BRB No. 89-2937

JESSIE E. BREWER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MARATHON LETOURNEAU COMPANY	)	
	)	
and	)	
	)	
HARTFORD FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

William J. Beanland (Wheeless, Beanland, Shappley & Bailess), Vicksburg, Mississippi, for the employer/carrier.

Karen B. Kracov (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: STAGE, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (88-LHC-2696) of Administrative Law Judge Ben H. Walley awarding relief pursuant to Section 8(f), 33 U.S.C. §908(f), 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).

Claimant injured his lower back, left hip and left leg on September 18, 1984 while working as a heavy manual laborer for employer. As a result of this injury, claimant underwent hemilaminectomies at L3-4 and L4-5. Dr. Stringer, claimant's neurosurgeon, assigned claimant a 20 percent impairment rating. Claimant has not returned to gainful employment since this injury. Employer agreed to pay claimant benefits for permanent total disability resulting from the work injury. 33 U.S.C. §908(a). The only unresolved issue before the administrative law judge entailed employer's entitlement to Section 8(f) relief.

In his Decision and Order, the administrative law judge determined that employer was entitled to Section 8(f) relief. The administrative law judge noted claimant had suffered a lower back injury in July 1977, for which he underwent surgery for removal of a disc at L5-S1. Claimant ultimately received a 20 percent impairment rating from Dr. Neill, who released claimant to return to work on light duty in August 1979. Claimant worked at this light duty job until suffering his second injury in 1984. The administrative law judge found that the 1979 injury constituted a manifest pre-existing permanent partial disability that contributed to claimant's permanent total disability based on the opinion of Dr. Stringer that the 1979 injury made claimant more susceptible to serious injury.

On appeal, the Director challenges the administrative law judge's determination that employer satisfied the contribution element for Section 8(f) relief. The Director contends the administrative law judge misinterpreted Dr. Stringer's testimony, asserting that Dr. Stringer repeatedly stated in his deposition testimony that claimant's second injury in 1984 would have resulted in his permanent total disability regardless of whether he had suffered the 1979 back injury. The Director, therefore, seeks a reversal of the administrative law judge's award of Section 8(f) relief. Employer responds, urging affirmance of the administrative law judge's award.

Section 8(f) relief is available to employer in this case if it establishes that claimant had a manifest pre-existing permanent partial disability that contributed to claimant's permanent total disability. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); 33 U.S.C. §908(f). The contribution element cannot be satisfied if the evidence establishes that claimant's permanent total disability is due solely to the subsequent work injury. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1989); *FMC Corp. v. Director, OWCP*, 886

F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989).

In this case, the administrative law judge found that employer satisfied the contribution element based on the deposition testimony of Dr. Stringer, who advised that claimant's 1984 back injury resulted in a 20 percent permanent impairment in addition to the 20 percent impairment rating assigned by Dr. Neill. The administrative law judge conceded that Dr. Stringer testified that claimant would have been permanently totally disabled regardless of whether he had suffered the 1979 injury; however, the administrative law judge nonetheless found this opinion established that the 1979 injury contributed to claimant's permanent total disability because Dr. Stringer stated that a person is more prone to back problems once he has suffered a herniated disc.

We reverse the administrative law judge's award of Section 8(f) relief, as his finding that employer satisfied the contribution element of Section 8(f) based on Dr. Stringer's opinion is contrary to law and the evidence of record. Dr. Stringer stated in a March 1987 report that claimant's present disability is due solely to the residuals of his 1984 injury. DX 1. Although Dr. Stringer conceded that claimant's 1979 injury and subsequent surgery for disc removal made him more prone to a subsequent, significant back injury, Dep. at 16, 31, he repeatedly testified that claimant's inability to perform his usual work is due solely to the 1984 injury.[1] Dep. at 18, 24, 26, 28, 31. This evidence is insufficient, as a matter of law, to support a finding of contribution for purposes of Section 8(f) as it establishes that claimant's permanent total disability is due solely to the 1984 injury. As there is no other medical evidence of record, we reverse the administrative law judge's award of Section 8(f) relief. *See Luccitelli*, 964 F.2d at 1306, 26 BRBS at 6 (CRT); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986).

[1] Dr. Stringer explained that claimant's injury in 1979 caused problems on the right side whereas the 1984 injury caused problems on the left side. Moreover, although Dr. Stringer stated that claimant's anatomical impairment is 40 percent as a result of the two injuries, he stated that the impairment ratings are for unrelated problems. Dep. at 28.

Accordingly, the Decision and Order of the administrative law judge awarding employer Section 8(f) relief is reversed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge