

BRB No. 97-906

RICHARD R. LEWIS, SR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS	)	DATE ISSUED:
CORPORATION	)	
	)	
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 on Remand - Denying Section 8(f) Relief 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.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand- Denying Section 8(f) Relief (89-LHC-0958) 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 if they 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 the second time. On January 23, 1978, claimant injured his back during the course of his employment as a longshoreman for employer. Employer voluntarily paid claimant temporary total disability compensation from March 23, 1978 through March 11,

1979, and from April 17, 1979, and continuing. Claimant sought permanent total disability compensation under the Act, and employer sought entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his initial Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from March 23, 1978 to March 11, 1979, and from April 17, 1979 to June 15, 1981, and permanent total disability compensation thereafter. In addition, he determined that employer established entitlement to Section 8(f) relief based on claimant's prior back injuries in 1954 and 1959 and a left leg and hip injury claimant sustained in 1976.

The Director, Office of Workers' Compensation Programs (the Director), appealed the award of relief under Section 8(f) to the Board. On appeal, the Board vacated the administrative law judge's award of Section 8(f) relief, and remanded the case for reconsideration because the administrative law judge had summarily concluded that employer was entitled to Section 8(f) relief based on the aforementioned injuries without weighing and fully explaining the basis for his conclusions in violation of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A) (the APA). *Lewis v. General Dynamics Corp.*, BRB No. 90-1159 (June 27, 1996)(unpublished). In addition, the Board held that the fact that claimant had previously sustained back injuries did not, standing alone, establish a pre-existing permanent partial disability and remanded the case for the administrative law judge to consider whether claimant's prior 1954 and 1959 back injuries, which were manifest based on employer's records, constituted serious lasting physical conditions, noting that there was evidence in the record which suggested that these injuries did not resolve without permanent effects. The Board further instructed the administrative law judge that if, on remand, he found that claimant's prior back-related injuries constituted pre-existing permanent partial disabilities, he was to reconsider whether employer established that claimant's permanent total disability was not due solely to his last injury as is required under the controlling legal standard set forth in *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).<sup>1</sup>

On remand, the administrative law judge denied Section 8(f) relief. He initially found, consistent with the Board's prior determination, that inasmuch as claimant's pre-existing

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<sup>1</sup>In its Decision and Order, the Board also held that claimant's prior 1976 injury to his left hip and leg could not support an award of Section 8(f) relief because the record reflected that the effects of this injury were temporary. Slip op. at 4. The Board also noted that as claimant's pre-existing degenerative back disease was not manifest to employer until after his 1978 work injury, it also could not serve as a proper basis for an award of Section 8(f) relief. *Id.*

degenerative arthritis was not manifest until an x-ray was taken on March 21, 1978, following the work accident, that condition could not serve as a basis for awarding Section 8(f) relief. In addition, he determined that as the lumbar residuals claimant experienced as a result of his September 3, 1954, and January 5, 1959, work-related back injuries prior to his subsequent 1978 work injury represented temporary flareups which did not preclude him from performing all of his assigned duties at any time prior to the last work injury, these injuries did not constitute pre-existing permanent partial disabilities under Section 8(f). Finally, the administrative law judge found that neither Dr. Browning's opinions, Dr. Brown's opinion, nor the reports provided by Drs. Mariorenzi and Hayes were sufficient to establish that claimant's subsequent 1978 injury alone would not have caused claimant's permanent total disability as is required to satisfy the contribution requirement for Section 8(f) relief. Employer now appeals the administrative law judge denial of Section 8(f) relief, challenging his finding that claimant's prior 1954 and 1959 back injuries did not constitute manifest pre-existing permanent partial disabilities, and his finding that the medical opinions of Drs. Browning and Brown are insufficient to establish that claimant's disability is not solely due to the last injury. The Director has not responded to employer's appeal.

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 permanent total disability is not due solely to the subsequent work injury. See 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability was caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. See *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we affirm the administrative law judge's denial of Section 8(f) relief. Initially, we need not address whether the administrative law judge properly found that claimant's prior back injuries did not constitute pre-existing permanent partial disabilities. Any error in this regard is harmless, because in denying Section 8(f) relief, the administrative law judge properly found that there is no evidence of record sufficient to support a finding that claimant's disability is not solely due to the last injury. Contrary to employer's assertions on appeal, although in his June 20, 1988, report Dr. Browning assigned a 30 percent loss of function to claimant's back, with 10 percent attributable to his conditions which predated the 1978 injury, CX-15, an opinion with which Dr. Brown agreed, CX-16, this evidence is not sufficient to meet the requirements for Section 8(f) relief because it does not establish that but for claimant's pre-existing permanent partial disability claimant would not have been rendered totally disabled by the work-related injury alone. See *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91 (CRT) (5th Cir. 1997); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). The November 3, 1996, opinion letter by Dr. Browning, which employer introduced on remand and which states that the January 1978 injury is not the sole cause of claimant's disability is similarly deficient in that it indicates only that there are multiple factors causing claimant's disability. *Director, OWCP v.*

*General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993), *aff'g in part and modifying on other grounds McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988). Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, we affirm that finding, and consequently his denial of Section 8(f) relief in this case. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Section 8(f) Relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge