BRB No. 09-0233

D.W.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WASHINGTON GROUP INTERNATIONAL, INCORPORATED	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 10/26/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying the Petition for Section 8(f) Relief of Richard K. Malamphy, United States Department of Labor.

Kenneth M. Simon (Flicker, Garelick & Associates, LLP) for employer/carrier.

Heather A. Vitale (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying the Petition for Section 8(f) Relief (2007-LHC-00990) 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 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).

Claimant worked for employer on the Johnson Atoll. Prior to the commencement of her employment, claimant underwent two physical examinations that did not detect any physical or psychological problems. In June 1996, claimant developed an intestinal condition, which required surgery in Honolulu on June 9, 1996. Following her medical release to return to Johnston Atoll in September 1996, claimant resumed her prior employment duties with employer, but her health problems resumed. In October 1997, claimant had additional surgery during which her anal sphincter muscle was accidentally severed. Claimant subsequently underwent five additional surgeries, and, in addition, developed headaches and depression. Claimant filed a claim for continuing permanent total disability benefits under the Act, commencing January 10, 2001.

In a December 10, 2004, Decision and Order, Administrative Law Judge Huddleston awarded claimant continuing permanent total disability benefits as of January 10, 2001. EX 4. Employer appealed this decision to the Board, which affirmed in all respects. [*D.W.*] *v. Washington Group Int'l, Inc.*, BRB No. 05-0387 (Jan. 11, 2006) (unpub.). The Director, Office of Workers' Compensation Programs (the Director) and employer agreed to stay litigation regarding employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), while the appeal was pending.[1]

In his Decision and Order, Administrative Law Judge Malamphy (the administrative law judge) denied employer's claim for Section 8(f) relief, finding that claimant is totally disabled from her work-related bowel condition alone. Employer appeals the administrative law judge's denial of Section 8(f) relief. The Director responds, urging affirmance. Employer filed a reply brief.

[1] After the Board affirmed the administrative law judge's decision, the Director agreed to accept employer's Section 8(f) petition as timely submitted. DX B.

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, e.g., Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). A work-related aggravation of a pre-existing condition will suffice as contribution to the total disability, whereas Section 8(f) is not applicable where the claimant's disability is the result of a natural progression of the pre-existing disability. *See Jacksonville Shipyards, Inc.*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988), *aff'g Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002).

Employer alleged that claimant's work-related bowel condition was aggravated by her continued employment after 1996, ultimately resulting in total disability in 2001 due to that condition as well as to headaches and depression. The administrative law judge found that claimant is totally disabled due to the work-related bowel disorder alone which began in 1996, and that employer did not establish that any disabling conditions pre-existed the onset of the bowel disorder. The administrative law judge found that physicians attribute claimant's headaches and depression to her severe physical and social limitations produced by the work-related bowel disorder. Consequently, the administrative law judge denied employer's petition for Section 8(f) relief because employer failed to establish that any condition other than the natural progression of her bowel disorder caused her permanent total disability.

On appeal, employer contends the administrative law judge failed to address its contention that claimant's continued employment aggravated her condition to result in total disability. The Director counters that the record is susceptible only to the finding that claimant's work-related injury progressed to result in her total disability. We agree with the Director, and thus, we affirm the denial of Section 8(f) relief.

In its brief, employer recites the medical evidence concerning the progression of claimant's condition following the botched surgery in 1997, as well as her development of headaches and depression. Although claimant continued to work for employer until January 2001, the medical record is devoid of any evidence that this employment aggravated her condition or that claimant's total disability is due to anything other than the progression of her bowel condition and resulting psychological condition. *See* EX 2, 3, 6. Indeed, employer contends that it is entitled to Section 8(f) relief merely because claimant continued to work until she became totally disabled. *See* Emp. Br. at 22-23;

Emp. Reply Br. at 3-4. It is well-settled that a claimant's mere continued employment following an injury is insufficient to establish that the injury was aggravated to the point of disability. Rather, employer must establish some actual aggravation of the pre-existing disability in order to satisfy the contribution element for Section 8(f) relief. *Jacksonville Shipyards, Inc.*, 851 F.2d 1314, 21 BRBS 150(CRT); *see also Electric Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2d Cir. 2007); *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). In this case, employer failed to adduce any evidence of aggravation and, moreover, the administrative law judge's finding that the progression of the work injury and its resulting conditions alone caused claimant's total disability is amply supported by substantial evidence and in accordance with law. *Id.* Therefore, we affirm the denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order Denying the Petition for Section 8(f) Relief is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge