

RICHARD R. LEWIS, Sr.)	
)	
Claimant)	
)	
v.)	
)	
GENERAL DYNAMICS)	DATE ISSUED:
CORPORATION)	
)	
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 - Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation, 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 - Awarding Benefits (89-LHC-0958) of Administrative Law Judge David W. Di Nardi 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The only issue presented by this appeal is whether the administrative law judge erred in awarding employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). On January 23, 1978, claimant injured his back while in the course of his employment as a longshoreman for employer. Employer voluntarily paid claimant temporary total disability compensation from March 23, 1978 through March 11, 1979, and from April 17, 1979, and continuing. Claimant sought permanent total disability compensation under the Act. In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from March 23, 1978, to March 11, 1979 and from April 17, 1979 to June 15, 1981, and permanent total disability compensation thereafter. In addition, the administrative law judge determined that employer established entitlement to Section 8(f) relief based on claimant's prior back injuries in 1954 and 1959 and a left leg and hip injury claimant sustained in 1976.

On appeal, the Director challenges the award of Section 8(f) relief. Employer responds, urging affirmance of the administrative law judge's Decision and Order. Section 8(f) of the Act shifts liability to pay compensation for permanent disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to the employer; and 3) the permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *See E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990).

In appealing the award of Section 8(f) relief, the Director initially contends that claimant's prior back injuries in 1954 and 1959 do not establish a pre-existing permanent partial disability for purposes of Section 8(f) entitlement, inasmuch as they did not require continuing medical treatment or medication and did not necessitate the imposition of work-restrictions. The Director further contends that assuming, *arguendo*, that employer established a pre-existing disability based on these injuries, the administrative law judge's award of Section 8(f) relief was, in any event, improper because there is no evidence of record sufficient to establish that claimant's subsequent work injury alone would not have caused his permanent total disability, as is required under *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992).

In addressing the requirements for Section 8(f) relief, the administrative law judge summarily concluded that they were satisfied, citing claimant's prior injuries to his back in 1954 and 1959, and to his left hip and left leg on September 15, 1976, and stating "claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and the January 23, 1978 injury, according to Dr. Browning."¹ Decision and Order at 12. We are unable to

¹In an opinion dated June 20, 1988, Dr. Browning stated that claimant had "very significant degenerative changes in his back before [the 1978] injury, and as a result the outcome is materially and substantially worse than would have occurred without them." He further stated that he "would use a figure of 30 percent permanent partial impairment of the lumbar spine and assign about ten

affirm the administrative law judge's award of Section 8(f) relief. Initially, his failure to weigh the relevant evidence, and to identify and fully explain the basis for his Section 8(f) findings, is in violation of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A) (the APA). *See generally Shrout v. General Dynamics Corp.*, 27 BRBS 160, 165 (1993)(Brown, J., dissenting). This case must be remanded for reconsideration of Section 8(f), under the APA.

In addition, the Director correctly asserts that the fact that claimant previously sustained back injuries cannot, standing alone, establish a pre-existing permanent partial disability under Section 8(f). *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Rather, in order to constitute a pre-existing permanent partial disability for Section 8(f) purposes, claimant's pre-existing condition must constitute a serious, lasting physical condition such that a cautious employer would have been motivated to discharge or decline to hire the claimant because of an increased risk of compensation liability. *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992). The Director argues that this case is factually indistinguishable from *Legrow* and *Campbell Industries*, wherein the court held that where a claimant had prior back injuries but was able to return to work within days, without restrictions or medical problems, his prior back injuries did not constitute pre-existing permanent partial disabilities for Section 8(f) purposes. We note, however, that there is evidence of record which suggests that claimant's 1954 back injury did not resolve without undue effects. Notably, Dr. Browning assigned claimant a 10 percent permanent impairment rating based in part on this injury. Ex. 11. The record reflects, moreover, that claimant was hospitalized for a week after the 1954 injury and that thereafter he missed 3 weeks of work. Ex. 3. Furthermore, contrary to the Director's assertions, there is also evidence that when claimant did return to work on October 3, 1954, he did so under light duty restrictions and subsequently sought further treatment for his back on December 23, 1954 and April 25, 1955. Exs. 3 and 5. In addition, employer's medical record, Ex. 4, suggests that the January 1959 injury may have been an exacerbation of the 1954 injury, and claimant testified at the hearing that since the time of the 1954 injury he has suffered back pain most of the time. Tr. at 22. Inasmuch, however, as the administrative law judge summarily listed claimant's prior back injuries as bases for Section 8(f) relief without considering the aforementioned evidence or explaining his conclusion, we must vacate this determination and remand for him to reconsider claimant's entitlement to Section 8(f) relief in light of all of the relevant evidence of record consistent with the requirements of the APA. *Shrout*, 27 BRBS at 165; *Ballestros v. Willamette Western Corp.*, 20 BRBS 184 (1988).

If, on remand, the administrative law judge finds that employer met the pre-existing permanent partial disability requirement of Section 8(f) based on claimant's pre-existing back injuries, he should then reconsider whether employer established that claimant's permanent total disability was not due solely to his last injury.² Employer must demonstrate, with medical or other

percent to the prior injury of 1954 and his extensive degenerative arthritis of the spine and degenerative disc disease." Ex. 11; Cx. 15.

²With regard to the manifest requirement, while the back injuries discussed above were clearly

evidence, that claimant's subsequent injury alone would not have caused claimant's permanent total disability under the standard set forth in *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT), which was decided subsequent to the administrative law judge's decision herein. *Luccitelli* is controlling in this case, as it arises within the appellate jurisdiction of the United States Court of Appeals for the Second Circuit. *See generally Esposito v. Bay Container Repair Co.*, BRBS , BRB No. 93-0658, slip op. at 4 (March 25, 1996).

Finally, the Director asserts that claimant's 1976 left hip and leg injury cannot support the administrative law judge's award of Section 8(f) relief. We agree that this injury is insufficient to establish a pre-existing permanent partial disability on the existing record as a matter of law. Inasmuch as the record is devoid of any evidence establishing the need for continuing medical treatment, medication, or restrictions necessitated as a result of this injury, employer has failed to establish that it resulted in a serious, lasting physical problem which can properly form the basis for Section 8(f) relief. *See generally Bergeron*, 982 F.2d at 797, 26 BRBS at 149 (CRT). Accordingly, we also vacate the administrative law judge's award of Section 8(f) relief to the extent that it was premised on this prior injury.

manifest, the Director is correct that claimant's underlying degenerative back condition, which Drs. Browning and Brown believed pre-dated the 1978 injury and contributed to claimant's ultimate disability, cannot serve as a proper basis for an award of Section 8(f) relief on the facts in this case. As this condition was first diagnosed based on a March 21, 1978 x-ray, it was not manifest to employer prior to the January 1978 work injury. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT)(2d Cir. 1993).

Accordingly, the administrative law judge's findings with regard to employer's entitlement to Section 8(f) relief are vacated, and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, his Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge