

VERNON L. SARGENT)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY 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 of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Janet Palmer, Newport News, Virginia, for 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Petition for Relief Under Section 8(f) (90-LHC-1565, 1566) of Administrative Law Judge Daniel A. Sarno, Jr., 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith,*

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 21, 1986, claimant sustained a back injury while in the course of his employment with employer, for which employer voluntarily paid compensation for temporary total and temporary partial disability. 33 U.S.C. §908(b), (e). Thereafter, on August 3, 1987, while in the course of his employment as a shipfitter with employer, claimant sustained injuries to his back and left leg. Employer voluntarily paid compensation for temporary total and temporary partial disability resulting from these injuries for various periods commencing August 4, 1987. Employer subsequently sought relief from continuing compensation liability for claimant's August 3, 1987, injuries pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge accepted the parties stipulations regarding the nature and extent of claimant's disability and thereafter awarded claimant temporary total disability compensation from September 19, 1988 to March 15, 1989, and permanent partial disability compensation thereafter. 33 U.S.C. §908(b), (c)(21). The administrative law judge further found employer entitled to Section 8(f) relief on the grounds that claimant's previous back injury sustained on August 21, 1986, constituted a manifest pre-existing permanent partial disability which, when combined with claimant's second back injury, created a greater disability than that which would have resulted from the second injury alone.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief, contending that the administrative law judge erred in both finding the pre-existing permanent partial disability and manifest requirements of Section 8(f) to have been satisfied by employer. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The only issue presented by this appeal is whether the administrative law judge properly awarded Section 8(f) relief to employer. Section 8(f) of the Act shifts liability to pay compensation for permanent disability and/or death after 104 weeks from an employer to the Special Fund. Generally, Section 8(f) relief is applicable if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury; 2) the disability was manifest to employer prior to the employment injury; and 3) the current disability or death is not due solely to the most recent injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd*, 63 U.S.L.W. 4213 (March 21, 1995). To satisfy the pre-existing permanent partial disability requirement, employer must establish that the employee's pre-existing condition resulted in a serious, lasting physical problem which would motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *see also Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989). The mere existence of a prior injury will not establish a pre-existing disability for Section 8(f) purposes unless it results in a serious lasting physical problem. *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988).

The Director initially contends that the administrative law judge erred in determining that claimant's pre-1987 back condition constituted a pre-existing permanent partial disability. In the instant case, the administrative law judge, in concluding that the condition resulting from claimant's 1986 back injury constitutes a pre-existing permanent partial disability, initially noted that claimant

had sought medical care for the pain resulting from his 1986 injury and that, although claimant's treating physicians were unable to identify the reason for claimant's pain, they did not discount that claimant suffered continuing back pain. Next, the administrative law judge, after having inferred that the reason for claimant's failure to seek medical attention after that time was his belief that doctors could not help him, determined that the absence of evidence that claimant received medical treatment subsequent to December 1986 does not establish that claimant no longer suffered back pain. *See* Decision and Order at 5-6. The administrative law judge, however, did not evaluate or discuss the specific medical evidence in his discussion of claimant's 1986 injury and the resulting back pain, nor did the administrative law judge evaluate this evidence under the relevant standard to determine whether claimant's condition constituted a serious, lasting physical problem.

Decisions rendered under the Act are subject to the Administrative Procedure Act 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 Western Corp.*, 20 BRBS 184 (1988). Furthermore, the administrative law judge must independently analyze and discuss the medical evidence; failure to do so violates the Administrative Procedure Act's requirement for a reasoned analysis. *See Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, the administrative law judge's failure to specifically set forth the evidence upon which he relied makes it impossible for the Board to apply its standard of review. *See Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994). The record in the instant case contains conflicting medical evidence regarding whether or not claimant's pre-1987 physical condition constituted a pre-existing permanent partial disability. As it is the function of the administrative law judge to evaluate and weigh the conflicting medical evidence under the appropriate legal standard, we vacate the administrative law judge's award of relief under Section 8(f). On remand, the administrative law judge must consider and discuss all of the relevant medical evidence concerning the issue of whether the back condition claimant experienced as a result of his 1986 back injury rose to the level of a serious, lasting physical problem sufficient to motivate a cautious employer to discharge the employee. *See C & P Telephone Co.*, 564 F.2d at 503, 6 BRBS at 399.

The Director next contends that the administrative law judge erred in determining that employer had satisfied the manifest requirement of Section 8(f). Medical records need not indicate the severity or precise nature of the pre-existing condition in order for the manifest requirement to be satisfied, as long as there is sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem which would motivate a cautious employer to consider terminating the employee because of the increased risk of compensation liability. *See Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT)(5th Cir. 1989); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984). In the instant case, the administrative law judge found that employer had actual knowledge of claimant's 1986 work-injury, and that medical records available to employer indicated that claimant's 1986 back condition had not resolved. Based upon these findings, the administrative law judge concluded that, although employer was not aware of the specific diagnosis of claimant's pre-existing back condition until after the second injury, medical records were available prior to claimant's second injury to verify the lingering nature of claimant's back condition. *See Decision and Order at 6-7*. In rendering this determination, the administrative law judge again did not discuss the specific medical evidence of record and evaluate it in light of the relevant legal standard. *See Smith*, 862 F.2d at 1220, 22 BRBS at 11 (CRT); *Armstrong*, 22 BRBS at 276; *Hitt*, 16 BRBS at 353. We therefore vacate the administrative law judge's finding that employer satisfied the manifest requirement; on remand, should the administrative law judge find the pre-existing permanent partial disability requirement of Section 8(f) to have been met, he must reconsider this issue in light of the relevant legal standard.¹

Accordingly, the administrative law judge's Decision and Order Granting Petition for Relief Under Section 8(f) is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I must respectfully dissent from my colleagues' decision to vacate the administrative law

¹While the Director correctly states that the specific diagnosis of claimant's congenital spinal stenosis, not made until after claimant's second injury, is insufficient to meet the manifest requirement, *see Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), the Director's argument is not dispositive of the manifest issue. Rather, the question to be addressed by the administrative law judge on remand is whether, notwithstanding the absence of a specific diagnosis, the medical records available prior to the second injury contained sufficient information regarding the existence of a serious, lasting physical problem. *See Smith*, 862 F.2d at 1220, 22 BRBS at 11 (CRT).

judge's award of Section 8(f) relief to employer, as I would hold that the administrative law judge properly found both the pre-existing permanent partial disability and manifest requirements satisfied.

The administrative law judge, after considering the medical and lay evidence, found the presence of a pre-existing permanent partial disability. The administrative law judge cited the relevant case precedent and concluded that claimant's injury resulted in a serious, lasting physical problem. The administrative law judge relied on evidence of claimant's continuing pain after the 1986 injury.

The administrative law judge's finding is supported by the record, which indicates that the ongoing back pain suffered by claimant as a result of his 1986 work-injury constitutes a serious, lasting physical problem sufficient to motivate an employer to discharge an employee. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In addition, the administrative law judge's conclusion is supported by evidence that in the course of the year following the first accident, employer had paid benefits to claimant for temporary total disability for various periods of time until 11 days before claimant's second injury, and that the work restrictions placed upon claimant had not been lifted at the time of his second injury. Accordingly, as there is evidence in the record that claimant's back and leg problems were serious, longstanding and documented, *see Armand v. American Marine Corp.*, 21 BRBS 305 (1988), I would affirm the administrative law judge's determination that these conditions constituted a pre-existing permanent partial disability as it is supported by substantial evidence and accords with relevant law. *See Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989).

Additionally, I would affirm the administrative law judge's determination that claimant's pre-existing permanent partial disability was manifest to employer. Not only were medical records available to employer prior to the second injury documenting claimant's longstanding back problems, but employer's own payment of compensation to claimant until shortly before claimant's second injury reflects employer's actual knowledge of claimant's unresolved back and leg conditions resulting from the first injury.

Thus, for the reasons set forth above, I would affirm the administrative law judge's award of relief to employer under Section 8(f).

REGINA C. McGRANERY
Administrative Appeals Judge