BRB No. 95-2125

FLORENCE SNOWDEN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
WASHINGTON HOSPITAL CENTER	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Roger S. Mackey (Law Offices of Conrad A. Fontaine), Fairfax, Virginia, for employer/carrier.

Laura Stomski (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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (88-DCW-0086) of Administrative Law Judge Charles P. Rippey 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 District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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).

This case is before the Board for the second time. Claimant sustained injuries to her back while working for employer. In its initial Decision and Order, the Board affirmed the administrative law judge's award of permanent total disability compensation to claimant, vacated the administrative law judge's finding that employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), since that determination did not comply with the Administrative Procedure Act, and remanded the case to the administrative law judge for reconsideration of the Section 8(f) issue. *Snowden v. Washington Hospital Center*, BRB Nos. 92-1453/A (June 28, 1994) (unpub.).

In his Supplemental Decision and Order on Remand, the administrative law judge denied employer's request for relief pursuant to Section 8(f), finding that employer failed to establish the contribution and manifest elements necessary for such relief to be granted. Employer's motion for reconsideration was subsequently denied.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, 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 current 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 is caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30 (CRT)(D.C. Cir. 1994); *Dominey v. Arco Oil and 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); *see Jaffe New York Decorating*, 25 F.3d at 1085, 28 BRBS at 35 (CRT). 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 opinion of Dr. Moskovitz, while supportive of a finding that claimant's present condition is related to a combination of her pre-existing lupus and her job injury, does not establish that claimant's total disability is not solely the result of her work injury.[1] Thus, as

[1]Dr. Moskovitz opined "[y]es, I believe that, within a reasonable medical certainty, because she

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 Supplemental Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

---

has lupus, her present level of functioning is worse than if she didn't have lupus." Depo. at 37.