

CRAIG M. STANLEY)	
)	
Claimant)	
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	
)	
Self-Insured)	DATE ISSUED: <u>Apr. 29, 2014</u>
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Denying Special Fund Relief of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

John H. King, Jr. (Norman, Hanson & DeTroy, L.L.C.), Portland, Maine, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Denying Special Fund Relief (2013-LHC-00259) of Administrative Law Judge Timothy J. McGrath 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).

Claimant sustained a back injury while working for employer on February 18, 2010. He continued to work for employer until February 9, 2011, when he was removed from work due to his back injury. Dr. Barth performed surgery on claimant’s back on February 28, 2011; claimant contracted an infection that required additional hospitalization. The surgery did not improve claimant’s condition, and Dr. Barth and claimant’s primary care physician, Dr. Schuler, concluded that claimant is permanently totally disabled. Claimant filed a claim seeking permanent total disability benefits commencing March 15, 2012. The private parties agreed that claimant’s back condition reached maximum medical improvement on March 15, 2012 and that he is entitled to permanent total disability benefits from that date. Employer timely requested Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f).

In his decision, the administrative law judge awarded claimant temporary total disability benefits from February 9, 2011 through March 14, 2012, and ongoing permanent total disability benefits from March 15, 2012. With regard to employer’s request for Section 8(f) relief, the administrative law judge found that employer satisfied the pre-existing permanent partial disability and manifest elements based on claimant’s left and right knee conditions, but did not satisfy the contribution element. He thus denied employer’s request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge’s denial of Section 8(f) relief. The Director, Office of Workers’ Compensation Programs, responds, urging affirmance of the denial of Section 8(f) relief.

Employer contends that claimant’s testimony and a report from Dr. Schuler establish that the combination of claimant’s pre-existing knee disabilities with his work injury has caused his present totally disabling condition, thereby entitling employer to Section 8(f) relief. In response to a letter detailing claimant’s prior knee injuries and plantar fasciitis,¹ Dr. Schuler wrote on March 15, 2012, “At this time, I do feel that Mr. Stanley is totally disabled from a combination of his injuries.” JX 21 at 259. Claimant testified on deposition as to the restrictions caused by his prior knee injuries and plantar fasciitis, and to his belief that he is totally disabled by a combination of all his ailments. JX 7 at 11-18.

¹Employer’s letter to Dr. Schuler asked, “Would it be your opinion that the prior injuries [claimant] sustained at [employer] along with the permanent partial disabilities those injuries produced have combined with his current low back injury to make him permanently and totally disabled?” JX 21 at 260.

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) claimant's permanent total disability is not solely due to the subsequent work-related injury. *Director, OWCP v. Bath Iron Works Corp.[Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

The administrative law judge found that claimant had manifest, pre-existing permanent partial disabilities to each of his knees. Decision and Order at 6-7; JX 27 at 381; JX 34 at 440, 452; JX 35 at 460, 478. The administrative law judge rejected employer's contention that claimant's plantar fasciitis and hearing loss qualify as pre-existing permanent disabilities. The administrative law judge further found that employer did establish that claimant's 2010 back injury was not the sole cause of claimant's permanent total disability. The administrative law judge found that Dr. Schuler did not give his opinion to a reasonable degree of medical certainty, nor did he provide the reasoning behind his conclusion. The administrative law judge found that Dr. Schuler did not use any impairment rating analysis or state how claimant's back injury would have affected claimant's disability absent the pre-existing conditions. Decision and Order at 9. The administrative law judge also found that claimant's testimony, consisting of an "I do" response to a query of whether he believed his current disability was the result of his pre-existing conditions combined with his back injury, is not sufficient to satisfy employer's burden. The administrative law judge found that claimant did not state what limitations he would experience from the back injury alone, nor explain how the pre-existing conditions combine with his back injury to make him totally disabled. *Id.*

In contrast to employer's position, the administrative law judge found that claimant's back injury degenerated until it, alone, caused total disability. In this regard, the administrative law judge found that after the work-related back injury in February 2010, claimant was able to perform alternative work for employer as a van driver without any restrictions from his back injury. The administrative law judge found that claimant's back condition began to degenerate such that he was removed from work and surgery was necessitated in February 2011. *See* JX 1 at 1; JX 20 at 290; JX 23 at 331. The administrative law judge found that the surgery did not stop the degeneration; in July 2012, Dr. Barth opined "that the L4-5 disk space is completely collapsed and obliterated." JX 20 at 192, 195. The administrative law judge found that claimant's back condition degenerated significantly over the course of two years following the work

injury such that by March 2012 the back injury alone totally disabled claimant.² The administrative law judge thus found that employer did not satisfy the contribution element for Section 8(f) relief.

We affirm the administrative law judge's finding that employer did not establish the contribution element as it is rational, supported by substantial evidence, and in accordance with law. The administrative law judge properly found that Dr. Schuler's opinion and claimant's testimony do not establish the contribution element, as it is insufficient merely to demonstrate that the pre-existing conditions and the work injury "combined." *Johnson*, 129 F.3d at 51, 31 BRBS at 158(CRT); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989). Moreover, the administrative law judge rationally accorded diminished weight to the opinion of Dr. Schuler on the ground that he failed to explain the basis for his conclusion. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Based on the evidence of record, the administrative law judge rationally found that significant degeneration of claimant's work-related back condition is the cause of claimant's present permanent total disability. As employer did not establish that claimant is not totally disabled due to the work injury alone, we affirm the administrative law judge's finding that employer did not meet its burden of establishing the contribution element. Thus, we affirm the denial of Section 8(f) relief. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

²Dr. Barth's records include a document dated July 20, 2012, entitled "Practitioner's Report State of Maine Workers' Compensation Board," wherein the physician checked off "no work capacity" as a result of "back surgery." JX 20.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Denying Special Fund Relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge