BRB No. 04-0661

CHRISTOPHER HEAVIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHEVRON USA, INCORPORATED	)	
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	DATE ISSUED:APR 26, 2005
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Permanent Total Disability Benefits, the Order Granting Request for Modification of Decision, and the Order Denying Request for Modification of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Graham M. Kelly, Jr., Coronado, California, and Eric Dupree (Dupree Law, PLC), San Diego, California, for claimant.

James P. Aleccia and Jeanne S. Kuo (Aleccia, Conner & Socha), Long Beach, California, for employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Permanent Total Disability Benefits, the Order Granting Request for Modification of Decision, and the Order Denying Request for Modification (2002-LHC-2122) of Administrative Law Judge Jennifer Gee rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law; if they are, they must be affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured on October 13, 1986, during the course of his employment for employer as a facility operator on an offshore oil platform when he fell approximately 40 feet during a rainstorm. Claimant fractured his ribs, back, hip, and right femur. He also sustained a ruptured spleen and injuries to other internal organs. Claimant underwent surgery on his diaphragm, spleen, back, and right leg, and hemodialysis to restore his left kidney function.[1]

Dr. Linovitz became claimant's treating physician for his back condition in 1988. He performed additional back surgery in August 1988 and in June 1989, when the plate in claimant's right leg also was removed. Claimant underwent multiple psychological examinations in 1993, from which it was determined that claimant has an organic mental disorder and an affective disorder. A comprehensive neuropsychiatric examination in 1997 by Dr. Addario revealed that claimant sustained a mild traumatic brain injury due to the October 1986 work injury; in January 2003 Dr. Addario recommended counseling and medication for depression and anxiety. Claimant was diagnosed in 1997 with the hepatitis C virus related to the approximately 48 blood transfusions claimant received immediately after his work injury to alleviate internal bleeding. Claimant underwent Interferon treatment for hepatitis C from March 1998 to March 1999. In March 2001, Dr. Linovitz opined that claimant's back symptomatology is worsening, and that claimant was at risk for developing advanced degenerative changes, stenosis, and further neurologic impairment.

In her decision, the administrative law judge found that claimant's work injuries reached maximum medical improvement on July 6, 1988. The administrative law judge credited the opinion of Dr. Linovitz that claimant's condition has not improved since the day he first examined claimant. The administrative law judge noted that it is

[1] Claimant's right kidney had been removed in 1983 due to a congenital deformity.

uncontroverted that claimant is unable to return to his usual employment as a facility operator. The administrative law judge found that employer failed to show the availability of suitable alternate employment that claimant is capable of performing. Additionally, the administrative law judge credited the opinions of Drs. Linovitz and Addario that the combination of claimant's physical injuries, metabolic factors, pain disorders, and psychiatric condition render claimant unable to work. The administrative law judge also found claimant totally disabled from March 13, 1998, to March 15, 1999, while he underwent Interferon treatment for hepatitis C. The administrative law judge therefore awarded claimant permanent total disability benefits commencing July 6, 1988.

The administrative law judge determined claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), relying on claimant's wages for employer after it merged with claimant's former employer, Gulf Oil Company (Gulf), and claimant was promoted from pumper/gauger to facility operator, to derive an average weekly wage of $1,009.63. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), finding that employer failed to establish that claimant's pre-existing back pain and removal of his right kidney contribute to his permanent total disability. With regard to medical benefits, the administrative law judge found claimant entitled to reimbursement from employer for sums he personally paid for a month of Interferon treatment. However, the administrative law judge determined that claimant is not entitled to receive from employer the value of 11 months of Interferon treatment that the University of California, San Diego, Hospital provided to claimant free of charge, but that the hospital is entitled to payment from employer. Employer was further ordered to authorize all requested medical evaluations, treatment, and prescriptions relating to the claimant's medical conditions referenced in the decision, including claimant's psychological/psychiatric deficiencies.

In her Order Granting Request for Modification of Decision issued on February 26, 2004, the administrative law judge additionally awarded claimant compensation for temporary total disability from the date of injury, October 14, 1986, to July 5, 1998. The administrative law judge granted claimant's request for clarification that claimant should be awarded compensation for permanent total disability, instead of temporary total disability, while he received Interferon treatment from March 13, 1998, to March 15, 1999. The administrative law judge found claimant entitled to reimbursement from employer for the $7,050 cost of medical testing performed by Dr. Wegman, plus interest. Finally, the administrative law judge found that claimant is entitled to an additional assessment pursuant to Section 14(e), 33 U.S.C. §914(e). The administrative law judge found that employer failed to timely controvert claimant's disputing the average weekly wage employer utilized to voluntarily pay claimant compensation from the date of injury.

In her Order Denying Request for Modification issued on May 7, 2004, the administrative law judge rejected employer's contention that claimant should receive compensation for temporary total disability while he underwent Interferon treatment. The administrative law judge also denied reconsideration of the Section 14(e) assessment. Finally, the administrative law judge rejected employer's motion for reconsideration of the denial of Section 8(f) relief. The administrative law judge found that employer's petition for reconsideration in this regard was not timely filed. Moreover, the administrative law judge found that employer did not present any argument that would warrant changing her finding that it is not entitled to Section 8(f) relief.

On appeal, employer challenges the administrative law judge's findings regarding the date of maximum medical improvement, suitable alternate employment, average weekly wage, Section 8(f) relief, the award of permanent total disability benefits from March 13, 1998, to March 15, 1999, and her imposition of a Section 14(e) assessment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance in all other respects.

Maximum Medical Improvement

Employer initially contends that the administrative law judge erred by finding that claimant's October 13, 1986, work injury reached maximum medical improvement on July 8, 1988, rather than on June 8, 1995, when Dr. London stated claimant reached maximum medical improvement and was capable of sedentary employment. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

In her decision, the administrative law judge found that the testimony of claimant's treating physician, Dr. Linovitz, is entitled to special weight.[2] The administrative law judge reasoned that Dr. Linovitz had treated claimant for over 10 years, he maintained well-documented treatment notes, and he presented persuasive testimony that, in hindsight, claimant's back condition has not improved, but has

[2] The administrative law judge also credited Dr. Linovitz's opinion based on his credentials as an orthopedic surgeon who specializes in spinal disorders and on his testimony that claimant is not feigning his condition. CX 24 at 5, 24.

declined, since July 6, 1988, when he first examined claimant.[3] *See* CX 24 at 6-11, 29-30; EX 19. The administrative law judge also found Dr. Linovitz's opinion supported by the medical evidence of claimant's deteriorating condition. Specifically, Dr. Linovitz diagnosed claimant with arachnoiditis, scoliosis, and worsening dysesthesias subsequent to first examining claimant in July 1988. CX 2 at 36, 58, 100. The administrative law judge also credited claimant's diagnosis in February 1993 of a post-traumatic psychiatric condition, and his diagnosis of hepatitis C in 1997. CXs 1 at 6; 5 at 196. Finally, the administrative law judge credited evidence that claimant's psychiatric condition worsened from 1993 to 2003. CXs 1 at 4; 7 at 205-206; 20 at 550-552. Based on this evidence, the administrative law judge found that any improvement in claimant's condition physically from 1989 to 1993 was limited to specific symptoms and was short-lived, whereas claimant's work-related physical and psychological condition progressively worsened after July 8, 1988. Decision and Order at 14.

The Board is not empowered to reweigh the evidence, and the administrative law judge's weighing of the evidence must be affirmed if it is rational and supported by substantial evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). In this case, the administrative law judge acted within her discretion as fact-finder to accord the greatest weight to the opinion of claimant's treating physician, Dr. Linovitz. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). Moreover, the testimony of Dr. Linovitz, and the credited medical evidence that claimant's work-related physical and psychological condition worsened after July 8, 1988, constitutes substantial evidence from which the administrative law judge rationally concluded that claimant's work injury had reached maximum medical improvement at the time of Dr. Linovitz's initial evaluation. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248 (1988). As the administrative law judge's decision to credit this evidence is within her discretion, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that claimant's work injury reached maximum medical improvement on July 8, 1988. *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

[3] Dr. Linovitz initially stated on June 8, 1995, in response to a question from employer, that claimant was permanent and stationary with regard to his work injuries. On deposition, he explained that in hindsight, claimant has not improved since at least 1988. CX 24 at 29.

We also affirm the administrative law judge's rejection, on reconsideration, of employer's contention that claimant should have been awarded compensation for temporary total disability from March 13, 1998, to March 15, 1999, rather than for permanent total disability, while he received Interferon treatment. Order Granting Request for Modification of Decision and Order at 2-3; Order Denying Request for Modification at 2. The administrative law judge correctly awarded claimant compensation for permanent disability from the date of maximum medical improvement, notwithstanding that claimant was additionally disabled from the temporary physical side-effects of Interferon treatment. *See generally Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994). A compensation award for permanent partial disability lapses during a period of temporary total disability inasmuch as the claimant is entitled to compensation for his complete inability to work. *See generally Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). This rationale, however, is inapplicable in circumstances such as those here, where claimant sustained a period of temporarily totally disabling symptoms after the date the administrative law judge found that claimant became permanently totally disabled due to his work injury. *See generally Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990).

Suitable Alternate Employment

We next address employer's appeal of the administrative law judge's finding that employer failed to establish the availability of suitable alternate employment. Section 802.211(b) of the Board's regulations states, in pertinent part:

> Each petition for review shall be accompanied by a supporting brief . . . which: Specifically states the issues to be considered by the Board; presents . . . an argument with respect to each issue presented with references [to the record]; a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result.

20 C.F.R. §802.211(b). The Board has stated previously that a brief filed by a party represented by counsel must address why the administrative law judge's decision is not supported by substantial evidence or in accordance with law. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227, 229 (1990); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988). "[M]ere assignment of error is not sufficient to invoke Board review." *Carnegie v. C&P Telephone Co.*, 19 BRBS 57, 58-59 (1986).

In this case, employer's contention regarding the extent of claimant's disability is taken virtually verbatim from the Post-Hearing Brief submitted to the administrative law judge. *See* Employer's Post Trial Brief at 23-26. Employer fails to address the administrative law judge's findings or identify any error committed by the administrative

law judge in finding that employer failed to establish the availability of suitable alternate employment. As employer has failed to raise a substantial issue for the Board to review in relation to the administrative law judge finding that employer did not establish the availability of suitable alternate employment, we affirm the administrative law judge's award of compensation for permanent total disability from July 8, 1988. *Plappert v. Marine Corps Exch.*, 31 BRBS 109 (1997), *aff'g on recon. en banc*, 31 BRBS 19 (1997); *Collins*, 23 BRBS at 228-229; *Carnegie*, 19 BRBS at 59.

Average Weekly Wage

Employer next contends that the administrative law judge erred in determining that claimant's average weekly wage at the date of injury is $1,009.63. Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous, and he is a five or six day per week worker. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied.

Employer argues that the administrative law judge erred by not applying Section 10(a) since claimant was employed for substantially the whole of the year preceding the October 13, 1986, work injury. Specifically, employer asserts that the administrative law judge should have credited claimant's total earnings during 1986. Claimant submitted 1986 W-2 wage forms showing that he earned $19,715.39 for Gulf, and $15,144.44 for employer. CX 15 at 266-267; *see also* Tr. at 87-93. Employer contends that the sum of these wages, $34,859.83, should be divided by 52 to derive an average weekly wage of $670.38.

While Section 10(a) may be applied when an employee has worked substantially the whole of the year immediately preceding his injury, for this or another employer, it requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. Claimant's 1986 W-2 statements are not sufficient evidence from which the administrative law judge could rationally derive claimant's average daily wage from January 1 to October 13, 1986, as there is no evidence of the number of days he worked during this period. *See Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 89 (1999)(decision on recon.), *aff'd*, 204 F.3d 616, 34 BRBS 12(CRT) (5th Cir. 2000). Moreover, the record establishes that claimant was not a five or six day per week employee; rather he worked seven days on and seven days off. *See* CX 19 at 507. Section 10(a) therefore cannot be applied. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT)

(9th Cir. 1999). Accordingly, the administrative law judge properly utilized Section 10(c) to calculate claimant's average weekly wage.

Section 10(c) of the Act is a catchall provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(b), can be reasonably and fairly applied.[4] *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). It is well established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). The goal of Section 10(c) is to calculate a reasonable approximation of claimant's annual wage-earning capacity at the time of the injury. *See generally New Thoughts Finishing Co. v. Chilton*, 118 F.3d 1028, 31 BRBS 51(CRT) (5th Cir. 1997); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In this case, the administrative law judge determined that claimant's average weekly wage is $1,009.63 by dividing claimant's 1986 earnings for employer of $15,144.44 by the number of weeks he was employed by employer as a facility operator. Decision and Order at 25. The administrative law judge found that claimant's average weekly wage in 1986 of $758.28 while he was employed by Gulf corroborates claimant's testimony that he was promoted from pumper/gauger to facility operator shortly after Gulf merged with employer. Tr. at 90-91. The administrative law judge found that claimant's average weekly wage should reflect the pay increase received after his promotion.

It is proper for a Section 10(c) computation to reflect an increase in wages claimant received before the injury. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986). The use of claimant's wage rate at the time of injury fully compensates claimant for the earnings he lost due to his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979). As the administrative law judge's calculation of average weekly wage under Section 10(c) reasonably approximates claimant's annual earning capacity at the time of injury, we reject employer's assertion of error, and we affirm the administrative law judge's finding, as it is supported by substantial evidence.[5] *See Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d

[4] No party contends Section 10(b) is applicable in this case and there is no evidence in the record of the wages of similarly situated employees. 33 U.S.C. §910(b).

[5] Employer contends that the administrative law judge erred insofar as claimant was promoted to facility manager in 1986 while he was employed by Gulf. *See* Tr. at 90-93. Any error by the administrative law judge with respect to the date claimant was

1025, 32 BRBS 91(CRT) (5th Cir. 1998); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

SECTION 14(e)

Employer contends that the administrative law judge erred in awarding claimant a Section 14(e) assessment. 33 U.S.C. §914(e). In her Order Granting Request for Modification of Decision, the administrative law judge found that employer was first notified by the Department of Labor (the Department) on March 21, 1997, of a dispute regarding claimant's average weekly wage. CX 14 at 247. The administrative law judge found that this issue was addressed by the parties at an informal conference held three days later on March 24, 1997. The administrative law judge credited a letter from the Department stating the substance of the informal conference, in which employer's insurance carrier was directed to provide the parties with a copy of claimant's wage records for the year prior to the date of injury so that claimant's average weekly wage could be calculated. CX 14 at 261. The administrative law judge further found that employer did not file a notice of controversion until July 29, 1999. The administrative law judge therefore concluded that claimant is entitled to a Section 14(e) assessment on the amount of additional compensation for which employer was found liable from the date of injury to March 24, 1997. Order Granting Request for Modification of Decision at 5-6.

Where an employer is paying benefits and a dispute exists between the parties as to the amount of compensation due, employer has 28 days to pay the amount demanded or 14 days to file a notice of controversion in order to avoid incurring a 10 percent assessment on the amount due under Section 14(e). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000). In this case, the administrative law judge found that, three days after employer received notice that claimant disputed the average weekly wage at which employer was voluntarily paying him compensation, the parties attended an informal conference where the issue was addressed. The purposes of Section 14(e) are to encourage the prompt payment of benefits and to act as an incentive to induce employer to bear the burden of bringing any compensation disputes to the attention of the Department. *Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991), *aff'd sub nom., Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992). Therefore, it is well established that, absent the filing of a notice of controversion, employer's liability for a Section 14(e) assessment terminates on the date an informal conference addressing the disputed issue is held, inasmuch as the dispute is brought to the attention of the Department at that time.

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promoted is harmless, however, because the record evidence is uncontroverted that claimant earned a higher average weekly wage with employer than he did with Gulf.

See generally Browder v. Dillingham Ship Repair, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). In this case, the purpose of Section 14(e) to timely bring compensation disputes to the attention of the Department was fulfilled by the informal conference on March 24, 1997, because it was conducted within the 14-day statutory period for employer to file its notice of controversion. We hold that the March 24, 1997, informal conference therefore was the *de facto* date at which employer timely provided a notice of controversion. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). Accordingly, the administrative law judge's finding that employer is liable for a Section 14(e) assessment on the amount of unpaid compensation due from the date of injury to March 24, 1997, is reversed.[6]

SECTION 8(f)

Lastly, employer argues that the administrative law judge erred in finding that it did not establish the contribution element necessary for Section 8(f) relief. Section 8(f) shifts the 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 Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *see also Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In order to establish the contribution element, employer must show, by medical or other evidence, that claimant's subsequent injury alone would not have caused claimant's permanent total disability. *See Two "R" Drilling Co.*, 894 F.2d at 750, 23 BRBS at 35(CRT); *see also Ceres Marine Terminals*, 118 F.3d at 389-90, 31 BRBS at 93(CRT); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992). In denying employer Section 8(f) relief, the administrative law judge assumed that claimant had pre-existing back pain, and that claimant's right kidney was removed on March 7, 1983, and she found that these medical conditions were manifest to employer. However, the administrative law judge found that employer did

[6] We therefore need not address employer's contention that the administrative law judge, in her Order Granting Request for Modification of Decision, essentially imposed a Section 14(f) assessment, 33 U.S.C. §914(f), on the amount it owed claimant pursuant to Section 14(e).

not establish that claimant's permanent total disability is not due solely to the October 13, 1986, work injury. Decision and Order at 26-28.

We affirm the administrative law judge's finding that employer did not establish the contribution element as it is supported by substantial evidence. *See Ceres Marine Terminals*, 118 F.3d 387, 31 BRBS 91(CRT); *Two "R" Drilling Co.*, 894 F.2d 748, 23 BRBS 34(CRT). The administrative law judge credited the opinion of Dr. Blanda, which attributed claimant's pre-existing back pain to his urinary and kidney problems that ultimately led to the removal of his right kidney. EXs 17 at 663-665; 19 at 974. The administrative law judge found, however, that the opinion of Drs. Grodan and London that the removal of claimant's right kidney substantially contributes to claimant's current disability are insufficient to establish that claimant is not totally disabled due to the work injury alone. *See* EXs 24 at 20-21; 25 at 44. This finding is rational, as the contribution element is not established where the work injury alone is totally disabling and a pre-existing condition merely combines with the work injury to make claimant's physical condition even worse or more painful. *Ceres Marine Terminals*, 118 F.3d 387, 31 BRBS 91(CRT). The opinion of Dr. London does not address the extent of claimant's disability due to his work injury alone. Moreover, the administrative law judge observed that Dr. Grodan inconsistently opined that the removal of claimant's right kidney does not affect claimant's current disability, which is due to his orthopedic limitations. CX 4 at 150. As the administrative law judge's finding that employer did not establish that claimant is not totally disabled due to the work injury alone is supported by substantial evidence, we reject employer's contention that the administrative law judge erred in finding that the contribution element necessary for Section 8(f) relief is not established. *See Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Dominey*, 30 BRBS 134.

Accordingly, the administrative law judge's finding that employer is liable for a Section 14(e) assessment on the amount of unpaid compensation due from the date of injury to March 24, 1997, is reversed. In all other respects, the administrative law judge's Decision and Order Granting Permanent Total Disability Benefits, Order Granting Request for Modification of Decision, and Order Denying Request for Modification are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge