

BRB No. 96-0730

EMIL FAIETA, SR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
LABELLE PROCESSING COMPANY	)	DATE ISSUED:
	)	
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 - Denying Section 8(f) Relief of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert W. Murdoch (Grogan, Graffam, McGinley & Lucchino, P.C.), Pittsburgh, Pennsylvania, for self-insured employer.

Michael S. Hertzog (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., 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:

Employer appeals the Decision and Order - Denying Section 8(f) Relief (95-LHC-572) of Administrative Law Judge Thomas M. Burke 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained a work-related injury to his back on January 16, 1984, while working for employer. The injury resulted in temporary total disability from January 16, 1984, until March 25,

1985, at which time claimant returned to work for employer in a light duty position as a dispatcher. Claimant worked in this position until July 28, 1986, when he was again placed on temporary total disability.<sup>1</sup> Prior to his work-related injury, claimant suffered a crushing injury to his left foot in 1972 which required the amputation of two toes. He also suffered back and neck injuries in a car accident in 1974, and a left shoulder injury in 1975 when he fell off a ladder. Additionally, in either October or November 1983, claimant suffered an injury to his lower back while working for employer when moving heavy equipment, but was able to return to his usual employment.

The parties stipulated that claimant is permanently totally disabled as a result of his work-related injury. Thus, the only issue presented for adjudication before the administrative law judge was whether employer is entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, the administrative law judge found that employer established that claimant suffered from a manifest pre-existing permanent partial disability, but did not establish that claimant's permanent total disability was not due solely to his work-related injury. Thus, the administrative law judge denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent disability or death 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 the claimant had a manifest pre-existing permanent partial disability, and that his permanent total disability is not due solely to the subsequent work injury. See 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability was caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. See *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Specifically, we agree with the Director that there is no record evidence sufficient to support a finding of Section 8(f) contribution in this case. Contrary to employer's contention, the opinions of Drs. Cohen and Yanchus, while supportive of a finding that claimant's present condition may be related to a combination of his pre-existing conditions and his job injury, does not establish that claimant's total

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<sup>1</sup> Subsequent to his work-related injury, claimant suffered injuries to his shoulder and knee.

disability is not solely the result of his work injury.<sup>2</sup> Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, we affirm that finding and consequently his denial of Section 8(f) relief in this case. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>2</sup>Employer's reliance on a "common sense" presumption, specifically that since Dr. Cohen's report references only the November 1983 injury, the January 1984 injury could not by itself cause claimant's disability without contribution from the November 1983 injury, is misplaced. This "common sense" approach has been rejected by both the courts and the Board. *See Two "R" Drilling*, 894 F.2d at 750, 23 BRBS at 35 (CRT); *Dominey*, 30 BRBS at 137 n.2.