

STEPHEN J. HRESCHAK)	
)	
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 Joel F. Gardiner, Administrative Law Judge, United States Department of Labor.

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

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel Oshinsky, Counsel for Longshore), 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.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (95-LHC-0239) of Administrative Law Judge Joel F. Gardiner 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 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).

On April 14, 1992, claimant slipped on the floor and landed on his left knee while working for employer. Claimant reported this incident and continued working until July 14, 1992. On July 21, 1992, claimant was examined by Dr. Zeppieri for pain in both knees. X-rays taken revealed advanced degenerative arthritis in both knees. Claimant's Exhibit 1. Claimant subsequently underwent total knee replacement surgery on both legs. In his Decision and Order, the administrative law judge awarded claimant temporary total disability compensation from July 15, 1992 through July 31, 1993, and permanent total disability compensation from August 3, 1993 and continuing. 33 U.S.C. §908(a), (b). Finally, the administrative law judge granted employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief to employer. Employer responds, urging affirmance.

The Director contends that the administrative law judge erred in finding employer entitled to Section 8(f) relief. Specifically, the Director asserts that claimant's obesity was not a pre-existing permanent partial disability and that claimant's underlying degenerative joint disease of the knees was not manifest to employer prior to claimant's work injury. Section 8(f) 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 has a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent 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. 33 U.S.C. §908(f); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Dominey v. Arco Oil and Gas Co.*, 30 BRBS 134 (1996).

In this case, the administrative law judge's findings regarding the contribution element are not challenged; the Director appeals the findings that claimant sustained a manifest, pre-existing permanent partial disability. The Director initially asserts that employer failed to establish that claimant's pre-existing obesity constituted a permanent disability. In support of his contention, the Director argues that obesity without evidence of physically disabling symptoms attributable to the obesity is insufficient to establish a pre-existing permanent partial disability for Section 8(f) purposes. *See Brogden v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 259, 261 (1984). Thus, the Director asserts, claimant's obesity in the instant case must be considered to be an unhealthy lifestyle rather than a pre-existing disability because it did not interfere with the performance of claimant's regular work prior to the 1992 work injury. However, a pre-existing disability need not be an economic disability, *see Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989)(Brown, J., dissenting); rather, the pre-existing condition need only have been of sufficient seriousness that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of an employment-related accident and compensation liability. *See Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988). In addressing claimant's obesity, the administrative law judge found the pre-existing permanent partial disability element satisfied on the basis that this condition was of long-standing duration. *See* Decision and Order at 6. The administrative law judge made no finding, however, regarding whether claimant's obesity was a

medically recognizable physical ailment or whether he had physically disabling symptoms. *See Brogden*, 16 BRBS at 259. We therefore vacate the administrative law judge's finding that claimant's obesity constitutes a pre-existing permanent partial disability for purposes of awarding Section 8(f) relief, and we remand the case for the administrative law judge to reconsider the evidence of record regarding this element of Section 8(f).¹ *See Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989).

The Director also argues that substantial evidence does not support the administrative law judge's finding that claimant's underlying degenerative joint disease of his knees was manifest. We agree. The manifest element will be satisfied if either employer had actual knowledge of the pre-existing condition or if there were medical records in existence from which claimant's condition was objectively determinable. *See Lockhart v. General Dynamics*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *see also Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge found that claimant's pre-existing condition of degenerative joint disease of the knees was manifest based on a May 1991 x-ray and employer's yard records. Our review of the record reveals, however, that the 1991 x-ray relied upon by the administrative law judge is of claimant's spine, and employer's yard records document left shoulder and right hand injuries. *See EXS 3, 5*. Inasmuch as the documents upon which the administrative law judge fail to document claimant's knee condition, we vacate the administrative law judge's finding that degenerative joint disease of the knees was manifest to employer prior to the date of claimant's work injury. We note, however, that the record does contain additional evidence which, if credited, could satisfy the Section 8(f) manifest element.² Accordingly, on remand, the administrative law judge must reconsider the evidence of record as it relates to this issue.

¹We note that the record contains evidence that claimant was under a medically-supervised weight loss program, that claimant experienced swelling in his knees, and that claimant had high blood pressure requiring medication. *See RX 6; RX 8g*.

²Dr. Kucharchik's medical records, which were in existence prior to the injury, contain general references to recurrent swelling of left knee, joint pain, arthritis, and a general diagnosis of degenerative joint disease. There is also a reference about claimant's going to the emergency room for pain in his right leg. *RX 6*.

Accordingly, the administrative law judge's findings that claimant's obesity was a pre-existing permanent partial disability and that degenerative joint disease in claimant's knees was manifest are vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge