BRB No. 93-0831

ERIKA MAHANEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEGEV AIRBASE CONSTRUCTORS	)	DATE ISSUED: _____
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Raymond H. Warns, Jr. (Faulkner, Banfield, Doogan & Holmes), Seattle, Washington, for employer/carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, 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 on Remand (83-LHC-1008) of Administrative Law Judge C. Richard Avery 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is on appeal before the Board for a second time. Claimant sought medical benefits and disability compensation under the Act in connection with a November 20, 1980, cervical and lumbar spinal injury she sustained while working for employer as a driver in Israel at the Negev Air Base project. Employer sought relief pursuant to Section 8(f), 33 U.S.C. §908(f), based on claimant's pre-existing degenerative disc disease.

In his initial Decision and Order issued on August 22, 1983, Administrative Law Judge Alfred Lindeman awarded claimant temporary total disability compensation commencing December 15, 1980, for her work-related injuries under the Act. He further found that employer was not liable for medical expenses for Dr. Greenlee's examinations in Seattle, but held employer liable for costs incurred in claimant's visits to Dr. Linder in 1981, for the costs of physical restoration therapy and psychotherapy provided through the Alaska Department of Vocational Rehabilitation, and for the treatment provided by Dr. Gieringer. *See* 33 U.S.C. §907(a).

Employer subsequently sought to modify Administrative Law Judge Lindeman's disability award from one for temporary total disability compensation to one for permanent partial disability compensation. In a Decision and Order issued on December 30, 1985, Administrative Law Judge C. Richard Avery granted modification. The administrative law judge found that claimant reached maximum medical improvement on July 13, 1983, and that although she was unable to resume her former employment, employer had met its burden of establishing the availability of suitable alternate employment as of October 12, 1984. Accordingly, he awarded claimant permanent partial disability benefits commencing as of October 12, 1984, at the rate of $85.58 per week. The administrative law judge also determined that employer was liable for claimant's treatment at the Ohlson Psychological Services Clinic, but not for the unauthorized treatment provided by the Family Chiropractic Center, Dr. Reese, or Dr. Rowan. The administrative law judge further found that although claimant had pre-existing degenerative changes, there was no evidence she had a pre-existing permanent partial disability within the meaning of Section 8(f) and denied Section 8(f) relief accordingly. Finally, he remanded the case to the district director for resolution of remaining medical benefits issues. Claimant's motion for reconsideration of this Decision and Order was denied.

On appeal, the Board rejected claimant's arguments that the initial Decision and Order was not subject to modification as well as various credibility arguments but vacated the administrative law judge's findings regarding the extent of claimant's loss in wage- earning capacity, instructing him to recalculate claimant's loss of wage-earning capacity on remand based on what the suitable alternate employment would have paid at the time of claimant's injury. The Board also found that the administrative law judge erred in considering claimant's entitlement to medical benefits, and remanded the case for him to consider whether employer refused to provide claimant with medical treatment, thus obviating the need for claimant's having to obtain prior authorization for the treatment provided by various physicians. Finally, agreeing with employer's argument on cross-appeal that claimant's pre-existing degenerative disc disease constituted a serious lasting physical

problem, the Board reversed the administrative law judge's finding that employer did not establish the existence of a pre-existing permanent partial disability and remanded the case for the administrative law judge to consider whether employer established the manifest and contribution elements necessary for entitlement to Section 8(f) relief. *Mahaney v. Negev Airbase Construction*, BRB Nos. 86-1543 and 86-1543A (Jan. 29, 1991)(unpublished).

On remand, the administrative law judge recomputed claimant's post-injury wage-earning capacity based on the intervening changes in the National Average Weekly Wage since the time of claimant's injury and modified the award of permanent partial disability compensation accordingly. In addition, he ordered employer to reimburse claimant for the treatment claimant received through the Ohlson Clinic and Dr. Rowen, awarded future medical benefits and interest, and determined that employer was entitled to Section 8(f) relief.

In the present appeal, the Director challenges the administrative law judge's award of Section 8(f) relief, arguing that the evidence is insufficient to satisfy the manifest and contribution elements. Employer responds, urging affirmance.

Section 8(f) shifts the liability to pay compensation for permanent partial and permanent total disability and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently partially disabled, employer is entitled to relief from the Special Fund where it establishes that the employee suffers from a manifest pre-existing permanent partial disability which combined with a subsequent work-related injury to result in a materially and substantially greater degree of permanent impairment than that which would have resulted from the subsequent work-related injury alone. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 1 (1992); *see generally Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1992).

The Director initially contends that although the administrative law judge found that Dr. Nolan's 1977 report, stating that x-rays showed mild facet changes with narrowing at the L-5 area, was sufficient to render claimant's pre-existing degenerative disc disease constructively manifest under the standard articulated by the Board in *Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989), *rev'd sub nom. Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), this finding cannot stand because the Board's decision was subsequently reversed by the United States Court of Appeals for the District of Columbia Circuit. The Director avers that consistent with the circuit court's decision in *Berkstresser*, the appropriate legal standard for manifestation requires a showing of objective evidence of a serious disabling condition that would motivate the cautious employer to discharge the employee because of a greatly increased risk of liability.[1]

[1]The Director also does not agree that claimant's degenerative disc disease constitutes a pre-existing permanent partial disability, but concedes that the Board's holding in the prior appeal is the law of the case. *See Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991).

After review of the administrative law judge's Decision and Order on Remand in light of the record evidence and the Director's arguments, we affirm his finding that Dr. Nolan's 1977 report is sufficient to satisfy the manifest requirement for Section 8(f) relief. Although the D.C. Circuit held in *Berkstresser*, 921 F.2d at 306, 24 BRBS at 69, that an x-ray report documenting minimal spinal degeneration did not meet the requisite standard for establishing a manifest pre-existing permanent partial disability, we note that in addition to finding x-ray evidence of narrowing at the L-5 area with mild facet joint changes, in his 1977 report Dr. Nolan also diagnosed a lumbar sprain with associated right S-1 radiculopathy, listed abnormal findings on physical and neurological examinations, and noted that claimant had a history of back trouble. Attachment to Joint Exhibit 1. These additional findings in Dr. Nolan's report render this case distinguishable from *Berkstresser* and provide objective evidence of a serious lasting physical condition which would motivate the cautious employer to discharge the employee because of an increased risk of compensation liability. Accordingly, we affirm the administrative law judge's finding that claimant's pre-existing degenerative disc disease was constructively manifest based on Dr. Nolan's 1977 report. *See Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992), *aff'g Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988)*; Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 841, 14 BRBS 974, 978 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

Next, the Director challenges the administrative law judge's determination that employer satisfied the contribution requirement. The administrative law judge relied upon Dr. Gieringer's April 19, 1983, report which indicated that it was very likely that claimant's degenerative changes had been aggravated by the work-related injury and that it was apparent from her x-rays that the injury had accelerated the progression of claimant's degenerative condition. In challenging the administrative law judge's finding that this report satisfies the contribution element, the Director contends that the administrative law judge's finding is insufficient under the standard enunciated in *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991). We agree. In order to establish the contribution element of Section 8(f), employer must show, by medical or other evidence, that a claimant's subsequent injury alone would not have caused the claimant's permanent disability. *See E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT)*; Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992). In addition, since this case involves permanent partial disability, employer must further demonstrate that claimant's permanent partial disability is materially and substantially greater than due to the second injury alone. *See Sproull v. Director, OWCP*, ___ F.3d ___, Nos. 94-70906, 70914 (9th Cir. May 9, 1996).

In the instant case, however, after stating that the contribution element requires only that claimant's pre-existing permanent partial disability combine with the subsequent injury to produce a greater degree of disability, the administrative law judge found the contribution element satisfied based on Dr. Gieringer's opinion regarding aggravation. Decision and Order on Remand at 10. Because the administrative law judge did not apply the legal standard for establishing contribution

enunciated in more recent court opinions, we vacate the administrative law judge's finding that the contribution requirement is satisfied and remand the case for reconsideration of the evidence consistent with the appropriate legal standard. On remand, in view of the recent developments in the law, the administrative law judge may reopen the record upon request by a party.

Lastly, the Director asserts that the administrative law judge erred in awarding temporary total disability compensation from the date claimant reached maximum medical improvement to the date employer established suitable alternate employment, citing *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155 (1989). The Board addressed the *Stevens* issue in its prior decision, affirming the finding claimant's award changed from total to partial disability on the date suitable alternate employment was established, but did not specifically discuss the permanency issue. *See Mahaney*, slip op. at 5. The administrative law judge's award of benefits on remand, however, at least implicitly recognizes that benefits due after the July 13, 1983, date of maximum medical improvement are for permanent disability, as the administrative law judge commenced employer's 104 weeks of liability on that date. Decision and Order on Remand at 11. Thus, claimant is entitled to temporary total disability as awarded prior to July 13, 1983, permanent total disability from July 13, 1983 to October 12, 1984, and permanent partial disability thereafter in accordance with the administrative law judge's decision.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge