BRB No. 96-0731

SAMUEL DILLARD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Granting Motion for Reconsideration and For Entry of an Errata Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Stephanie Burks Paine (Mason & Mason), Newport News, Virginia, for self-insured employer.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Section 8(f) Relief and Order Granting Motion for Reconsideration and For Entry of an Errata Order (92-LHC-70) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 the 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 sustained a work-related back injury on October 30, 1987. On September 19, 1990, while riding a bicycle as rehabilitation for his 1987 back injury, claimant suffered an injury to his left ankle. In a Decision and Interlocutory Order dated April 14, 1995, based on stipulations submitted by claimant and employer, the administrative law judge awarded claimant permanent total disability compensation at the rate of $340.94 per week from December 29, 1992 through November 6, 1994, and permanent partial disability at the rate of $296.27 thereafter based solely on the 1987 back injury. At that time, the parties agreed that the only issues left to be decided were employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief, and claimant's entitlement to compensation under the schedule for his 1990 ankle injury.[1] The parties were also granted additional time to file exhibits and briefs.[2]

Employer initially filed an application for Section 8(f) relief on October 14, 1994, while the case was before the district director, based on claimant's pre-existing hearing loss and left foot injury. Subsequent to the administrative law judge's Decision and Interlocutory Order, however,

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[1]In a Decision and Order dated August 31, 1993, Administrative Law Judge Theodor von Brand determined that employer was liable for medical expenses relating to the 1990 ankle injury because it was a compensable sequelae of claimant's 1987 back injury. *Dillard v. Newport News Shipbuilding and Dry Dock Company*, Case No. 92-LHC-70 (August 31, 1993). Employer's appeal of this decision was assigned the Board's docket number BRB No. 94-336. Pursuant to an Order dated March 19, 1996, employer's appeal of this decision was consolidated with the Director's appeal in this case, BRB No. 96-731. In consolidated cases, the Board has determined that the one-year period for review provided by P. L. No. 104-134 runs from the date of the later appeal. Nonetheless, on September 12, 1996, the Board notified employer that its appeal in BRB No. 94-336 was administratively affirmed. Employer has not requested reconsideration of this determination. On the facts presented, any error is harmless as Judge von Brand's decision, that since claimant's ankle injury occurred when he was hit by a car while riding a bicycle as part of his rehabilitation for his 1987 back injury, claimant's ankle condition was a compensable sequelae of this injury, is supported by substantial evidence and in accordance with law. Under the Act, the aggravation of a primary work-related injury by medical treatment is compensable, *see Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1986); *see generally Mattera v. Pacific King, Inc.*, 20 BRBS 43 (1987), and injuries due to negligence which are related to the process of treatment or convalescence are also within the compensable range of consequences. 1 A. Larson, *Workmen's Compensation Law*, §13.21(a)-(c)(1993). *See generally White v. Peterson Boatbuilding Co.*, 29 BRBS 1, 5 (1995); *Wheeler v. Interocean Stevedoring Co.*, 21 BRBS 33 (1988).

[2]Pursuant to a prior Order, employer and the Director were to file all exhibits relating to employer's application for Section 8(f) relief by April 13, 1995. In the April 14 Order, employer and claimant were directed to file simultaneous briefs on or before May 12, 1995, on the issues of claimant's entitlement to payment of scheduled benefits for his ankle and employer's entitlement to Section 8(f) relief. The Director was ordered to file his brief on the issue of Section 8(f) relief on or before June 5, 1995.

employer filed a medical report prepared by Dr. Reid, with supporting documentation, and for the first time asserted entitlement to Section 8(f) relief based on a pre-existing back condition in addition to the theories previously raised. In a post-hearing brief, the Director raised the absolute defense of Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), with regard to the claim for Section 8(f) relief based on claimant's pre-existing back problems, asserting that employer was barred from asserting additional grounds for relief which were not presented in its Section 8(f) application before the district director. The Director also argued in the alternative that employer failed to establish entitlement to Section 8(f) relief.

