

BRB No. 02-0259

DORIS M. SATTERFIELD)

Claimant)

v.)

UNITED ENGINEERS AND)
CONSTRUCTORS, INCORPORATED)
nka WASHINGTON GROUP)
INTERNATIONAL, INCORPORATED)

DATE ISSUED: Oct. 28, 2002

and)

LIBERTY MUTUAL INSURANCE)
COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)

Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor

Kurt A. Gronau (Law Offices of Kurt A. Gronau), Glenwood Springs, Colorado, for employer/carrier.

Sarah C. Crawford (Eugene Scalia, Solicitor of Labor; John F. Deppenbrock, Jr., Associate Solicitor; Burke Wong, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (01-LHC-0208) of Administrative Law Judge

Richard K. Malamphy 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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, an executive secretary, sustained injuries to her left arm, wrist and knee on November 30, 1990, when she fell while working on a military base on the Johnston Atoll. Claimant was not correctly diagnosed with a ligamentous tear of her left wrist until August 1993, when she underwent surgery. Claimant continues to suffer impairments to her left wrist, arm and shoulder, including a "frozen" shoulder and chronic pain syndrome. Claimant and employer resolved all issues between them prior to the hearing, stipulating that claimant is permanently totally disabled. EX 1. The only issue before the administrative law judge was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his decision, the administrative law judge determined that although employer established that claimant suffered from a manifest pre-existing permanent partial disability, it failed to establish that such condition contributed to claimant's current, total disability. Accordingly, the administrative law judge denied employer Section 8(f) relief.

Employer appeals,¹ contending that the administrative law judge erred in finding that it failed to establish the contribution element necessary for relief under Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision.

¹This is the second time this claim has been before the Board. Employer unsuccessfully sought to reverse Administrative Law Judge Thomas Schneider's award of temporary total disability benefits, arguing that the claim for benefits was untimely filed. *Satterfield v. United Engineers & Constructors, Inc.*, BRB No. 97-1373 (June 19, 1998)(unpublished).

Section 8(f) shifts the liability to pay compensation for permanent disability or death from an employer after 104 weeks 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 the claimant had a manifest pre-existing permanent partial disability, and that her current permanent total disability is not due solely to the subsequent work injury.² 33 U.S.C. §908(f)(1); *Director OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT)(2^d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d748, 23 BRBS 34(CRT) (5th Cir. 1990). Thus, a claimant's total disability must have been caused by both the work injury and the pre-existing condition; unless employer can demonstrate this, it may not receive Section 8(f) relief. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). It is not sufficient for employer to demonstrate the existence of a pre-existing disability that created a greater physical impairment; rather, employer must demonstrate that the second injury, *i.e.*, the disability resulting from claimant's fall at work, did not in and of itself render her totally disabled. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1(CRT) (9th Cir. 1989).

Employer contends that claimant's cervical fusion at C6/7, performed in 1974, contributed to her work-related left ulnar neuropathy and left shoulder condition to produce greater disability than that caused by the work injury. In this regard, employer's claim for Section 8(f) relief rests on the opinions of two doctors, Drs. Kleen and Gross, regarding the effects of claimant's prior cervical fusion. Both physicians noted that claimant was relatively symptom-free following her cervical fusion. EX 2; EX 7, Dep. at 13-14. Dr. Kleen ruled out any correlation between claimant's cervical fusion in 1976 and the current disabling symptoms related to her fall at work. EX 7, Dep. at 13-15. Moreover, although Dr. Kleen stated that it is not likely that all of claimant's overall permanent physical impairments are due to the work injury alone, in that the cervical fusion accelerates degenerative changes and results in a greater overall physical impairment, he did not state that claimant's work injury alone was not totally disabling. *Id.* at 33-34, 37-39; *see Luccitelli*, 964 F.2d at 1305-1306,

²The administrative law judge found that employer satisfied the first two elements, *i.e.*, that claimant had a manifest pre-existing permanent partial disability, necessary for Section 8(f) relief. *See* Decision and Order at 10-11. Although employer presents an argument on appeal addressing the manifest requirement, the administrative law judge's finding that the manifest element has been satisfied obviates the need to address this contention.

26 BRBS at 6(CRT). Likewise, Dr. Gross's testimony does not address the extent of claimant's disability resulting solely from the work injury. Dr. Gross stated that it is probable that claimant's cervical fusion contributed to claimant's current left arm impairment. EX 6, Dep. at 36-37, 62. Dr. Gross, however, did not address whether or not claimant's work injury, in and of itself, would have rendered her totally disabled. Thus, employer has not presented evidence that claimant's work injury did not render her totally disabled regardless of the residual effects, if any, of her prior cervical surgery. The administrative law judge's denial of Section 8(f) relief is, therefore, affirmed as it is supported by substantial evidence and in accordance with law. *See 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) (2^d Cir. 1993); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2^d Cir. 1992).

Accordingly, the administrative law judge's Decision and Order denying employer relief under Section 8(f) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge