

MARCEL DESROCHERS)	
)	
Claimant)	
)	
v.)	
)	
SCHLUMBERGERS LTD.)	DATE ISSUED:
)	
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Denying Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Marianne F. Tancor (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for the employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Denying Reconsideration (90-LHCA-1839) of Administrative Law Judge Kenneth A. Jennings rendered on a claim filed pursuant to the provisions of the Longshore and Harbor

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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, a service supervisor, sustained three back injuries while working for employer on January 2, 1978, May 12, 1978, and August 3, 1978. She sought compensation under the Act following the final injury. At the formal hearing, employer and claimant stipulated that claimant was entitled to temporary total disability compensation from September 8, 1978, through July 19, 1981, permanent total disability benefits thereafter, and medical benefits. The only issue remaining for adjudication before the administrative law judge was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. Employer argued that claimant's January 2, 1978, and May 12, 1978, back injuries constituted pre-existing permanent partial disabilities for Section 8(f) purposes which combined with the final August 3, 1978, back injury to result in claimant's permanent total disability.

The administrative law judge denied Section 8(f) relief. The administrative law judge found initially that employer failed to establish that claimant had any permanent disability which pre-existed the August 1978 work accident. In so concluding, the administrative law judge noted that employer stipulated that claimant was temporarily disabled through July 20, 1981, and permanently disabled thereafter based on Dr. Von Rogov's October 2, 1990, opinion. While the administrative law judge indicated that this concession alone was sufficient to warrant a finding that claimant had no permanent disability which pre-existed the August 3, 1978, work injury, he further determined that employer's attempt to establish the pre-existing permanent partial disability element of Section 8(f) was also undermined by Dr. Fussel's opinion that claimant reached a permanent and stationary status on July 2, 1979.

The administrative law judge also found that employer failed to meet its burden of establishing that the August 1978 injury alone did not render claimant permanently totally disabled. The administrative law judge noted that there was no medical opinion which specifically addressed this question. He nonetheless found that because claimant's May 1978 x-rays and neurological exam, performed after the first two accidents, were negative and the first positive evidence of disc herniation in the record was found on the December 1978 discogram performed after the August 1978 work injury, claimant's disc herniation and resultant permanent total disability are solely attributable to his most recent injury.¹

On appeal, employer challenges the denial of Section 8(f) relief, arguing that the administrative law judge erred in evaluating the pre-existing permanent partial disability requirement of Section 8(f) in terms of whether maximum medical improvement had been achieved.

¹The Director filed a motion for reconsideration, asserting that employer was not entitled to Section 8(f), 33 U.S.C. §908(f), relief as a matter of law because she was not given prior notice of the stipulations employer entered into with claimant, and that therefore they were invalid insofar as they affected Section 8(f) entitlement. The administrative law judge denied the Director's motion, finding that it was moot in light his denial of Section 8(f) relief.

Employer further asserts that the administrative law judge erred in finding that there was no medical opinion of record which specifically addressed the contribution element of Section 8(f), inasmuch as Dr. Von Rogov's opinion clearly establishes that claimant's three injuries contributed to his permanent disability. Employer also asserts that in finding no contribution, the administrative law judge failed to properly evaluate Dr. Fussel's findings of a disc condition prior to the last injury. Finally, employer asserts that it was irrational for the administrative law judge to attribute claimant's permanent total disability to the August 1978 injury alone based on the results of the December 1978 discogram given that all of the other evidence of record indicates that claimant suffered from recurring back problems and lumbar disc disease prior to the August 1978 injury. The Director, Office of Worker's Compensation Programs (the Director), has not responded to employer's appeal.

Section 8(f) relief is available to employer if it establishes: (1) that the employee had an pre-existing permanent partial disability; (2) that the pre-existing disability was manifest to employer prior to the subsequent work injury; (3) that the employee's current disability is not due to the most recent injury alone. *See Bunge Corp. v. Director, OWCP (Miller)*, 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 147 (1991); 33 U.S.C. §908(f).

At the outset, we agree with employer that in analyzing the pre-existing permanent partial disability requirement of Section 8(f) in terms of whether "maximum medical improvement" had been achieved, the administrative law judge employed an erroneous legal standard. Disability for purposes of Section 8(f) is not a term of art equating to the statutory definition of disability. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198 (1949). A pre-existing permanent partial disability for purposes of Section 8(f) can be a pre-existing economic disability, a scheduled injury under in Section 8(c) of the Act, 33 U.S.C. §908(c), or a serious, lasting, physical condition such that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability. *C & P Telephone Co., v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). *See Director, OWCP v. General Dynamics Corp.(Lockhardt)*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *Director, OWCP v. General Dynamics Corp.(Bergeron)*, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). As the Act does not require a physician's opinion on permanency or maximum medical improvement to establish a pre-existing permanent partial disability under Section 8(f), the administrative law judge erred in finding that employer failed to establish the pre-existing permanent partial disability requirement of Section 8(f) on this basis.

The administrative law judge's analysis of this element of Section 8(f) is not dispositive in this case, however. Any error which the administrative law judge may have made in his decision regarding a pre-existing permanent partial disability is harmless, as his finding that employer failed to satisfy the contribution element of Section 8(f) is rational and supported by the record. In order to establish Section 8(f) contribution, employer must demonstrate that the subsequent work injury alone would not have caused claimant's permanent total disability. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1353, 27 BRBS 41 (CRT) (9th Cir. 1993). In the present case, the administrative law judge correctly determined that there was no evidence sufficient to establish contribution under this standard. We reject employer's assertion that the administrative law judge erred in failing to find contribution on the basis that Dr. Von Rogov opined that claimant's three work-related injuries contributed to his permanent disability and the record reflects that claimant has experienced ongoing pain and disability since the time he was first injured in January 1978. As was noted by the administrative law judge, it is not sufficient that claimant's injuries combine to create a greater degree of disability than would have occurred based on the August 3, 1978 back injury alone. *E.P. Paup Co.*, 999 F.2d at 1353. If the later injury alone is sufficient to render claimant permanently totally disabled, that his pre-existing conditions may have made his total disability even greater is not determinative. *Id.*, 999 F.2d at 1353; *See Director, OWCP v. Luccitelli*, 965 F.2d 1303, 1305-1306, 26 BRBS 1 (CRT) (2d Cir. 1992); *FMC Corp v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); *Two "R" Drilling Co., Inc., v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1989).

Employer's argument that the administrative law judge failed to properly evaluate the significance of Dr. Fussell's pre-August 1978 findings of symptoms consistent with disc herniation similarly must fail. The administrative law judge explicitly recognized that Dr. Fussel indicated in his June 7, 1978, report that his impression of a disc herniation was subject to confirmation. The administrative law judge also noted that this tentative diagnosis was contradicted by claimant's subsequent negative EMG and myelogram taken later that month. Although employer also asserts that the administrative law judge erred in attributing determinative weight to the December 1978 discogram because the evidence overwhelmingly establishes that claimant suffered from pre-existing lumbar disc disease prior to the August 1978 work injury, we disagree. Inasmuch as all of the objective testing performed prior to the August 1978 injury was negative, and as the first positive evidence of a disc herniation was found on claimant's December 1978 discogram, taken after the August 1978 work injury, it was not unreasonable for the administrative law judge to conclude that claimant's disc herniation and resultant permanent total disability were attributable solely to the August 1978 accident. As the administrative law judge's finding that claimant's disability was due to the final injury alone is rational and supported by the record, and employer has failed to raise any reversible error made by the administrative law judge in evaluating the conflicting medical evidence and making credibility determinations, the denial of Section 8(f) relief is affirmed.

Accordingly, the Decision and Order Denying Section 8(f) relief and Decision and Order Denying Motion for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge