BRB No. 89-3768

ARANDELL PAYNE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MAHER TERMINALS, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Reconsideration of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Leonard J. Linden (Linden & Gallagher), New York, New York, for the self-insured employer.

Karen B. Kracov (Thomas S. Williamson, Jr., 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: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Self-insured employer appeals the Decision and Order, and Order Denying Reconsideration (88-LHC-1286) of Administrative Law Judge Jeffrey Tureck awarding benefits 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sought compensation under the Act for a back injury he sustained at work on May

30, 1986. The administrative law judge awarded claimant permanent total disability compensation commencing March 16, 1987. The administrative law judge further determined that employer was not entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing 1978 back condition and his pre-existing hypertension and diabetes. Employer's motion for reconsideration of the denial of Section 8(f) relief was denied. Employer now appeals the denial of Section 8(f) relief. The Director responds, urging that the denial of Section 8(f) relief be affirmed.

Section 8(f) shifts the liability to pay compensation for permanent partial disability, permanent total disability, and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. To obtain the benefit of Section 8(f) relief, employer must show (1) that the employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent injury, and (3) that the subsequent injury alone would not have caused claimant's permanent disability or death. *Director, OWCP v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

On appeal, employer contends that in denying Section 8(f) relief, the administrative law judge disregarded the testimony of Drs. Post and Patel relating to the issue of whether claimant's work injury alone caused claimant's disability. In the alternative, employer contends that the administrative law judge's denial of its request for an extension of time in which to take post-hearing depositions was arbitrary, capricious, and an abuse of discretion. The Director responds that the administrative law judge acted within his discretion in rejecting the testimony of Drs. Post and Patel and that employer is, in essence, asking the Board to reweigh the evidence. In addition, Director asserts that, in any event, the medical evidence in question can not properly support a finding that employer satisfied the contribution element of Section 8(f) under the standard set forth in *Director, OWCP v. Luccitelli* , 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), which is applicable in this case arising within the jurisdiction of the United States Court of Appeals for the Second Circuit.

Employer's argument that the administrative law judge disregarded the testimony of Dr. Post in denying its request for Section 8(f) relief is without merit. Although employer argued that it was entitled to Section 8(f) relief based on claimant's pre-existing hypertension and diabetes, as well as a pre-existing 1978 work-related back injury, the administrative law judge found that only the back injury could potentially satisfy the pre-existing permanent partial disability requirement of Section 8(f). The administrative law judge further determined that this condition was manifest to employer prior to the work injury by virtue of Brooklyn Longshoremen's Medical Center records. He ultimately denied employer Section 8(f) relief based on this pre-existing condition, however, because he found that Dr. Post's testimony that claimant's work-related injury, when imposed on the previous back injury would delay the healing and was "maybe what you refer to as the straw that broke the camel's back," was unexplained and equivocal. Tr. at 36. Thus, the administrative law judge did not disregard Dr. Post's testimony; he considered this evidence and rejected it, as was within his discretion. *See generally Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). Moreover, as Director asserts, Dr Post's opinion could not properly support a finding of contribution under *Luccitelli*, as Dr. Post did not opine that claimant would not be

permanently totally disabled by the subsequent work injury alone. *See Bergeron*, 982 F.2d at 797-798, 26 BRBS at 150 (CRT). Accordingly, the administrative law judge's denial of Section 8(f) relief based on claimant's pre-existing 1978 back condition is affirmed.

Employer's argument that the administrative law judge disregarded the testimony of Dr. Patel similarly must fail. The administrative law judge specifically considered Dr. Patel's testimony that claimant's pre-existing diabetes and hypertension in conjunction with the work injury render claimant permanently totally disabled from any kind of work, but rejected it as conjectural. The administrative law judge further noted that when Dr. Patel's testimony was considered in its entirety, it was clear that she believed that claimant was totally disabled by the back condition alone and that claimant's diabetes and hypertension were well-controlled.

The administrative law judge's finding that claimant's diabetes and hypertension did not constitute pre-existing permanent partial disabilities under Section 8(f) because these conditions were well-controlled does not appear to be consistent with the record evidence which indicates that claimant was hospitalized on several occasions for these pre-existing conditions. Moreover, even if these conditions were, in fact, well-controlled, it would not negate the fact that diabetes and hypertension are the type of serious lasting physical problems which can properly form a basis for Section 8(f) relief. *See generally Bergeron*, 982 F.2d at 790, 26 BRBS at 139 (CRT). Errors in this regard are harmless, however, as it is employer's burden to establish all three elements necessary for Section 8(f) relief and the administrative law judge reasonably determined from the context of Dr. Patel's overall testimony that she believed that claimant was totally disabled by his back injury alone.

Dr. Patel testified that she believed claimant was totally disabled the first time she examined him due to his acute back injury. Tr. at 113. When asked to explain why she felt that claimant was totally disabled from any employment, Dr. Patel also indicated that claimant would have to constantly change his position because he was not able to sit or stand for more than a few minutes at a time and was unable to bend or stoop because of his back condition. Tr. at 113, 115. Because the administrative law judge reasonably inferred from the aforementioned testimony that Dr. Patel found the work injury was in and of itself totally disabling, employer failed to prove that claimant's pre-existing diabetic and hypertensive conditions were contributing factors in his disability. Accordingly, as employer failed to establish one of the requirements for Section 8(f) relief, the administrative law judge's finding that employer was not entitled to Section 8(f) relief is affirmed. *See Sproull v. Stevedoring Services of America*, 25 BRBS 100, 110-111 (1991).

Finally, we reject employer's assertion that the administrative law judge abused his discretion in denying its request for an extension of time in which to take post-hearing depositions. At the conclusion of the formal hearing on October 27, 1988, the administrative law judge granted the parties until December 30, 1988, in which to obtain post-hearing depositions. At that time, the administrative law judge admonished the parties that extensions of time would not be granted absent "extremely unforeseen circumstances." Tr. at 218. By letter dated December 22, 1988, counsel for employer requested an extension, indicating that it had not scheduled its depositions because claimant's attorney had not been able to schedule claimant's post-hearing depositions. By Order dated January 10, 1989, the administrative law judge denied employer's extension request, finding that the reason given by employer for the request, *i.e.*, the inability to schedule the deposition in the allotted time, was not at all unforeseeable. Accordingly, the administrative law judge found that the record was closed. By letter dated January 27, 1989, employer sought reconsideration of this Order, reiterating that it had not scheduled its post-hearing depositions because claimant's counsel had not been cooperative in scheduling the deposition of his last witness, Dr. Dinhoffer, and arguing that employer had the right to hear claimant's complete case prior to putting on its case. By Order dated February 1, 1989, the administrative law judge denied reconsideration, noting that from his experience, the failure of these attorneys to agree to dates for post-hearing depositions was typical, rather than unforeseeable.

Pursuant to 20 C.F.R. §702.338, the administrative law judge has a duty to inquire fully into matters at issue and to receive into evidence all relevant and material testimony and documents. *Olsen v. Triple A Machine Shop, Inc.*, 25 BRBS 40, 44 (1991); *McCurley v. Kiewest Co.*, 22 BRBS 115, 118 (1989). Section 702.339, 20 C.F.R. §702.339, further provides, however, that the administrative law judge is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but has great discretion concerning the admission of evidence. Such rulings may only be overturned if they are arbitrary, are capricious or involve an abuse of discretion. *See Olsen*, 25 BRBS at 44-45; *Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321 (1983).

In the present case, the parties were afforded ample opportunity in which to obtain post-hearing depositions and had been forewarned that extensions would not be given absent unforeseen circumstances. Employer did not obtain its post-hearing depositions within the time frame allotted by the administrative law judge, however, based solely on its erroneous belief that it was not required to depose its witnesses until claimant's case was completed. On these facts, we hold that the administrative law judge's refusal to grant employer's extension request did not involve an abuse of discretion. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988). As employer has failed to raise any reversible error committed by the administrative law judge, his denial of Section 8(f) relief is affirmed. *See generally Uglesich v. Stevedoring Services of America*, 24 BRBS 180, 183 (1991).

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge