

ANTHONY ESPOSITO)	
)	
Claimant)	
)	
v.)	
)	
BAY CONTAINER REPAIR COMPANY)	DATE ISSUED:
)	
and)	
)	
NEW JERSEY MANUFACTURERS,)	
INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Betty J. O'Shea, New York, New York, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, 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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (91-LHC-0182) of Administrative Law Judge Gerald M. Tierney 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).

The only issue presented by this appeal is whether the administrative law judge erred in awarding employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). On November 3, 1983, claimant sustained a back injury while in the course of his employment as a longshoreman for employer. In his Decision and Order, the administrative law judge accepted the parties' stipulations regarding the nature and extent of claimant's disability and thereafter awarded claimant permanent total disability compensation. 33 U.S.C. §908(a). The administrative law judge further found employer entitled to Section 8(f) relief on the basis that claimant's pre-existing back condition constituted a manifest pre-existing permanent partial disability which, when combined with claimant's subsequent back injury, created a greater disability than that which would have resulted from the second injury alone.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief, contending that the administrative law judge erred in finding the manifest and contribution requirements of Section 8(f) to have been satisfied by employer. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent total 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. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991). *See also E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

The Director initially contends that the administrative law judge erred in finding that claimant's pre-existing permanent partial disability was manifest to employer prior to claimant's 1983 work-related injury. We disagree. It is well-established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. *Director v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978). *See also Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). The manifest requirement assumes that the pre-existing disability was manifest at the time of hire or during the period of employment with the employer, since the purpose of the manifest requirement is to limit the application of Section 8(f) to those cases where employer might be motivated to discharge a handicapped employee due to his disability. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987). The medical records pre-existing the subsequent injury need not indicate the severity or precise nature of the pre-existing condition in order for the

manifest requirement to be satisfied; rather, medical records will satisfy this requirement as long as they contain sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem. See *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992), *aff'g Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988). In this regard, the Board has held that where medical records of a pre-existing condition are no longer in existence, circumstantial evidence that the records existed at the time of employment may suffice to meet the manifest requirement. See *Stone*, 20 BRBS at 6; *Menacho v. General Dynamics Corp.*, 12 BRBS 790 (1980).

In the instant case, the administrative law judge found that claimant's pre-existing back condition was constructively manifest based on Dr. Pack's treatment of claimant for this condition. The administrative law judge credited Dr. Pack's letter dated October 25, 1989, in which that physician stated that his medical records are no longer in existence but that his financial records confirm that claimant was under his care from 1969 to 1971 for a low back injury sustained while working for Ship Tank Container. Dr. Pack, in his letter, further stated that he recalled that claimant had a severe back injury with signs of a herniated disc, that claimant's condition had existed for many years, that he saw claimant occasionally after 1971 and was aware that claimant's back continued to bother him. Dr. Pack concluded that claimant's 1969 back injury, with definite signs of a herniated disc with radiculopathy, resulted in permanent disability. See Emp. Ex. 4. Having credited Dr. Pack's statements that his financial records verify treatment of claimant and that he has a personal recollection of claimant's condition, the administrative law judge concluded that the manifest requirement was satisfied. See Decision and Order at 4.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including physicians, and to draw his own inferences from the evidence. See generally *Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). We hold that the administrative law judge acted within his discretionary authority when, after crediting Dr. Pack's independent recollection that he treated claimant's severe back injury from 1969 to 1971, as supported by Dr. Pack's financial records, he concluded that those records and personal recollection supported the inferences that Dr. Pack's medical records were available when employer hired claimant in 1969 and for some time thereafter, and that those records would have provided sufficient information regarding a serious lasting physical problem to satisfy the manifest requirement. See *Stone*, 20 BRBS at 1; *Menacho*, 12 BRBS at 790. We therefore affirm the administrative law judge's determination that claimant's pre-existing back condition was constructively manifest at the relevant time.

Next, the Director challenges the administrative law judge's determination that employer satisfied the contribution requirement; specifically, the Director contends that the administrative law judge's consideration of this requirement is not in accordance with *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT). We agree. In order to establish the contribution element of Section 8(f), employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's permanent total disability. See *Luccitelli*, 964 F.2d at 1306, 26 BRBS

at 7 (CRT); *Maryland Shipbuilding and Dry Dock Co. v. Director, OWCP*, 618 F.2d 1082, 12 BRBS 77 (4th Cir. 1980); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992). In the instant case, however, the administrative law judge, after stating that the contribution element requires only that the employee's pre-existing permanent partial disability combine with the subsequent injury to produce the employee's permanent total disability, *see* Decision and Order at 2, determined that Dr. Kestler's report satisfied the contribution element. *Id.* at 3. Dr. Kestler opined that claimant's "permanent total disability since February 1, 1984, is due to his severe pre-existing permanent disability to a significant degree," and that claimant's subsequent back injury sustained in 1983 "further aggravated this pre-existing permanent disability rendering his overall disability materially and substantially greater." *See* Emp. Ex. 5. Because the administrative law judge did not consider Dr. Kestler's opinion, as well as the other relevant evidence of record, in accordance with the applicable legal standard for establishing contribution, we vacate his finding that the contribution requirement is satisfied, and remand the case for reconsideration of the evidence consistent with the standard set forth in *Luccitelli*.

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge