BRB No. 93-1190

DAVID LORANGER Claimant v. GENERAL DYNAMICS CORPORATION and NATIONAL EMPLOYERS COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: __________________ DECISION and ORDER

Appeal of the Decision and Order of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (92-LHC-2354, 92-LHC-2355) of Administrative Law Judge Vivian Schreter-Murray 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 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 painter who had worked for employer from 1967 until 1969, and again

commencing in 1975, sought permanent total disability compensation under the Act, alleging that as of March 14, 1991, he was no longer able to continue working due to the cumulative effect of a plethora of employment-related injuries. Employer voluntarily paid temporary total disability compensation and claimant's medical bills from the date of the accident. At the hearing before the administrative law judge, claimant and employer stipulated that claimant sustained a work-related injury on March 14, 1991, for which he was entitled to permanent total disability compensation, based on an average weekly wage of $617.31. The administrative law judge accepted these stipulations. Accordingly, the only issue to be resolved by the administrative law judge was employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In her Decision and Order, the administrative law judge denied employer relief under Section 8(f), finding that employer had failed to establish the existence of a manifest, pre-existing permanent partial disability. Employer appeals the denial of Section 8(f) relief, contending that inasmuch as the record is replete with evidence in existence prior to the last work injury which indicates that claimant suffered numerous serious pre-existing physical problems, the administrative law judge erred in finding that employer failed to establish the existence of a manifest pre-existing permanent partial disability. The Director, Office of Workers' Compensation Programs, has not responded to employer's appeal.

Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following prerequisites: (1) the injured employee had a pre-existing permanent partial disability; (2) the pre-existing disability was manifest to employer; and (3) the permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Esposito v. Bay Container Repair Company*, 30 BRBS 67 (1996).

After considering the administrative law judge's Decision and Order in light of the record evidence and employer's arguments on appeal, we are unable to affirm her denial of Section 8(f) relief. Initially, we note that in finding that employer failed to establish a pre-existing permanent partial disability, the administrative law judge failed to identify and weigh the relevant evidence, or indicate the evidentiary basis for her conclusion as is required by the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *See generally Hawthorne v. Ingalls Shipbuilding, Inc.,* 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). Moreover, the standard which she appears to have applied in making this determination does not comport with applicable law. In her Decision and Order, the administrative law judge summarily concluded that based on her review of the relevant evidentiary record, "employer has failed to establish by any credible evidence that the employee claimant had a pre-existing permanent partial disability at any time prior to March 14, 1991." Decision and Order at 5. In a footnote at the end of this sentence, the administrative law judge stated "Dr. Willett refers to `prior injuries' not to prior or pre-existing disability." *Id.*, n.1. These conclusory statements are insufficient, particularly in view of the evidence of record and

applicable law.

A doctor's reference to "prior injuries" rather than "disability" is not dispositive; under established case law, a pre-existing permanent partial disability may be found where the employee had such a serious lasting physical condition such that a cautious employer would have been motivated to discharge [or decline to hire] the handicapped employee because of a greatly increased risk of employment related accident and compensation liability. *Bergeron*, 982 F.2d at 797, 26 BRBS at 143 (CRT); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305, 26 BRBS 1, 5 (CRT) (2d Cir. 1992) (citing *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977)). Medical records need not indicate the precise nature or severity of a pre-existing condition in order to satisfy the pre-existing permanent partial disability requirement of Section 8(f), so long as there is sufficient information to establish the existence of a serious lasting physical problem prior to the subsequent injury. *See e.g., Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT) (1st Cir. 1992). In the present case, the record contains evidence that claimant suffered from pre-existing problems with his right knee which resulted from an August 1985 work injury and coronary artery disease, both of which required surgery. *See, e.g.,* Ex. 4 at 21; Ex. 5 at 4-5; Ex. 7 at 3, 15-16. In addition, the record reflects that on April 19, 1988, claimant sustained an injury to his left index finger, after which he lost about 2 years of work. *See* Ex. 4 at 16; Ex. 5 at 1; Ex. 7 at 15. Moreover, there is also evidence of record which indicates that claimant suffered from chronic drug addiction, prior back, neck, and elbow problems, and diabetes and hypertension which required medication. *See, e.g.*, Ex. 4 at 8, 17, 18, 19, 22. Because the administrative law judge neglected to explicitly consider this evidence, which if properly credited could support a finding of a pre-existing permanent partial disability for Section 8(f) purposes under the appropriate legal standard, we vacate her denial of Section 8(f) relief. The case is remanded for her to reconsider whether employer established a pre-existing permanent partial disability under the proper legal standard, consistent with the requirements of the APA. *See generally Cotton v. Newport News Shipbuilding & Dry Dock Co.,* 23 BRBS 380 (1990).

If, on remand, the administrative law judge finds that employer established the existence of a pre-existing permanent partial disability, she must then reconsider whether this disability was manifest prior to the subject work injury. Although the administrative law judge summarily found that even if employer had introduced evidence sufficient to establish the existence of a pre-existing permanent partial disability, there was no evidence sufficient to establish that such pre-existing disability was manifest to employer prior to the March 14, 1991, work injury, her analysis of this issue is insufficient. We note that it is well-established that a pre-existing disability will meet the manifest requirement of Section 8(f) if, prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. *Esposito*, 30 BRBS at 68. In attempting to determine whether any pre-existing permanent partial disability that claimant may have had was manifest on remand, we direct the administrative law judge's attention to employer's yard hospital records, which reference many of claimant's pre-existing conditions and which pre-date the subject work injury. Ex. 4. Accordingly, we vacate the administrative law judge's finding that employer failed to establish the manifest requirement of Section 8(f) entitlement, and remand

for her to reconsider this issue in light of her pre-existing permanent partial disability findings on remand.

Finally, if the administrative law judge determines on remand that claimant suffers from a manifest, pre-existing permanent partial disability, she must then consider whether employer has satisfied the contribution element of Section 8(f) entitlement in light of the relevant evidence. In order to satisfy this element of Section 8(f) entitlement, employer must establish that claimant's permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *See Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7 (CRT).

Accordingly, the administrative law judge's findings with regard to employer's entitlement to Section 8(f) relief are vacated, and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I concur only in the result reached by my colleagues.

JAMES F. BROWN
Administrative Appeals Judge