BRB No. 99-0387

WARREN DUFOUR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
FRALEY ASSOCIATES	)	DATE ISSUED:
	)	
and	)	
	)	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision Denying 8(f) Relief of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

Kristin M. Dadey (Henry L. Solano, Solicitor of Labor; 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision Denying 8(f) Relief (93-LHC-1598) 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 which 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, who worked as a dock builder for employer, suffered a work-related injury on August 29, 1986 while carrying a 400-450 pound beam with a co-worker, when the co-worker dropped his end of the beam causing all the weight to rest on claimant's neck and back. Claimant left work and went to see his doctor, who prescribed pain medication, recommended rest, and referred him to a specialist. In November 1986, claimant was diagnosed by Dr. Sawyer, an orthopedic surgeon, as suffering from a bulging disc at the L4-5 level due to degenerative disc disease, a congenitally narrow spinal canal, back strain and right radiculopathy. Dr. Sawyer prescribed physical therapy, although claimant continued to complain of pain. On December 16, 1986, Dr. Sawyer reported that claimant continued to complain of pain but a neurological examination revealed no objective abnormalities, opined that claimant had reached maximum repair, and released claimant to his usual work.

Claimant returned to work on December 26, 1986, but on that day experienced back pain when he attempted to pick up a 70-80 pound ladder. He reported the incident to his supervisor and thereafter sought medical attention. After a negative MRI reading on April 7, 1987, Dr. Sawyer opined on April 10, 1987, that claimant suffered from a simple back strain and rated his impairment at two and one-half percent. Based on claimant's feeling that he was not capable of his former work, Dr. Sawyer suggested that claimant consider another form of employment. Claimant continued to experience symptoms of pain, and by December 1989, he was diagnosed by Dr. Kasper as suffering from chronic lumbar syndrome and spinal stenosis. In October 1990, Dr. Kasper opined that claimant would not be able to perform any manual labor in the future. Employer voluntarily paid claimant temporary total disability compensation from September 9, 1986 through March 27, 1988, temporary partial disability compensation from March 28, 1988 through September 13, 1988, and permanent partial disability compensation from September 14, 1988 and continuing.

In his initial Decision and Order issued on September 2, 1994, the administrative law judge found that claimant was entitled to permanent partial disability compensation commencing on December 1, 1987, the date Dr. Hochberg opined that claimant reached maximum medical improvement, but the administrative

law judge did not make a determination as to the compensation rate. With regard to employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), the administrative law judge found that claimant's second incident on December 26, 1986 was an aggravation of the first injury on August 29, 1986, and therefore constituted a "second injury" under the Act. Next, the administrative law judge found that employer established that claimant had a manifest, pre-existing permanent partial disability which contributed to a greater degree of permanent impairment. Thus, the administrative law judge found that employer was entitled to Section 8(f) relief.

After the administrative law judge's decision was administratively affirmed by the Board, *see* Pub. L. 104-134, 110 Stat. 1321-211, 1321-219 (1996), the Director, Office of Workers' Compensation Programs (the Director), appealed the administrative law judge's decision to the United States Court of Appeals for the Third Circuit. Thereafter, the Director and employer entered into a stipulation on September 3, 1997, whereby the parties agreed that the administrative law judge's decision must be vacated as it did not assign a compensation rate to the disability, and thus, the award under Section 8(c)(21) was impossible to determine. Moreover, the parties agreed that the administrative law judge provided an insufficient basis to support an award of Section 8(f) relief; specifically, they agreed that the administrative law judge's finding regarding the aggravation of a pre-existing disability was insufficient as a matter of law to establish the contribution element of Section 8(f) relief. The Third Circuit accepted the parties' agreement and remanded the case to the administrative law judge for further consideration.

On remand, the administrative law judge initially accepted the parties' stipulation that claimant is entitled to permanent partial disability at a compensation rate of $430.93 per week. The administrative law judge then determined that claimant's permanent partial disability occurred as a result of the December 1986 accident alone, and he therefore denied employer entitlement to Section 8(f) relief.

On appeal, employer contends that the administrative law judge's decision must be vacated, as it does not meet the requirements of the Administrative Procedure Act, 5 U.S.C. §557 (c)(3)(A) (APA). Specifically, employer asserts that the administrative law judge failed to explain why he reversed his prior 1994 decision on this issue. In addition, employer avers that the administrative law judge's decision's lack of an Order section constitutes a violation of the APA. In the alternative, employer asserts that medical evidence of record establishes the prerequisites for relief under Section 8(f). The Director responds, contending that the combination of the administrative law judge's 1998 decision, wherein he found the compensation rate to be $430.93 per week, and his 1994 determination that

permanent partial disability compensation shall commence on December 1, 1987, constitutes an enforceable order. The Director further states, however, that although the administrative law judge's ultimate determination is supported by substantial evidence, his decision violates the APA because it lacks a sufficient explanation for the administrative law judge's reversal of his initial determination that claimant suffered a permanent partial disability after his August 1986 incident. Consequently, both employer and the Director request that the administrative law judge's 1998 decision be vacated and the case be remanded for reconsideration.

Section 8(f) shifts liability for payment of compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. *See* 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 31 BRBS 155 (CRT)(1st Cir. 1997); *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141 (CRT)(5th Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Section 8(f) is not applicable when claimant's disability results from the progression of, or is a direct and natural consequence of, the pre-existing disability. *See generally Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT), *reh'g denied*, 859 F.2d 928 (5th Cir. 1988); *Mississippi Coast Marine, Inc. v. Bosarge*, 657 F.2d 885, 13 BRBS 851 (5th Cir. 1981), *modifying* 637 F.2d 994, 12 BRBS 969 (5th Cir. 1981); *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1085 (D.C. Cir. 1979); *Vlasic v. American President Lines*, 20 BRBS 188 (1987). Nevertheless, an employment-related aggravation of a pre-existing disability is a new injury and may form the basis for Section 8(f) relief. *See Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom., Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT)(1st Cir. 1983).

In awarding employer Section 8(f) relief in his 1994 decision, the administrative law judge found that employer met its burden of establishing that claimant suffered a second injury in December 1986, based on the opinion of Dr.

Hochberg that the December 1986 event aggravated claimant's injury of August 1986. Cl. Ex. 19. In addition, the administrative law judge relied on Dr. Sawyer's opinion following the August 1986 injury that claimant suffered from degenerative disc disease and right radiculopathy, and that claimant's pre-existing narrow spinal canal compromised his tolerance to any increased pressure within the canal. Cl. Ex. 4. Thus, in finding that employer established entitlement to Section 8(f) relief in his 1994 decision, the administrative law judge found that claimant had a pre-existing permanent partial disability at the time of the December 1986 incident. However, in his 1998 decision, the administrative law judge reversed these findings. In contrast to his 1994 decision, in his 1998 decision the administrative law judge determined that the December 26, 1986, accident was the sole cause of claimant's disability, finding that the release of claimant to his former employment by Dr. Sawyer, claimant's treating physician on December 16, 1986, outweighed Dr. Hochberg's "mere conclusions." *See* Decision Denying 8(f) Relief at 5. Based on this determination, the administrative law judge concluded that claimant's disability is a result of his December 1986 accident alone.[1] *See* Decision Denying 8(f) Relief at 5.

Initially, we note that a claimant's pre-existing permanent condition for purposes of Section 8(f) need not result in an actual inability to perform his job*, see Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 797, 26 BRBS 139, 149-150 (CRT)(2d Cir. 1992), and thus, Dr. Sawyer's release of claimant to his former employment, alone, is insufficient to support a finding that claimant suffered no pre-existing permanent partial disability. In the December 16, 1986 report, while releasing claimant for work, the doctor noted that claimant continued to complain of back pain although without objective abnormalities, and found he reached maximum medical improvement. The administrative law judge, however, did not discuss this opinion in terms of whether it established that claimant had a serious lasting physical condition, and thus a pre-existing permanent partial disability for purposes of Section 8(f). *Id. See also Director, OWCP v. General Dynamics Corp.,* 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992).

[1]The administrative law judge noted that the objective test results showed no significant change after the December 1986 injury, but, without resolving the conflict, also noted claimant's testimony that his pain worsened after the second injury. *See* Decision Denying 8(f) Relief at 5.

Moreover, we agree with employer and the Director that the administrative law judge's 1998 decision fails to comply with the requirements of the APA. Decisions rendered under the Act are subject to the APA, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988). In this case, the administrative law judge did not discuss his prior findings or provide any reasoning for reversing his 1994 factual conclusions. He also did not fully analyze the evidence under the applicable legal standard. We therefore vacate the administrative law judge's 1998 finding that claimant's permanent partial disability is the result of the December 1986 accident alone, and remand the case to the administrative law judge to provide a complete Section 8(f) analysis consistent with the requirements of the APA. In determining whether the December 1986 incident constitutes a "second injury" on remand, the administrative law judge must analyze whether this accident constituted an aggravation of a pre-existing permanent partial disability under the pertinent legal standards. If he concludes that an aggravation occurred, he must determine whether employer demonstrated that claimant's disability is not due solely to the last injury but was made materially and substantially greater by the combination of the last event and the prior condition. Finally, the administrative law judge should formalize his award of benefits by entering the appropriate order.

Accordingly, the Decision Denying 8(f) Relief of the administrative law judge is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge