

HAROLD GLOWACKI)
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 Claimant)
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 v.)
)
 CN/DULUTH, MISSABE AND IRON)
 RANGE RAILWAY COMPANY)
)
 and)
)
 SIGNAL MUTUAL INDEMNITY) DATE ISSUED: 07/25/2012
 ASSOCIATION, LIMITED)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) ORDER on
) RECONSIDERATION

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely motion for reconsideration of the Board's decision in *Glowacki v. CN/Duluth, Missabe & Iron Range Ry. Co.*, BRB No. 11-0666 (May 10, 2012) (unpub.).¹ 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. The Director asserts that the Board erred in remanding the case to the administrative law judge to address employer's third theory of entitlement to Section 8(f) relief, that claimant's 2007 elbow injury constitutes a manifest pre-existing permanent partial disability that materially and substantially contributed to claimant's overall disability following his 2008 back injury, because employer's theory is

¹Although employer correctly states that 30 days from the issuance of the Board's Decision and Order was June 9, 2012, the Director's motion was timely filed on June 11, 2012, as June 9 was a Saturday. 20 C.F.R. §802.221(a). We therefore reject employer's assertion that the Director's motion is untimely.

“incompatible and inconsistent with the ALJ’s factual findings.” Dir. Br. at 4-5. Employer responds in opposition to the Director’s motion. We deny the Director’s motion for reconsideration.

Although the Director correctly notes that the administrative law judge found that claimant’s elbow and back injuries prevent his return to his usual work, as of August 2008, the administrative law judge compensated claimant for his disability under Section 8(c)(21), 33 U.S.C. §908(c)(21), which is appropriate only for claimant’s back injury. The Board did not err in this regard as claimant is not totally disabled and as a partial award for an elbow injury cannot be entered pursuant to Section 8(c)(21). *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). Moreover, contrary to the Director’s assertion, a pre-existing elbow condition is not inconsistent with the administrative law judge’s finding that claimant also suffers from pre-existing degenerative disc disease; the administrative law judge simply did not address this issue. Claimant’s 2007 elbow injury can constitute a “pre-existing permanent partial disability” with respect to the later, work-related aggravation of claimant’s back injury and it can contribute to claimant’s disability if it affects claimant’s ability to do suitable alternate employment. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997). As the administrative law judge did not address this issue, the Board properly remanded the case to him to make the necessary findings of fact. Thus, the Director has not stated a basis for granting reconsideration.

Accordingly, the Director’s motion for reconsideration is denied and the Board’s decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge