BRB No. 10-0375

LARRY GLINDEMAN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CROFTON DIVING CORPORATION	)	DATE ISSUED: 11/24/2010
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand Denying Respondent's Request for Section 8(f) Relief of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Denying Respondent's Request for Section 8(f) Relief (2006-LHC-00425) of Administrative Law Judge Alan L. Bergstom 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 administrative law judge's findings of fact and

conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The case is before the Board for the third time. To recapitulate the facts, claimant, a diving supervisor, injured his cervical spine when he tripped and fell at work on May 27, 1999. He continued performing light-duty work for employer until he underwent surgery at C5/6 on July 26, 2002. The parties agreed that claimant cannot return to his pre-injury work. Claimant sought compensation for permanent total disability arising out of the work injury, commencing April 23, 2003, the date his treating physician found he reached maximum medical improvement. At this juncture, the award of permanent total disability benefits commencing October 6, 2005, is no longer at issue. *See L.G. [Glindeman] v. Crofton Diving Corp.*, BRB No. 07-0273 (Oct. 30, 2007)(unpub.); *L.G. [Glindeman] v. Crofton Diving Corp.*, BRB No. 08-0694 (May 21, 2009)(unpub.). Relevant to the current appeal, the Board, in its second decision, stated that the administrative law judge did not adequately discuss the medical evidence or make sufficient findings of fact regarding either the pre-existing permanent partial disability or manifest elements of Section 8(f), 33 U.S.C. §908(f). *Glindeman*, BRB No. 08-0694, slip op. at 6-7. Thus, the case was remanded for further consideration, including the contribution element if reached.

In his Decision and Order on Second Remand Denying Respondent's Request for Section 8(f) Relief, the administrative law judge found that employer established that the claimant's prior left great toe fracture, non-insulin dependent diabetes, irritable bowel syndrome, mild narrowing of the patellofemoral joint compartment, mild mixed hyperlipidemia, and anxiety disorder are medical conditions that were manifest prior to the claimant's work-related neck and upper right extremity injury of May 27, 1999. However, the administrative law judge found that claimant did not have any medical or work restrictions related to any of the manifest conditions, and thus he concluded they were not pre-existing permanent partial disabilities for purposes of Section 8(f). In addition, the administrative law judge found that employer failed to establish that claimant's permanent total disability commencing on October 6, 2005, is not due solely to his work-related neck and upper right extremity injury of May 27, 1999. The administrative law judge rejected Dr. Gurtner's opinion that claimant was not employable due to a combination of all of his medical conditions, as she did not give a well-reasoned medical opinion as to the effects claimant's pre-existing medical conditions had on his inability to perform any work after October 5, 2005. Thus, the administrative law judge again denied employer relief from continuing compensation liability pursuant to Section 8(f).

On appeal, employer contends the administrative law judge erred in finding that it did not establish that claimant had any pre-existing permanent partial disabilities within the meaning of Section 8(f). In addition, employer contends that the administrative law judge erred in finding that claimant's total disability is not due to the combination of his pre-existing conditions and his work-related injury. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that claimant had a preexisting permanent partial disability, that the pre-existing disability was manifest to employer prior to the second injury, and that the claimant's disability is not due solely to the subsequent injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). Employer bears the burden of proving each element of Section 8(f) relief. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995).

In reviewing claimant's conditions which employer contended are manifest, pre-existing, permanent partial disabilities, the administrative law judge again found that as claimant did not miss work or was not assigned work restrictions due to any of the medical conditions, they do not constitute pre-existing permanent partial disabilities. Decision and Order at 9-10. We cannot affirm the administrative law judge's use of this rationale, as it is inconsistent with law. As the Board stated in its previous decision, a condition need not result in economic harm or work restrictions in order to constitute a pre-existing permanent partial disability. *See Devor v. Dep't of the Army*, 41 BRBS 77 (2007). Rather, for purposes of Section 8(f), a pre-existing "disability" has been defined as "such a serious physical disability that a cautious employer…would [be] motivated to discharge the … employee because of a greatly increased risk of employment-related accident and compensation liability." *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977); *see Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 6(CRT) (4th Cir. 2003). Although the mere existence of a prior condition is not sufficient to satisfy this element, *Cherry*, 326 F.3d 449, 37 BRBS 6(CRT); *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983), a medical condition that is controlled or asymptomatic, such as hypertension or a degenerative disease, may be a pre-existing disability if it nonetheless is serious and lasting. *Dugan v. Todd Shipyards Inc.*, 22 BRBS 42 (1989); *see also Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988). Similarly a condition that is controlled with medication could be a

serious, lasting condition. *Id.* Therefore, the evidence in this case could support a finding that some of claimant's manifest conditions, while reportedly asymptomatic or controlled with medication, could be a serious, lasting medical problem and thus a "pre-existing permanent partial disability" within the meaning of Section 8(f). *See Director, OWCP v. General Dynamics Corp.*, 787 F.2d 723, 18 BRBS 88(CRT) (1st Cir. 1986); *Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988); *Dugan*, 22 BRBS 42.

However, any error in the administrative law judge's finding that employer did not establish that claimant suffered from a pre-existing permanent partial disability is harmless. *See Cherry*, 326 F.3d 449, 37 BRBS 6(CRT). Employer must establish that claimant's permanent total disability is not due solely to his work injury. It is insufficient to offer evidence that the pre-existing conditions "combined" to result in total disability. *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992). In this case, the administrative law judge found that Dr. Gurtner's opinion is insufficient to establish that claimant's total disability is not due solely to the work-related injury, as the administrative law judge rationally found she did not adequately explain how claimant's pre-existing conditions played a contributory role in his total disability. Dr. Gurtner testified in a deposition dated June 15, 2006, that due to his "medical conditions," claimant was unable to perform any jobs after October 2005. She stated that her recommendation that claimant is not employable is based on all of claimant's medical and psychological conditions in addition to the neck pathology resulting from the work injury. Cl. Ex. 12 at 13, 26. It is within the administrative law judge's discretion to find Dr. Gurtner's opinion that all of claimant's conditions contribute to his overall impairment insufficient to meet employer's burden of establishing that the work injury alone did not cause claimant's total disability, *see, e.g., Ceres Marine Terminal v. Director OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997), and the Board is not empowered to reweigh the evidence. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Moreover, while Ms. Byers, the vocational consultant, addressed claimant's educational and vocational history, as well the restrictions imposed by his medical conditions, in developing the labor market surveys, she did not specifically address the extent of claimant's disability due to his work-related injury alone. Emp. Ex. 4. Consequently, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer failed to establish that claimant's total disability is not due solely to the work injury. The administrative law judge's denial of Section 8(f) relief is therefore affirmed. *See e.g., Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993).

Accordingly, the administrative law judge's Decision and Order on Second Remand Denying Respondent's Request for Section 8(f) Relief is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge