BRB No. 97-1583

OTIS LEWIS	)	
	)	
Claimant	)	DATE ISSUED:
	)	
v.	)	
	)	
PENNSYLVANIA TIDEWATER DOCK COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Upon Remand From The Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Michael D. Schaff (Naulty, Scaricamazza & McDevitt, Ltd.), Philadelphia, Pennsylvania, for self-insured employer.

Laura Stomski (Marvin Krislov, Deputy Solicitor for National Operations; Carol DeDeo, Associate Solicitor, Samuel J. Oshinsky, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Upon Remand From The Benefits Review Board (94-LHC-2744, 94-LHC-2755) of Administrative Law Judge Paul H. Teitler 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case has been before the Board previously. On April 28, 1993, while working for employer, claimant fell from a ladder, injuring his left elbow and lower back. As a result of this work incident, employer voluntarily paid claimant temporary total disability compensation. 33 U.S.C. §908(b). Claimant returned to work on November 20, 1993, but on that date he slipped and fell, injuring his right wrist and lower back. Prior to his work-related injuries, claimant also suffered an injury to his right knee in 1987, and to his back in 1985. Claimant has not returned to work since this injury and sought permanent total disability compensation under the Act.

In his initial decision, the administrative law judge awarded claimant permanent total disability compensation and held that employer was entitled to relief under Section 8(f), 33 U.S.C. §908(f).[1] The Director appealed the award of Section

[1]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); *Ceres Terminal Inc. v. Director, OWCP*, 118 F.3d 387 (5th Cir. 1997); *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).

8(f) relief, and employer cross-appealed the administrative law judge's causation findings and, alternatively, his award of total disability compensation. Claimant responded, urging affirmance of the administrative law judge's decision.

On appeal, the Board affirmed the administrative law judge's award of permanent total disability compensation and vacated his award of Section 8(f) relief. *Lewis v. Pennsylvania Tidewater Dock Co.*, BRB Nos. 96-0733/A (February 25, 1997)(unpublished). Relevant to the present case, the Board instructed the administrative law judge, who had found the pre-existing permanent partial disability element satisfied based on the fact that claimant's back condition existed prior to his work injuries, that the mere existence of an underlying condition is not evidence of a pre-existing permanent partial disability. Accordingly, on remand the administrative law judge was to determine whether claimant had a lasting physical condition of sufficient severity that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *see Dugas v. Durwood Dunn Inc.*, 21 BRBS 277 (1988); *Bickham v. New Orleans Stevedoring*, 18 BRBS 41 (1986). In addition, the Board remanded the case for the administrative law judge to determine whether claimant's pre-existing back condition was manifest, noting that he had not done so previously.[2] The Board also vacated his finding that employer satisfied the contribution element of Section 8(f) entitlement, and remanded the case for reconsideration of this issue. In so doing, the Board noted that the administrative law judge found contribution based on the opinions of Drs. Lee and Sedacca that claimant's disability is a result of his pre-existing conditions in addition to his current injury; in cases involving permanent total disability; employer, however, must demonstrate that claimant would not have been totally disabled by the work injury alone in order to meet this element. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

In his Decision and Order Upon Remand, the administrative law judge did not

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[2]The manifest element will be satisfied if either employer had actual knowledge of the pre-existing condition or if there were medical records in existence from which claimant's condition was objectively determinable. *See Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988).

explicitly reconsider whether claimant's prior back injury was a manifest pre-existing permanent partial disability. Rather, citing his initial findings, he reiterated that claimant's prior knee and back injuries were pre-existing permanent partial disabilities and that claimant's pre-existing knee disability was manifest by virtue of a February 9, 1990, Compensation Order awarding him compensation pursuant to a settlement under 33 U.S.C. §908(i), based upon a 20 percent impairment rating. The administrative law judge did, however, consider whether employer introduced evidence sufficient to establish that claimant's permanent total disability was not due solely to his work-related injury, finding that the medical opinions of Drs. Greene, Coffey, Didizan, Lee, and Sedacca were sufficient to establish Section 8(f) contribution requirement under this standard. On appeal, the Director argues that the administrative law judge erred in failing to comply with the Board's remand instructions, and that the record evidence is insufficient to support an award of Section 8(f) relief as a matter of law. Employer responds, urging affirmance.

We agree with the Director that the administrative law judge's award of Section 8(f) relief cannot be affirmed because the medical evidence he relied upon in finding the contribution element satisfied does not establish that claimant's permanent total disability is not due solely to his work-related injury as is required under the controlling legal standard of *Luccitelli,* 964 F.2d 1303, 26 BRBS at 1(CRT). In finding the contribution element satisfied on remand, the administrative law judge relied on Dr. Greene's report, stating that as a result of claimant's pre-existing May 31, 1987, work injury to his knee, claimant experienced pain and swelling and was limited to light duty work because of his inability to climb ladders. EX-1. Moreover, he noted that Dr. Greene's records reflected a pre-existing March 3, 1986, work-related injury to the foot, which he opined would likely be permanent. *Id.* In addition, he recognized that Dr. Coffey reported that claimant suffered mild nerve root irritation as of February 7, 1992, and that an MRI revealed a bulging disc in December 1992. Finally, the administrative law judge found that in a report dated March 4, 1997, Dr. Didizian opined that claimant's degenerative spinal condition occurred over a period of years and is not related to the work injury. EX-3.

Contrary to administrative law judge's determination, the medical reports of Drs. Greene and Coffey cannot properly support a finding of contribution. While these reports indicate that claimant suffered from pre-existing problems with his knee, back and foot, neither doctor provided an opinion regarding the contributory effect, if any, of these pre-existing problems to his permanent total disability. The medical opinion of Dr. Didizian is similarly deficient in that he attributed all of claimant's problems to causes other than his work injuries; where an employee is permanently totally disabled, an employer must demonstrate that the total disability was caused by both the work injury and a pre-existing condition in order to receive

Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

In finding contribution in the present case, the administrative law judge also noted that Dr. Sedacca, claimant's physician, after recanting his original medical opinion, admitted that claimant had pre-existing degenerative changes and mild nerve root irritation which were aggravated by his work injury. CX-N at 45. Moreover, he noted that both Drs. Sedacca and Lee, CXS-A, I, concluded that claimant's disability is the result of his pre-existing conditions in addition to his work injury. While these medical opinions reflect that claimant's present condition is due to a combination of his pre-existing conditions and his job injury, they are insufficient to support a finding of contribution under Section 8(f) because they do not establish that claimant's total disability is not solely due to his work injury. *See Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992)*; Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Because the medical opinions of Drs. Greene, Coffey, Didizian, Sedacca, and Lee do not establish that claimant's permanent total disability is not solely due to the work injury as is required under *Luccitelli*, we reverse the administrative law judge's finding of contribution based on these opinions and consequently his award of Section 8(f) relief.[3]

Accordingly, the administrative law judge's award of Section 8(f) relief is reversed. In all other respects, his Decision and Order Upon Remand From The Benefits Review Board is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[3]Inasmuch as employer must establish all three elements necessary for Section 8(f) relief, our reversal of the administrative law judge's Section 8(f) contribution finding obviates the need for us to address the Director's arguments that the administrative law judge erred in failing to comply with the Board's remand instructions regarding the other elements of Section 8(f) entitlement, and that the record evidence is insufficient as a matter of law to establish that claimant's pre-existing back condition was a manifest pre-existing permanent partial disability.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge