BRB No. 92-288

MINNIE L. COBB	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NAVY MILITARY PERSONNEL COMMAND	)	
	)	
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	DATE ISSUED:_____
Employer/Carrier-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Gerard E.W. Voyer (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, 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.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (90-LHC-3176) of Administrative Law Judge Michael P. Lesniak 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured her back on October 30, 1984 in the course of her employment as a maid for employer. This injury necessitated a laminectomy on April 4, 1985, and Dr. Wile stated claimant would not be able to return to her usual employment. Employer has paid disability benefits since the date of the injury and does not contest claimant's entitlement to benefits. The administrative law judge held a hearing on May 9, 1991, wherein he determined that the issues before him were the nature and extent of claimant's disability, despite employer's admission that claimant is permanently totally disabled, and employer's entitlement to Section 8(f) relief. 33 U.S.C. §908(f). Decision and Order at 2-3, 5. Although the Director did not attend the hearing, he filed a brief in opposition to employer's petition for Section 8(f) relief. After concluding that claimant is permanently totally disabled and stating he construed the provisions of Section 8(f) liberally in favor of employer, the administrative law judge awarded employer relief from continuing liability for compensation based on Dr. Richmond's reports dated May 17, 1990 and April 26, 1991. Decision and Order at 6-7. The Director appeals the award of Section 8(f) relief, and employer responds, urging affirmance.

The Director contends the administrative law judge erred in awarding Section 8(f) relief to employer. Specifically, he argues that the evidence does not support the administrative law judge's finding that employer established that claimant suffered from a pre-existing permanent disability or that claimant's October 30, 1984 injury alone did not cause her disability. Section 8(f) shifts the liability to pay compensation for permanent disability or death from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. In a case where a claimant is permanently totally disabled, an employer may be granted this Special Fund relief if it establishes that claimant had a manifest pre-existing permanent partial disability and that pre-existing disability contributes to claimant's permanent total disability, so that it is not due solely to the most recent employment injury. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991); *Bunge Corp. v. Miller*, 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

In this case, the record indicates that claimant sought medical care for three previous back injuries. On April 8, 1977, she suffered a severe low back strain when she bent to remove linens from a bed. Emp. Ex. 3B. Dr. Marco indicated in a May 18, 1977 report that claimant was given medication and ordered to rest in bed and not return to work until April 25, 1977. He further noted that there should not be any permanent effects from this injury. *Id.* On December 14, 1982, claimant visited Dr. Fox, her treating physician, because of pain in her left buttock radiating down her left leg.

She had been cleaning house when the pain struck. Emp. Ex. 3A at 1. Dr. Fox noted that claimant may have "possible sciatica." *Id.* Finally, on May 27, 1983, the medical records indicate that claimant saw her doctor because of "constant pain" on the left side of her chest and back which increased with movement. Emp. Ex. 3C at 26. The record contains no other medical reports denoting the severity of these injuries or any additional pre-1984 back injuries.[1]

Based on a review of employer's application for Section 8(f) relief, Dr. Richmond stated in May 1990 that claimant's 1977 injury was significant because it required medication and bed rest and because it caused symptoms identical to those claimant suffered after the 1984 injury. Emp. Ex. 3D. Further, Dr. Richmond stated that the 1982 and 1983 back injuries documented a recurrence of claimant's problem of radiating left leg pain which is identical to claimant's 1984 complaints. *Id.* Based on her own evaluations and her above interpretations, in her report dated May 17, 1990, Dr. Richmond stated:

> It is my opinion, based on reasonable medical certainty that [claimant] had a preexisting injury to her lumbosacral spine which was manifested on at least three occasions prior to October 30, 1984; and that therefore this claimant's disability is not due solely to the injury for which compensation is being paid, but rather is due to the combination of effects of [her] work related injury of October 30, 1984 and her pre-existing condition. I believe that the medical evidence would substantiate application for relief under [Section 8(f) of the Act].

Emp. Ex. 3D. She also imposed severe work restrictions on claimant. Emp. Ex. 4. Dr. Richmond reiterated her May 1990 opinion in a letter dated April 26, 1991. Emp. Ex. 5. The administrative law judge found Dr. Richmond's reports to be "unequivocal and uncontradicted," and he awarded employer Section 8(f) relief based on Dr. Richmond's opinion. Decision and Order at 6.

A pre-existing permanent disability has been defined as a serious, lasting, physical condition. *C&P Telephone*, 564 F.2d at 503, 6 BRBS at 399 (D.C. Cir. 1977); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279, 287 (1990). In this case, the administrative law judge found that claimant's pre-injury condition constituted an "on-going process from her left-sided lumbar disc disease." Decision and Order at 7. He also found that claimant's pre-1984 condition constituted "a serious physical disability which would motivate a cautious employer to dismiss her because of a greatly increased risk of employment related accident." *Id.*

We reverse the administrative law judge's award of Section 8(f) relief as the evidence in this

[1]The record is replete with evidence of other ailments claimant suffered through the years. For example, her doctor noted high blood pressure and chest pain since 1982, a right foot injury, a knee injury, and abdominal and chest pains in 1983, and pelvic pain and abdominal cramping in 1984. Emp. Exs. 3A-C. Although employer based its petition for Section 8(f) relief on some of these ailments, and the administrative law judge did not address them, there is no evidence of record that these conditions contributed to claimant's total disability.

case is insufficient to establish that claimant had a serious, lasting physical condition prior to the last injury. Initially, the administrative law judge erred in concluding claimant had pre-existing lumbar disc disease. Although evidence of previous injuries combined with evidence of disc disease may be sufficient to support a finding of a pre-existing disability and permit the inference that the disc disease pre-dated the final injury, *see Lockheed Shipbuilding*, 951 F.2d at 1143, 25 BRBS at 85 (CRT), it is not reasonable to make such an inference in this case as there is no medical evidence showing that claimant suffered from disc disease prior to the 1984 injury. At most, the evidence reveals that claimant suffered from back pain prior to her 1984 work injury.

Additionally, the administrative law judge incorrectly differentiated this case from *C.N.A. Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). He stated that *Legrow* is distinguishable because claimant Legrow completely recovered from his previous injuries. *See Legrow*, 935 F.2d at 433, 24 BRBS at 204 (CRT). Legrow sustained three previous back injuries, causing him to miss work for periods of 1.5 years, 3 months and 5 months respectively. After each absence, he returned to his usual work. Legrow testified, and the medical records confirmed, that those injuries did not cause any permanent impairment. *Id.* Based on this evidence, the Board reversed the administrative law judge's finding that employer was entitled to Section 8(f) relief and held that employer failed to establish the existence of a pre-existing permanent partial disability. The United States Court of Appeals for the First Circuit affirmed the Board's decision. *Id.*, 935 F.2d at 436, 24 BRBS at 211-212 (CRT). Contrary to the administrative law judge's finding, we conclude that *Legrow* is directly on point with the case *sub judice*.

In the present case, claimant also sustained three previous back injuries, the first of which caused her to miss approximately two weeks of work. There is no indication that claimant's other injuries caused her any absences. Similarly, the record indicates that claimant was able to return to her usual work prior to her 1984 injury and that no doctor stated she had a permanent impairment or imposed physical restrictions on her until after the 1985 surgery. *Compare Lockheed Shipbuilding*, 951 F.2d at 1143, 25 BRBS at 85. We agree with the Director's contention that Dr. Richmond's opinions imply no more than they state, *i.e.*, that claimant had three back injuries prior to October 30, 1984. The mere occurrence of prior injuries is not sufficient, as a matter of law, to establish a pre-existing disability. *Lockheed Shipbuilding*, 951 F.2d at 1145, 25 BRBS at 88 (CRT); *Legrow*, 935 F.2d at 436, 24 BRBS at 211-212 (CRT); *see also Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Based on the evidence of record, we conclude that employer has failed to establish that claimant had a serious, lasting physical condition. *See Legrow*, 935 F.2d at 436, 24 BRBS at 211-212 (CRT); *Devine*, 23 BRBS at 287. Therefore, we reverse the administrative law judge's finding that claimant suffered from a pre-existing permanent partial disability, and consequently, we reverse the award of Section 8(f) relief.[2]

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

[2]Because we conclude the administrative law judge erred in finding that claimant suffered from a pre-existing permanent partial disability, we need not address the Director's remaining contentions.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge