BRB No. 88-4298

ANDREW VLASIC	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
AMERICAN PRESIDENT LINES	)	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 - On Remand of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Enrique M. Vassallo and Tim Keller (Mullen & Filippi), Long Beach, California, for self-insured employer.

Marianne Demetral Smith (Judith E. Kramer, 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: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

Employer appeals the Decision and Order - on Remand of Administrative Law Judge Steven E. Halpern (82-LHC-999) 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).

This case is before the Board for the second time. Claimant, a general stevedore, had an accident at work on February 4, 1979, which resulted in injuries to his leg and back. On February 12, 1979, claimant began to have hip and thigh pain. On March 14, 1979, claimant saw Dr. Brigham for a follow-up examination at which time he again mentioned back and hip pain which he

characterized as "really nothing major." Claimant returned to work full time for employer from March 14, 1979 until December 12, 1979, at which time he returned to Dr. Brigham complaining of intermittent back pain which radiated down his legs. X-rays taken at that time revealed a complete collapse of the disc space at the L5-S1 level. Although claimant attempted to return to work thereafter, working one hour in the week ending December 21, 1979, a total of 74.50 hours in 1980, and 284 hours in 1981, he ultimately retired on October 17, 1981.

In his original Decision and Order dated November 24, 1982, the administrative law judge awarded claimant permanent total disability benefits commencing October 17, 1981. The administrative law judge also found that the medical evidence revealed a degenerative disease of the spine, which he concluded was a pre-existing permanent partial disability which combined with claimant's February 4, 1979 back injury to produce a greater degree of disability than that which would have resulted from the subsequent work-related back injury alone. He denied employer relief under Section 8(f), 33 U.S.C. §908(f), however, on the rationale that claimant's degenerative condition was not manifest to employer prior to the February 4, 1979 work injury.

Employer appealed the denial of Section 8(f) relief to the Board, but later asked that the appeal be held in abeyance pending resolution of its Section 22, 33 U.S.C. §922, motion for modification. By Order dated September 28, 1983, the Board agreed to hold the appeal in abeyance. In its modification request, employer sought to establish that claimant's pre-existing degenerative condition was manifest to employer through new evidence consisting of a 1976 chest x-ray and a Pacific Maritime Association (PMA) accident frequency report indicating that claimant had suffered a no time lost back injury on February 23, 1973. On modification, employer also sought Section 8(f) relief on the theory that claimant's post-injury employment aggravated the back condition resulting from the February 1979 injury, thereby constituting a second injury for Section 8(f) purposes.

On modification, the administrative law judge, relying on Rowe v. Western Pacific Dredging/Willamette Western Corp., 12 BRBS 427 (1980), found that claimant's pre-existing degenerative low back condition was manifest to employer based on the PMA record showing a prior back injury.[1] Since he found previously that the

[1]The administrative law judge also found based on the Board's decision in Hitt v. Newport News Shipbuilding & Dry Dock Co., 16 BRBS 353, 355-356 (1984), and Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985) (Ramsey, C. J., dissenting in relevant part), aff'd on recon., 17 BRBS 160 (1980)(Ramsey, C. J., dissenting in relevant part), that claimant's 1976 chest x-ray was insufficient to satisfy the manifest requirement of Section 8(f) because there had been no written interpretation of this film prior to the February 4, 1979 injury.

pre-existing degenerative condition contributed materially to claimant's total disability, the administrative law judge awarded employer Section 8(f) relief.

The Director, Office of Workers' Compensation Programs (the Director), appealed and employer cross-appealed the administrative law judge's Decision and Order on Modification. The Board heard oral argument on this case in San Francisco, California, on June 26, 1987. Citing Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983), the Board agreed with the Director that claimant's PMA records were insufficient to establish a manifest, pre-existing permanent partial disability, and accordingly vacated the administrative law judge's finding to the contrary. The Board also agreed with employer that in denying employer Section 8(f) relief based on work-related aggravation of the February 1979 injury, the administrative law judge erroneously determined that the record was devoid of any medical opinion which established that claimant's post February 1979 work permanently increased the level of his disability. Accordingly, the Board vacated the administrative law judge's determination that employer was not entitled to Section 8(f) relief based on work-related aggravation of the 1979 work injury, and remanded the case to the administrative law judge for reconsideration of this issue in light of a series of medical reports by Drs. Brigham and Gray which he failed to consider in rendering his Decision and Order on Modification. Vlasic v. American President Lines, 20 BRBS 188 (1987).

On remand, the administrative law judge found that the evidence of record did not establish the existence of a manifest, serious lasting physical problem as a result of the February 4, 1979 accident until claimant was examined by Dr. Brigham on December 12, 1979. The administrative law judge accordingly found that employer's entitlement to relief under Section 8(f) was contingent upon employer's showing that the work claimant performed after December 12, 1979, resulted in a greater degree of permanent disability than that present as of December 12, 1979. The administrative law judge then evaluated the medical reports of Drs. Gray and Brigham and determined that they were not sufficiently unambiguous to establish employer's entitlement to relief under Section 8(f).[2]

[2]The administrative law judge's evaluation of this evidence is not challenged on appeal.

On appeal, employer contends that the administrative law judge's denial of Section 8(f) relief on remand must be reversed because he reconsidered his original determination that claimant's February 4, 1979 injury resulted in a serious lasting physical problem, a finding affirmed by the Board on appeal, in violation of the law of the case doctrine. Employer also contends that the administrative law judges's failure to reopen the record and admit new evidence when he heard the case on remand was a violation of his duty to inquire fully into the matters at issue. The Director responds, urging that the decision of the administrative law judge denying Section 8(f) relief be affirmed.

Section 8(f) relief is available to employer if: (1) the claimant had a pre-existing permanent partial disability; (2) such disability combined with the work injury to result in claimant's permanent total disability; and (3) the pre-existing disability was manifest to employer. See 33 U.S.C. §908(f); Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 146-148 (1991). Section 8(f) will not apply to relieve employer of liability unless claimant's pre-existing permanent partial disability contributes to claimant's greater degree of permanent partial or to permanent total disability. Merrill, 25 BRBS at 147. Employment-related aggravation of a pre-existing disability will suffice as contribution to the disability for purposes of Section 8(f). The employment-related aggravation is treated as a second injury, and arguments to the contrary consistently have been rejected. See Director, OWCP v. Todd Shipyards Corp., 627 F.2d 317, 12 BRBS 518 (9th Cir. 1980); Marko v. Morris Boney Co., 23 BRBS 353 (1990).

Initially, we reject employer's argument that the administrative law judge's decision on remand violated the law of the case doctrine. The rule of "law of the case" is a discretionary rule of practice based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. United States v. United States Smelting, Refining & Mining Co., et al., 339 U.S. 186 (1950). It is generally accepted that a tribunal will adhere to its initial decision when a case is on its second appeal to that body, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous. See Jones v. U.S. Steel Corp., 25 BRBS 355, 359 (1992); Williams v. Healy-Ball-Greenfield, 22 BRBS 234 (1989) (Brown, J., dissenting).

Contrary to employer's assertions, the administrative law judge in the present case did not reconsider his earlier determination that claimant's February 4, 1979 injury resulted in a serious, lasting physical problem in his Decision and Order on Remand. Rather, the administrative law judge merely determined

that claimant's pre-existing permanent partial disability resulting from the February 4, 1979 work accident was not manifest for Section 8(f) purposes until December 12, 1979, when claimant was examined by Dr. Brigham, noting claimant's ability to work until this date without apparent difficulty and without the need for medical treatment (emphasis added). Moreover, since the question of the date of manifestation of claimant's disability resulting from the February 4, 1979 work injury was not considered or addressed by the Board in its initial Decision and Order, the law of the case doctrine is, in any event, inapplicable. See Jones, 25 BRBS at 359.

We also reject employer's contention that the administrative law judge's failure to reopen the record and admit new evidence when he heard the case on remand was a violation of his duty to inquire fully into the matters at issue. Employer essentially argues that once the administrative law judge determined on remand that the existing medical evidence was too ambiguous to support an award of Section 8(f) relief, he had a duty to reopen the record for additional clarifying evidence. Although, as employer contends, 20 C.F.R. §702.338 of the regulations does impose upon the administrative law judge a duty to inquire fully into matters at issue and to receive into evidence all relevant and material testimony and documents, see generally Olsen v. Triple A Machine Shops, Inc., 25 BRBS 40, 44 (1991), the administrative law judge has considerable discretion in making evidentiary determinations. See Wayland v. Moore Dry Dock, 21 BRBS 177 (1988). Such determinations may only be overturned if they are arbitrary, capricious or an abuse of discretion. See generally Chavez v. Todd Shipyards Corp., 24 BRBS 71 (1990) aff'd in part and rev'd in part sub nom. Chavez v. Director, OWCP, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992). A rehearing of the evidence, or a reopening of the record, is generally not required when a case is on remand to an administrative law judge if, as here, the parties were afforded ample opportunity to develop their evidence prior to the issuance of the administrative law judge's original decision. See Smith v. Ingalls Shipbuilding Division, Litton Systems, Inc., 22 BRBS 46 (1989).

Although employer alleges error in the administrative law judge's failure to reopen the record, we note that employer made no attempt to introduce additional evidence or reopen the record while the case was before the administrative law judge on remand. We therefore decline to address employer's argument that the record should have been reopened for admission of additional relevant evidence, as this argument is being made for the first time on appeal. See Shaw v. Todd Pacific Shipyards Corp., 23 BRBS 96 (1989). As employer has failed to raise any reversible error made by the administrative law judge in his denial of Section 8(f) relief, we affirm this determination. See Sproull v. Stevedoring Services of America, 25 BRBS 100 (1991)(Brown, J., dissenting on

other grounds). See also generally Uglesich v. Stevedoring Services of America, 24 BRBS 180, 183 (1991).

Accordingly, the administrative law judge's Decision and Order - On Remand denying employer Section 8(f) relief is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge