BRB Nos. 09-0598
and 09-0598A

GARNETT G. MURRAY	)	
	)	
Claimant-Cross-Respondent	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 03/30/2010
	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Second Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Garnett G. Murray, *pro se*, Sebring, Florida.

Lawrence B. Craig III and Michael F. Kelley (Valle, Craig & Vazquez, P.A.), Miami, Florida, for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer cross-appeals the Second Decision and Order on Remand (2003-LHC-1015) of Administrative Law Judge Daniel F. Solomon 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the third time this case has come before the Board. Claimant injured his left big toe while working for employer on March 22, 2001. Employer voluntarily paid claimant periods of temporary total disability benefits, as well as permanent partial disability benefits for a three percent impairment of the toe. Although claimant returned to his usual work for a few weeks after the incident, he has not worked since May 2001. Claimant filed a claim for benefits alleging that, in addition to the toe injury, the work accident caused depression and aggravated his pre-existing low back condition, diabetes, and diabetic retinopathy.

In the initial Decision and Order, the administrative law judge awarded claimant an additional 12 weeks of scheduled benefits, 33 U.S.C. §908(c)(8), for the work-related toe injury, based on an eight percent impairment rating, but denied benefits for claimant's other alleged work injuries. On appeal, the Board reversed the administrative law judge's finding that claimant's depression is not work-related and remanded the case for the administrative law judge to address whether claimant is disabled by that condition. The Board vacated the finding that Dr. Cohen's opinion rebuts the Section 20(a), 33 U.S.C. §920(a), presumption with regard to whether claimant's diabetes was aggravated by his work injury and remanded the case for the administrative law judge to discuss the entirety of the doctor's opinion and determine whether, as a whole, it is sufficient to rebut the presumption. The Board affirmed the administrative law judge's findings that claimant's low back condition and diabetic retinopathy are not work-related. *Murray v. Universal Maritime Service Corp. [Murray I]*, BRB Nos. 05-0161/A (Oct. 13, 2005).

On remand, the administrative law judge found that Dr. Cohen's opinion was insufficient to rebut the Section 20(a) presumption that claimant's diabetes was aggravated by his 2001 work injury. Thus, as a matter of law, the administrative law judge concluded that claimant's diabetes was aggravated by his work injury. Additionally, as claimant is incapable of performing any work due to his work-related

psychiatric condition, the administrative law judge awarded claimant total disability benefits. Employer appealed the decision. The Board rejected employer's appeal of the issues decided against it in *Murray I*. The Board affirmed the administrative law judge's findings that claimant's diabetic condition was aggravated by his 2001 work injury because Dr. Cohen's opinion was insufficient to rebut the Section 20(a) presumption and that claimant is totally disabled because he is unable to return to any employment due to his work-related depression. The Board, however, remanded the case to the administrative law judge for consideration of employer's petition for Section 8(f), 33 U.S.C. §908(f), relief. *G.M. [Murray II] v. Universal Maritime Service Corp.*, BRB Nos. 06-0774, 06-0917 (Aug. 28, 2007).

On second remand, the administrative law judge granted employer's petition for Section 8(f) relief. He found that claimant's work-related injury combined with a pre-existing permanent partial disability to result in a materially and substantially greater disability than would have resulted from the 2001 work injury alone. He stated there is a psychiatric overlay to claimant's pain, in part from the history of diabetes and in part from his 1988 work injury.[1] He also found that the pre-existing disability was manifest to employer. The Director appeals the award of Section 8(f) relief, and employer responds, urging affirmance. BRB No. 09-0598. Employer cross-appeals the decision, raising "all those issues and matters not decided in their favor" in the Board's August 28, 2007, decision. BRB No. 09-0598A. Claimant, who is not represented by counsel, has not responded to this appeal.

We first address employer's cross-appeal. Specifically, employer contends: 1) claimant's psychiatric condition was improperly found to be work-related; 2) claimant's pre-existing diabetic condition was improperly found to be work-related; 3) Dr. Cohen's opinion is sufficient to rebut the Section 20(a) presumption that claimant's work injury aggravated his diabetic condition; 4) it was erroneous to credit the opinion of Dr. Garcia-Granda and to find that claimant is totally disabled; 5) claimant's current condition is due to a supervening cause that has not been addressed; and 6) it was erroneous to enter a decision in favor of claimant on remand. We reject employer's contentions. These issues were fully addressed by the Board in the previous decisions, and those dispositions constitute the law of the case. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Employer has offered no basis for the Board to depart from the law of the case doctrine, which holds that an appellate tribunal generally will adhere to its initial decision on an issue when a case is on a subsequent appeal, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates

[1]In December 1988, claimant was injured when plywood fell from a crane. He sustained a fractured left ankle, head, neck and back injuries, and he was off work for approximately four years.

that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *See Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999). Accordingly, we deny employer's request to reconsider the prior decisions on these matters. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989).

The Director contends the administrative law judge erred in granting employer's request for Section 8(f) relief. Specifically, he argues there is no evidence to support the administrative law judge's finding that the contribution element necessary for Section 8(f) relief was satisfied, the administrative law judge's findings regarding Section 8(f) are inconsistent with his prior fact-finding, and the administrative law judge did not identify which of claimant's conditions constitutes the "pre-existing permanent partial disability" or explain how claimant's current condition is not due solely to his work injury. Employer asserts that all that is necessary is that a pre-existing condition "combine" with the work injury to cause a greater disability, and it avers it has shown such. For the reasons that follow, we vacate the award of Section 8(f) relief and remand the case for further findings.

Section 8(f) of the Act 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. §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. 33 U.S.C. §908(f); *Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988); *see also Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). A condition need not be economically disabling to constitute a pre-existing permanent partial disability under Section 8(f), but it must be such a serious physical disability that a cautious employer would be motivated to discharge the employee because of a greatly increased risk of compensation liability. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989). To establish the contribution element, an employer must establish that the claimant's total disability is not due solely to the subsequent work injury and is contributed to by the manifest pre-existing permanent partial disability. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992).

Initially, the Director argues that the administrative law judge did not identify which of claimant's pre-existing conditions constitutes the pre-existing permanent partial disability that was manifest to employer in order to obtain Section 8(f) relief. In this case, it is undisputed that claimant suffered a traumatic injury in 1988 involving his left ankle, head, neck and back. Second Decision and Order on Remand at 3; Decision and Order at 3-4; Emp. Ex. 8 at 52; Tr. at 58-61, 99-102. It is also undisputed that claimant has a long-standing diabetic condition which, at times, is not well-controlled. Second Decision and Order on Remand at 3; Emp. Ex. 8 at 4. However, in addressing Section 8(f), the administrative law judge merely stated:

> The pre-existing injuries known to the Employer/Carrier at this time include the following injuries and medical care. Various medical records obtained through discovery, to date, reveal the Claimant's prior medical conditions which warrant Section 8(f) relief.

Second Decision and Order on Remand at 3. Thereafter, the administrative law judge generally discussed claimant's pre-existing diabetes mellitus, his 1988 work injuries to his head, back, and left foot, and mild diabetic ketoacidosis, as well as his subsequent diagnosis of proliferative diabetic retinopathy which rendered claimant legally blind as of June 2002. *Id.* The administrative law judge also noted claimant's 1996 and 2000 vision problems as well as some sensory loss related to the diabetes. *Id.* at 6. He then concluded: "I find that the work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone" because claimant has a psychiatric overlay to the pain resulting from his diabetes and his 1988 injury, and the mental impairment is "an emotional overlay on both the 1988 and 2002 (sic) physical injuries." Second Decision and Order on Remand at 5. Although the administrative law judge stated that claimant has pain from his pre-existing diabetes and his 1988 injuries, the Director is correct in arguing that the administrative law judge did not specifically identify which of claimant's pre-existing conditions constitutes the manifest disability or disabilities which contributed to his total disability. He did not explain which of the conditions constitutes the serious lasting physical problem which could have motivated employer to discharge claimant.[2] While diabetes generally is such a condition, *see Dugan*, 22 BRBS 42, the administrative law judge must specify the conditions which form the basis for employer's entitlement to Section 8(f) relief. Therefore, we must remand the case to the administrative law judge for further

[2]Although economic disability is not required, *C & P Telephone*, 564 F.2d 503, 6 BRBS 399, claimant testified that his 1988 injuries had resolved and he was able to return to full duty in 1993. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); Decision and Order at 4; Tr. at 61-62.

explanation of the pre-existing permanent partial disability element. *Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting).

The Director next argues that the administrative law judge's award of Section 8(f) relief cannot stand because his findings on the matter contradict previous findings on which the award of benefits is based. In particular, the Director challenges the findings the administrative law judge made with regard to the opinion of Dr. Garcia-Granda, stating that his opinion refutes, rather than supports, Section 8(f) relief, as it indicates that claimant's total disability was solely due to the 2001 injury. As satisfaction of the contribution element requires an employer to demonstrate that a claimant's total disability is not due solely to the work injury, we agree there is some discrepancy in the administrative law judge's findings on the merits and in his Section 8(f) discussion and that he must reconcile his findings in this regard on remand.

In concluding that claimant is totally disabled as a result of his 2001 work-related injury, the administrative law judge found credible the well-reasoned opinion of Dr. Garcia-Granda, who testified that claimant suffers from depression caused by the constant pain from his injuries and is incapable of returning to any work. *Murray II*, slip op. at 5-6; Decision and Order at 36-38, 71; Decision and Order on Remand at 5; Cl. Ex. 5 at 11-12, exh. 2. In his original decision when he set forth the evidence, the administrative law judge stated that Dr. Garcia-Granda related claimant's depression to the chronic pain "from the injuries of the March 2001 accident[.]" Decision and Order at 37. The Board held that Dr. Garcia-Granda's opinion relating claimant's depression to his left foot pain, back pain, and inability to work as a longshoreman, Cl. Ex. 5 at 10-12, was sufficient to establish the work-relatedness of claimant's depression, as it attributed the depression to the work injury, at least in part. *Murray I*, slip op. at 4. On remand in awarding total disability benefits, the administrative law judge stated merely that he accepted Dr. Garcia-Granda's opinion that claimant cannot perform any work. Decision and Order on Remand at 4-5. On second remand, the administrative law judge relied on Dr. Garcia-Granda's opinion and stated that, as the doctor attributed claimant's depression to his left foot pain, back pain, and his inability to work as a longshoreman, claimant's debilitating emotional overlay related to both the 1988 pre-existing injury and the 2001 work injury. Second Decision and Order on Remand at 4-5. A review of the record reveals that Dr. Garcia-Granda attributed claimant's depression to the "injuries" of his 2001 accident; however, he also stated that the depression is related to claimant's back and foot pain, which claimant complained about "all the time," yet there was no back injury in 2001.[3] Cl. Ex. 5 at 10, exh. 2. As the administrative law judge relied upon

[3]The Board affirmed the administrative law judge's finding that claimant's 2001 accident did not cause or aggravate his back condition. *Murray I*, slip op. at 6-7; Decision and Order at 61.

Dr. Garcia-Granda's opinion in awarding employer Section 8(f) relief, he must fully explain how this opinion supports a finding that claimant's disability is not due solely to the subsequent work injury.

Finally, the Director correctly contends the administrative law judge erred in failing to apply the correct contribution standard. In a case involving permanent total disability, as here, the employer must establish that the claimant's total disability was not due solely to the work injury in order to obtain Section 8(f) relief. 33 U.S.C. §908(f); *Stokes*, 851 F.2d 1314, 21 BRBS 150(CRT); *see also Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT); *Two "R" Drilling*, 894 F.2d 748, 23 BRBS 34(CRT); *Dominey*, 30 BRBS 134. In *Dominey*, the Board explained that this means an employer must demonstrate that a claimant's total disability was caused by both the work injury and the pre-existing condition. *Dominey*, 30 BRBS at 137; *see also Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) ("but for" language); *Bergeron*, 982 F.2d 790, 26 BRBS 139(CRT) ("not due solely to" language). In this case, the administrative law judge found that the work injury combined with a pre-existing partial disability to result in greater disability and that claimant's disability is materially and substantially greater as a result of his pre-existing conditions than it would have been as a result of the work injury alone. Neither standard is legally correct. Employer cannot rely merely on evidence stating that the pre-existing injury combined with or compounded the employment-related injury. *Jaffe*, 25 F.3d 1080, 28 BRBS 30(CRT); *Bergeron*, 982 F.2d 790, 26 BRBS 139(CRT). Moreover, the latter standard, the "materially and substantially greater" standard, is part of the test for assessing whether an employer is entitled to Section 8(f) relief in a case involving a permanent partial disability. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003). Therefore, on remand, the administrative law judge must reconsider whether employer has satisfied the contribution element by using the proper standard, specifying the evidence on which he relies. *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005).

Accordingly, the administrative law judge's award of Section 8(f) relief is vacated, and the case is remanded for further consideration of this issue. In all other respects, the Second Decision and Order on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge