BRB Nos. 87-469
and 90-1166

WILBERT LEE BROWDER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
McLEAN CONTRACTING COMPANY	)	
	)	
and	)	
	)	
FIDELITY AND CASUALTY COMPANY OF NEW YORK	)	DATE ISSUED:
	)	
Employer/Carrier Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Denying Petition for Modification of James L. Guill, Administrative Law Judge, United States Department of Labor.

Gerard E.W. Voyer (Taylor & Walker, P.C.) and F. Nash Bilisoly (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for employer/carrier.

Jeffrey Ross (Judith E. Kramer, 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: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order Denying Petition for Modification (86-LHC-662) of Administrative Law Judge James L. Guill 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, a pusher/welder, injured his back on March 2, 1984, while attempting to lift a steel plate. Claimant had sustained several previous injuries to his back, including an automobile accident in 1969 and work-related accidents on December 31, 1973, April 2, 1974, and May 30, 1974. Claimant returned to work about five months after the May 30, 1974 accident, and continued to work thereafter until the March 2, 1984 injury. Employer voluntarily paid claimant temporary total disability compensation from March 5, 1984 through July 17, 1989. Claimant sought permanent total disability compensation under the Act commencing September 27, 1985.

In his Decision and Order, the administrative law judge awarded claimant permanent total disability compensation commencing September 27, 1985, and medical benefits. In addition, the administrative law judge denied employer relief under Section 8(f) of the Act, 33 U.S.C.§908(f), finding that although claimant had suffered three back injuries between December 1973 and May 1974 and had been diagnosed by Drs. Kirk and Levy as having chronic back pain, these injuries were insufficient to establish a pre-existing permanent partial disability for Section 8(f) purposes, as claimant returned to work after each injury and worked without back pain or limitation for approximately 9 years. In addition, the administrative law judge found that even if employer had succeeded in establishing a pre-existing permanent partial disability, employer was not entitled to Section 8(f) relief because the March 2, 1984 work injury was, in and of itself, permanently totally disabling.

Employer appealed the administrative law judge's denial of Section 8(f) relief and his finding regarding maximum medical improvement to the Board. BRB No. 87-469. While the appeal was pending before the Board, employer filed a Petition for Modification with the administrative law judge pursuant to Section 22, 33 U.S.C. §922. In an Order dated March 31, 1988, the Board, at employer's request, dismissed employer's appeal and remanded the case to the administrative law judge for modification proceedings subject to reinstatement at employer's request following the termination of the modification proceedings.

In its modification request before the administrative law judge, employer sought to establish that claimant suffered a pre-existing condition that contributed to his current disability through new evidence consisting of the deposition testimony of claimant and Drs. Kirk, Stonnington and Suter. In a Supplemental Decision and Order, the administrative law judge found that the new evidence submitted on modification was not persuasive and accordingly affirmed the denial of Section 8(f) relief. Following the administrative law judge's denial of its Petition for Modification, employer filed an appeal of the administrative law judge's Supplemental Decision and Order Denying Petition for Modification. BRB No. 90-1166. By Order dated August 23, 1991, the Board granted employer's request to have its appeal of the administrative law judge's initial Decision and Order, BRB No. 87-469, reinstated and consolidated this appeal with employer's appeal of the Supplemental Decision and Order denying Petition for Modification for purposes of decision.

In both appeals, employer contends that the administrative law judge erred in failing to find that claimant's prior back injuries constituted pre-existing permanent partial disabilities under Section 8(f) which combined with the subsequent March 2, 1984 work injury to result in claimant's permanent total disability. In appeal BRB No. 87-746, employer also challenges the administrative law judge's maximum medical improvement determination. The Director, Office of Workers' Compensation Programs, responds to employer's appeal of the administrative law judge's initial Decision and Order, urging that the denial of Section 8(f) relief be affirmed.

Section 8(f) shifts liability to pay compensation for permanent disability and death benefits from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled after a work injury, employer is entitled to relief from the Special Fund if it establishes that the employee suffers from a manifest pre-existing permanent partial disability which combined with a subsequent work-related injury to result in claimant's total disability. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984); 33 U.S.C. §908(f)(1). In this case, the initial inquiry involves whether employer established that claimant suffered from a permanent partial disability prior to his 1984 injury. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Employer contends that the medical opinions of Drs. Jordan, Kirk, Levy, Neal and Vaid establish that claimant's 1973 and 1974 work accidents were significant and resulted in persistent and recurrent back problems over the next two years. Employer asserts that as these opinions establish that claimant's prior back injuries resulted in a serious lasting physical condition, the administrative law judge erred in finding claimant did not have a pre-existing permanent partial disability for Section 8(f) purposes.

After careful review of the administrative law judge's initial Decision and Order, we reject employer's assertion that the administrative law judge committed reversible error in concluding that the evidence was insufficient to establish that claimant's 1973 and 1974 back injuries resulted in a pre-existing permanent partial disability. In making this determination, the administrative law judge specifically addressed the opinions of Drs. Levy and Kirk, finding they had diagnosed claimant as having chronic low back pain and, in addition, that Dr. Kirk had predicted that claimant would experience recurrent acute discomfort. He found that this evidence did not establish a pre-existing

disability in light of claimant's testimony that he was able to perform his work without significant back pain or limitation for approximately 9 years.

Employer cites the testimony of Drs. Jordan, Reina, and Neal in support of its pre-existing permanent partial disability argument. These medical opinions, however, are insufficient to establish a pre-existing permanent partial disability under Section 8(f) as a matter of law. Dr. Jordan diagnosed a cervical and lumbosacral strain, Dr. Reina diagnosed only an ill-defined disease of the musculoskeletal system, and Dr. Neal indicated in his May 15, 1975 report that claimant appeared to have made a good recovery from his lower back muscular strain injuries without any permanent disability although there was a small possibility that he could be having early symptoms of what would turn out to be a lumbar disc lesion. Because these medical opinions do not establish that claimant had a serious, lasting physical problem, the administrative law judge's failure to specifically consider this evidence in finding no pre-existing permanent partial disability in his initial Decision and Order is harmless. *CNA Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), *rev'g in part*, 19 BRBS 15 (1986). As the administrative law judge's finding that claimant did not have a pre-existing permanent partial disability is supported by substantial evidence, and employer has failed to establish any reversible error made by the administrative law judge regarding the weighing of the relevant evidence[1], we affirm this determination.[2] *See generally Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

We also reject employer's assertion that the administrative law judge erred in denying employer Section 8(f) relief on modification. Employer contends that the deposition testimony of claimant and Dr. Kirk, in combination with previously submitted evidence, particularly Dr. Neal's May 15, 1975 report which recognized that claimant might be having early symptoms of what would turn out to be a lumbar disc lesion, establish that claimant had a pre-existing permanent partial disability as of March 2, 1984 as a matter of law. We disagree. Claimant deposed on modification that he continued to have problems with his back after he returned to work in 1974, when he was required to perform heavy lifting or work in awkward positions. He further testified, however, that these problems were alleviated by hot baths, heating pads, aspirin, and sleeping on a hard surface but

[1]Employer also cites Dr. Vaid's April 30, 1985 report in support of its argument that claimant's pre-existing back problems were chronic and longstanding. Although Dr. Vaid does state in this report that claimant's back problems are chronic and longstanding, this statement was made in reference to claimant's condition following recovery from the April 1984 hemilaminectomy.

[2]Employer also cites Drs. Sutter and Stonnington's deposition testimony in support of its pre-existing permanent partial disability argument, asserting that because claimant had misrepresented to them that his back problems had lasted only 5 months following his 1973 and 1974 injuries, their opinions that claimant's current disability is unrelated to his earlier injuries was based on a misconception of the facts. As this testimony relates only to the contribution requirement and not to the pre-existing permanent partial disability requirement of Section 8(f), this argument need not be addressed.

that he occasionally had to take a day off from work. Claimant conceded, however, that his absences were not frequent, that he was generally able to perform his work, and that he had not sought medical attention during the nine year period prior to the 1984 work injury.

While acknowledging that claimant's testimony on modification appears at first glance to conflict with his earlier hearing testimony, the administrative law judge ultimately determined than the sum of claimant's testimony established that he occasionally experienced stiffness and fatigue over the nine years between his 1974 and 1984 injuries, and that this was not sufficient to establish a pre-existing permanent partial disability under Section 8(f). Because the administrative law judge rationally determined that claimant's deposition testimony on modification was generally consistent with his earlier hearing testimony and that this testimony was insufficient to establish a pre-existing permanent partial disability, we affirm this determination. Although Dr. Kirk did, as employer avers, testify on modification that it was rather obvious that claimant had some splits or tears of the disc, and some evidence of a nerve root compression prior to the 1984 subject work injury, the administrative law judge acted within his discretion in rejecting this testimony. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990). The administrative law judge noted that Dr. Kirk's opinion was not "borne out" by his February 24, 1975 report which stated that claimant has evidence of a mild low back sprain that will result in occurrences of back discomfort on heavy exertion and some occurrences of acute discomfort. In addition, the administrative law judge noted that Dr. Kirk's deposition testimony received equivocal, if any, support from Drs. Suter and Stonnington's deposition testimony because these physicians merely acceded to the feasibility of contribution, if in fact it were assumed as Dr. Kirk had testified that claimant had previously torn or split his disk prior to the 1984 injury. As the administrative law judge's determination that the evidence submitted on modification was insufficient to establish a pre-existing permanent partial disability under Section 8(f) is rational, and supported by substantial evidence, we affirm his decision. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).[3] In light of our conclusion that the administrative law judge properly determined in both of his decisions that employer failed to establish the existence of a pre-existing permanent partial disability, one of the necessary elements for entitlement under Section 8(f), employer's arguments relating to the contribution element of Section 8(f) need not be addressed. The administrative law judge's denial of Section 8(f) relief is therefore affirmed.

Employer's argument that the administrative law judge erred in his original decision in finding that claimant reached maximum medical improvement on September 27, 1985 is also rejected. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement, the date of which is determined by medical evidence. *See generally Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT)(2d Cir. 1991); *Director,*

[3]Although the administrative law judge assumed that claimant had only worn his back brace for a month when he returned to work after the 1974 injury in finding no pre-existing permanent partial disability, claimant testified on modification that he actually wore the brace once or twice per week up until the March 2, 1984 work injury. We hold that this error is harmless however, because claimant's testimony as a whole supports the administrative law judge's finding of no pre-existing permanent partial disability.

OWCP v. Berkstresser, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C.Cir. 1990), *rev'g in part*, 16 BRBS 231 (1984) and *rev'g* 22 BRBS 280 (1989); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Although employer contends that the proper date of maximum medical improvement is October 8, 1984, as found by Dr. Magness, the administrative law judge determined that Drs. Suter and Stonnington were the most highly qualified physicians offering medial opinions on this issue. Inasmuch as such credibility determinations are within the purview of the administrative law judge and the opinions of Drs. Suter and Stonnington provide substantial evidence to support the administrative law judge's determination that maximum medical improvement was achieved as of September 27, 1985, we affirm this finding. *See O'Keeffe, supra; Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and the Supplemental Decision and Order Denying Petition for Modification are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge