was employed as a meatcutter when he injured his back on August 24, 1979. A laminectomy was performed on September 27, 1979; thereafter, claimant attempted to return to work, but was forced to cease working on May 2, 1980. In the original Decision and Order, Administrative Law Judge Dunau awarded claimant benefits for temporary total disability from August 25, 1979 through March 19, 1980, for temporary partial disability from March 20, 1980 through May 2, 1980, and for permanent total disability from May 3, 1980 and continuing. 33 U.S.C. §908(a), (b), (e). In addition, the administrative law judge determined that employer failed to establish its entitlement to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), as claimant's pre-existing weakened back condition was due to aging.

On appeal, the Board held that degenerative disc disease due to the aging process may be a pre-existing disability for purposes of Section 8(f). *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988). Accordingly, the Board vacated the administrative law judge's finding that the evidence failed to establish the existence of a pre-existing permanent partial disability, and remanded the case for the administrative law judge to reconsider the evidence under the proper standard. *Id.* at 214. The Board also held that employer had established the contribution element of Section 8(f) as a matter of law. *Id.* at 218. Lastly, the Board vacated the administrative law judge's determination that claimant's pre-existing degenerative spine condition was not manifest to employer and remanded for further findings of fact on this issue. *Id.* at 219.

On remand, the administrative law judge[1] found that claimant's degenerative disc disease is a serious, lasting physical condition that qualifies as a pre-existing permanent partial disability which was manifest to employer prior to the 1979 work-related injury. Therefore, the administrative law judge found employer entitled to Section 8(f) relief.

On appeal, the Director contends that the Board erred in reversing the original Decision and Order denying Section 8(f) relief, and in holding that the contribution element was established as a

[1] As Administrative Law Judge Dunau had retired, the case was assigned to Administrative Law Judge Feldman on remand.

matter of law. Employer responds, urging affirmance of the administrative law judge's decision on remand as it is supported by substantial evidence. Employer also notes that the Director improperly seeks review of the Board's first decision rather than the administrative law judge's decision on remand.

Specifically, on appeal the Director contends that medically insignificant, normal, age-appropriate degenerative changes in the back do not qualify as a manifest pre-existing permanent partial disability under Section 8(f), citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990). Thus, the Director contends that the Board erred in reversing the administrative law judge's original denial of Section 8(f) relief.

Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case of permanent total disability where an employee suffers from a manifest pre-existing permanent partial disability which contributes to the employee's permanent total disability. 33 U.S.C. §908(f); *see generally Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988). A medical condition need not be economically disabling in order to constitute a pre-existing permanent partial disability within the meaning of Section 8(f), as a pre-existing permanent partial disability has been defined as a serious, lasting physical condition. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146 (CRT)(D.C. Cir. 1985); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). An asymptomatic condition may constitute a pre-existing disability. *See generally Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Berkstresser*, 921 F.2d at 309, 24 BRBS at 71-72 (CRT); *Belcher Erectors*, 770 F.2d at 1223, 17 BRBS at 149 (CRT).

Initially, we note that contrary to the Director's assertion, the Board did not reverse the initial denial of Section 8(f) relief but remanded the case to the administrative law judge for reconsideration of the evidence regarding the existence of a pre-existing permanent partial disability and to consider whether claimant's pre-existing degenerative condition was manifest to employer. *Greene*, 21 BRBS at 217, 218. In the present case, the record contains medical evidence supporting the administrative law judge's finding that claimant had a pre-existing permanent partial disability, namely a degenerative spinal condition. Post-injury evidence may be used to establish the existence of a pre-existing permanent partial disability. *Currie v. Cooper Stevedoring Company, Inc.*, 23 BRBS 420 (1990). In this case, Drs. Cooney, Joseph, and Katzen all stated that, prior to the 1979 injury, claimant suffered degenerative changes in his spine due to discogenic disease.[2] Dr. Joseph noted that x-rays show that claimant had degenerative changes in the spine by the date of the x-rays and opined that this was not a normal spine at the time of the work episode. H. Tr. at 17-18, 33. Although Dr. Cooney attributed these changes to the normal aging process, the Board previously

[2] The record also contains evidence of pre-existing pain in the right hip, for which claimant required periodic injections of cortisone. The Board held in its original decision that there was no evidence that claimant's hip infirmity combined with the work injury to cause permanent total disability and thus affirmed the administrative law judge's finding that this evidence did not aid employer in establishing entitlement to Section 8(f) relief. *See Greene*, 21 BRBS at 217.

held that degenerative disc disease due to the aging process may be a pre-existing disability for purposes of Section 8(f), based on the facts of a specific case, and that handicaps due to age are not to be precluded based solely on the cause of the handicap. *See Greene*, 21 BRBS at 218. The record also contains an x-ray report from 1968 that revealed moderate narrowing of the disc space between the L5, S1 vertebrae, an x-ray from 1971 that was reported to show mild hypertrophic degenerative changes involving the mid-dorsal vertebrae, and an x-ray from 1974 that was reported to show mild degenerative changes in the mid-dorsal spine.

In the present case, the administrative law judge on remand found that the medical records which diagnose that claimant had a pre-existing degenerative disc disease and x-ray reports of record dated prior to the work-related injury which report degenerative changes in the spine indicate the presence of a serious and lasting degenerative spinal condition. As this finding is supported by the evidence of record and is rational, we affirm the administrative law judge's finding that claimant's degenerative disc disease constitutes a pre-existing permanent partial disability. *See generally Currie*, 23 BRBS at 426.

The manifest requirement may be satisfied either through employer's actual knowledge of the pre-existing condition or through medical records in existence prior to the second injury revealing an unambiguous, objective and obvious indication of a serious, lasting condition. *Berkstresser*, 921 F.2d at 923, 24 BRBS at 71 (CRT). The United States Court of Appeals for the District of Columbia Circuit held in *Berkstresser* that x-rays and medical reports which document a condition of "minimal degeneration" were insufficient as a matter of law to fulfill the manifest requirement under Section 8(f). Thus, the court affirmed the administrative law judge's finding that a manifest condition was not established as the claimant's condition was usual in people of his age and not medically significant. In this case, the administrative law judge found that the manifest element was satisfied by the 1971 and 1974 x-ray reports indicating disc degeneration.

We reject the Director's contention that the court's decision in *Berkstresser* requires a finding that the manifest element is not satisfied in this case, as the facts of the two cases are distinguishable. In *Berkstresser*, the x-ray report that pre-dated the work injury revealed "minimal degeneration," and the administrative law judge found, based on medical evidence, that this condition was "normal, age appropriate and medically insignificant." By contrast, in this case, the x-rays show that claimant had "mild" degeneration, and Dr. Joseph and Dr. Cooney stated that the 1971 and 1974 x-rays were not normal.[3] Cooney Dep. at 16; Joseph Dep. at 24-25. The precise nature of the pre-existing condition need not be manifest, as long as there is sufficient information regarding the existence of a serious, lasting physical problem. *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd*

[3] We also reject the Director's contention that the manifest element is not met because Judge Dunau, who originally decided this case, found that claimant's pre-existing condition was due to the normal aging process, a finding the Director alleges is consistent with the court's opinion in *Berkstresser*. Judge Dunau, however, erroneously ruled out all age-related conditions as the basis for Section 8(f) relief, and thus did not consider the evidence under the proper standard. *See Greene*, 21 BRBS at 217.

sub nom. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992). As this case is distinguishable from *Berkstresser*, and as the administrative law judge's finding is rational and supported by the evidence of record, we affirm his finding that the manifest element is satisfied.

Finally, we reject the Director's contention that the Board erred in holding that the contribution element of Section 8(f) is met as a matter of law. In the original Decision and Order, the administrative law judge found that "none of the problems of which there is a record had any demonstrable connection with the rupture of claimant's L3-4 disc ..." Decision and Order at 7. The Board has held that contribution may be established by medical or other evidence demonstrating that claimant's pre-existing permanent partial disability contributed to claimant's total disability. *See generally Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). As the evidence of record contains the medical opinions of Drs. Katzen, Cooney and Joseph who state that claimant's back problems after the work injury in 1979 and subsequent surgery resulted from a combination of pre-existing degenerative disc disease and the ruptured disc due to the work accident, we deny the Director's request to vacate the Board's earlier decision and reinstate the administrative law judge's original Decision and Order. Moreover, the Board's prior decision in this case holding that the contribution element is satisfied is the "law of the case." *See Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Brocklehurst v. Giant Food, Inc.*, 22 BRBS 256 (1989).

Accordingly, the Decision and Order of the administrative law judge granting employer relief from continuing compensation liability under Section 8(f) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge