BRB No. 91-493

WILLIAM CONNOLLY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
	)	
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 of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (88-LHC-1665) of Administrative Law Judge Robert G. Mahony 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).

Claimant injured his back while working for employer as a ship superintendent on October 12, 1985. After a short absence due to the accident, claimant returned to work, but stopped working due to back pain on July 7, 1986, and has not worked since that date. The record indicates that prior to the October 1985 injury, claimant had a history of elbow, back, knee, ankle, hand and head problems.

The administrative law judge found that claimant was permanently totally disabled from July 7, 1986 and continuing, and accordingly awarded benefits. 33 U.S.C. §908(a). The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), finding that while claimant had manifest, pre-existing permanent partial disabilities to his ankle and elbow, employer did not meet the contribution element of Section 8(f).

On appeal, employer contends that the administrative law judge erred in failing to find that claimant had permanent pre-existing disabilities to his back, knee, hand and head, and erred in failing to find that employer satisfied the contribution element of Section 8(f). The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

To establish entitlement to Section 8(f) relief, employer must show that 1) claimant has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd on other grounds*, U.S. , 115 S.Ct. 1278 (1995); *Director, OWCP v. Luccitelli*, 964 F.2d 1301, 26 BRBS 1 (CRT)(2d Cir. 1992). In order to satisfy the contribution element, employer must show that claimant's subsequent injury alone did not cause his permanent total disability. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT) (D.C. Cir. 1994); *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT).

The administrative law judge found that the record contains no medical evidence attributing any portion of claimant's current total disability to a pre-existing condition. The administrative law judge found that, at best, the record contains the vague statement of Dr. Douglas, a chiropractor, that "[w]ith the sequelae of several previous work related injuries and degenerative changes taking place in this spine, [claimant] would be increasingly at risk for re-injury." Decision and Order at 7; Emp. Ex. 11. The administrative law judge found that Dr. Douglas's statement alone is not sufficient to establish that claimant's pre-existing ankle and elbow disabilities combined with his 1985 back injury to contribute to his permanent total disability.

The administrative law judge properly found that Dr. Douglas's opinion is insufficient to establish that claimant's 1985 work injury alone did not cause claimant's total disability. *See Jaffe New York Decorating*, 25 F.3d at 1085, 28 BRBS at 36 (CRT); *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT). Although employer correctly notes that an employment-related aggravation of a pre-existing disability will satisfy the contribution element, *see Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT) (1st Cir. 1983), *aff'g Graziano v. General*

Dynamics Corp., 14 BRBS 950 (1982), the record in this case does not contain any evidence that claimant's work injury aggravated a pre-existing condition. Dr. Kurnzer's report of November 20, 1989, merely states that claimant reported a number of exacerbations of back pain over the years. Emp. Ex. 10. Employer's reliance on Dr. Glenney's report that claimant was able to work with back pain until the last incident is similarly misplaced, as this statement supports the conclusion that the last injury alone caused claimant's total disability. Emp. Ex. 12. Inasmuch as the record does not contain any evidence sufficient to satisfy the contribution element for Section 8(f) relief, we affirm the administrative law judge's denial of Section 8(f) relief.[1]

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[1]In view of the fact that the record does not contain evidence sufficient to establish the contribution element, we need not address employer's contentions that the administrative law judge erred in finding that it did not establish that claimant has permanent pre-existing disabilities to his knee, back, hand and head.