BRB No. 92-2221

HERMAN TAYLOR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SOUTHEAST STEVEDORE, INCORPORATED	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	DATE ISSUED:
	)	
Employer/Carrier Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order Granting Section 8(f) Relief of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Jordon D. Morrow (Barrow, Sims, Morrow & Lee, P.C.), Savannah, Georgia, for employer/carrier.

Mark Reinhalter (Thomas S. Williamson, Jr., 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, and DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Section 8(f) Relief (91-LHC-1551) of Administrative Law Judge Eric Feirtag 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).

On February 15, 1987, claimant, a longshoreman for 28 years, sustained a low-back injury while working for employer loading liner board. Although claimant returned to work in July 1987, by March 1988 claimant's back pain had increased and he again stopped working. On March 29, 1988, claimant underwent a lumbar laminectomy and discectomy at the L5-S1 level. Claimant has not returned to work since this surgery. Claimant sought permanent total disability compensation under the Act. Prior to the hearing, employer and claimant stipulated that claimant reached maximum medical improvement on September 22, 1988, that he was permanently totally disabled and that he was entitled to compensation based on an average weekly wage of $1,274.75. Accordingly, the only issue pending for adjudication before the administrative law judge was employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge determined that employer was entitled to Section 8(f) relief. In so concluding, the administrative law judge noted that since 1984 Dr. Stanley had treated claimant for a seizure disorder, which rendered his longshore work potentially more dangerous, and concluded that as this was the type of condition which would have motivated a cautious employer to discharge the employee because of an increased risk of compensation liability, it was a pre-existing permanent partial disability for Section 8(f) purposes. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). The administrative law judge further determined that the pre-existing seizure disorder was manifest to the employer prior to the work injury and that the combination of this pre-existing condition and the subsequent work-related back injury rendered claimant more physically and economically disabled than he otherwise would have been based on the work-related back injury alone. Decision and Order at 9.

Citing *Director, OWCP v. Luccittelli*, 965 F.2d 1303, 1305-1306, 26 BRBS 1, 5-6 (CRT) (2d Cir. 1992), the Director argues on appeal that the administrative law judge's award of Section 8(f) relief cannot stand because he analyzed the contribution element of Section 8(f) under an erroneous legal standard. The Director asserts that there is no evidence in the record sufficient to establish Section 8(f) contribution under the correct legal standard. Employer responds, urging that the administrative law judge's decision awarding Section 8(f) relief be affirmed.

Section 8(f) relief is available to employer if it establishes: (1) that the employee had an pre-existing permanent partial disability; (2) that the pre-existing disability was manifest to employer prior to the subsequent work injury; and (3) that the employee's current disability is not due to the most recent injury alone. *See Bunge Corp. v. Director, OWCP (Miller)*, 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 147 (1991); 33 U.S.C. §908(f).

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be affirmed because his finding of Section 8(f) contribution was made under an erroneous legal standard.[1] Based on claimant's testimony and that of Drs. Lorenzen and Stanley, the administrative law judge concluded that the limitations placed on claimant by his seizure disorder are different from those placed on him as a result of his back injury. The administrative law judge explained that in addition to the physical limitations which Dr. Lorenzen placed on claimant due to his back injury, *i.e.*, no heavy work and limited sitting and standing for four hours per day, Dr. Stanley's testimony established that claimant must also avoid any position where he could injure himself or another if he were to have another seizure. The administrative law judge further concluded that claimant's problems with sleepiness, concentration, and vision may prevent him from performing work which he would be able to perform if his back injury alone were his only disability. In this regard, the administrative law judge noted claimant's testimony that while his back injury alone would prevent him from performing his longshore employment, his seizure disorder would interfere with his ability to perform other types of work. In light of these findings, the administrative law judge concluded that contribution under Section 8(f) was established, stating that claimant not only suffers from a greater degree of physical disability due to the combination of his seizure disorder and subsequent back injury but, in addition, has a greater incapacity to earn wages.

The Director correctly asserts that in order to establish the contribution element of Section 8(f), employer must demonstrate that the subsequent work injury alone would not have caused claimant's permanent total disability. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1353, 27 BRBS 41 (CRT) (9th Cir. 1993); *Luccittelli*, 965 F.2d at 1306, 26 BRBS at 5 (CRT). It is not sufficient that claimant's injuries combine to create a greater degree of disability than would have occurred based on the subsequent work injury alone. *E.P. Paup Co.*, 999 F.2d at 1353, 27 BRBS at 54 (CRT). If the later injury alone is sufficient to render claimant permanently totally disabled, the fact that his pre-existing conditions may have made his total disability even greater is not determinative. *Id.*, 999 F.2d at 1353; *FMC Corp v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); *Two "R" Drilling Co., Inc., v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1989). As the administrative law judge in the present case concluded that the contribution element was established based on the combined effect of claimant's pre-existing condition and the work injury without considering whether claimant's second injury alone would have rendered him permanently totally disabled, we must vacate this finding and remand for him to reconsider this issue, re-opening the record if necessary. If on remand the administrative law judge concludes that claimant would

[1]The Director does not challenge the administrative law judge's findings with regard to the remaining elements of Section 8(f), 33 U.S.C. §908(f), entitlement.

have been totally disabled by the subsequent work-injury alone, employer is not entitled to Section 8(f) relief. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *cert. granted*, 115 S.Ct. 41 (Sept. 26, 1994). If, however, based on medical, vocational or other evidence, the administrative law judge finds that claimant's work-related back injury alone would not have rendered him permanently totally disabled but for his pre-existing seizure condition, he should reinstate his prior award of Section 8(f) relief.[2]

Accordingly, the administrative law judge's Decision and Order Granting Section 8(f) Relief is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]Inasmuch as we agree with the Director that the administrative law judge erred in analyzing Section 8(f) contribution in terms of whether claimant's pre-existing conditions rendered him more disabled, we need not address the Director's assertion that the administrative law judge's findings in this regard are speculative, equivocal, and not supported by the evidence.