In his Decision and Order, the administrative law judge rejected the Director's arguments with regard to application of Section 8(f)(3). Citing his decision in *Elliott v Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 31, 40 (ALJ) (1994), the administrative law judge found that inasmuch as employer was unaware of critical information concerning claimant's prior back injuries before referral of the case to the Office of Administrative Law Judges, the absolute defense was not available to the Director to defeat employer's claim on this theory.[3] After determining that each of the claimed pre-existing conditions was a manifest pre-existing permanent partial disability for Section 8(f) purposes, the administrative law judge found that only claimant's pre-existing back injury contributed to claimant's compensable disability. Accordingly, he awarded Section 8(f) relief based on claimant's pre-existing back condition, upon the expiration of 104 weeks after November 7, 1994. The administrative law judge further determined that although Judge von Brand had previously found that claimant's 1990 ankle injury was a compensable sequelae of his 1987 back injury and this finding was pending on appeal, the appeal did not divest him of jurisdiction to consider claimant's entitlement to a disability award for this injury. Accordingly, he awarded claimant permanent partial disability compensation under the schedule for a 25 percent loss of use of his lower left leg for the 1990 ankle injury, noting that until it was reversed he was bound by Judge von Brand's findings with respect to the work-related nature of this injury.

Employer sought reconsideration of Judge Campbell's Decision and Order. On September 22, 1995, Judge Campbell issued an Order Granting Motion for Reconsideration and for Entry of an Errata Order, in which, consistent with employer's assertions, he modified his prior Decision and Order to reflect that employer is entitled to Section 8(f) relief commencing 104 weeks from December 29, 1992, when employer's liability for permanent total disability commenced, rather than from November 7, 1994, when the parties stipulated that claimant was limited to permanent partial disability compensation. The administrative law judge further modified his prior Decision and Order to clarify that the award of Section 8(f) relief applied to the compensation awarded for both claimant's 1987 back injury and the consequential 1990 ankle injury and held that because these injuries were related and arose from one trauma, employer was only liable for disability compensation for one period of 104 weeks.

[3]In that decision, the administrative law judge held that to limit an employer to its original theory for Section 8(f) relief would unfairly and unreasonably nullify the discovery tool in any case involving Section 8(f) relief.

The Director appeals, asserting that the administrative law judge erred in finding that the absolute defense at Section 8(f)(3) does not bar Section 8(f) relief in this case, or, alternatively, that the administrative law judge erred in finding that employer is entitled to Section 8(f) relief. Furthermore, the Director contends that the administrative law judge's award of Special Fund relief for claimant's consequential 1990 ankle injury should be reversed because employer made no attempt to demonstrate entitlement to Section 8(f) relief independently based on claimant's 1990 ankle injury. Employer responds, urging affirmance.[4]

With regard to the Section 8(f)(3) absolute defense, the Director contends that denial of employer's request for Section 8(f) relief is mandated by the express language of Section 8(f)(3), which requires that employer's application with a "statement of the grounds therefor" be made before the district director prior to his or her consideration of the claim. The Director further avers that allowing employer to raise an entirely new ground for Section 8(f) relief after referral of the case to the administrative law judge will contravene the intent of Congress in enacting Section 8(f)(3), which was to provide a more elaborate screening mechanism to prevent the growing number of unmeritorious claims from draining the resources of the Special Fund.

Section 8(f)(3) states that any request for Section 8(f) relief and a statement of the grounds for such relief shall be presented to the district director prior to the consideration of the claim by the district director and that failure to do so is an absolute defense to the liability of the Fund unless employer could not have reasonably anticipated it. 33 U.S.C. §908(f)(3). The regulation implementing Section 8(f)(3), 20 C.F.R. §702.321, requires that employer also submit a fully documented application in support of its claim for Section 8(f) relief. The failure to present such a request prior to consideration of the claim by the district director is an absolute defense to the Special Fund's liability which must be raised and pleaded by the Director. 20 C.F.R. §702.321(b)(3). Under the regulation, an application need not be submitted if claimant's condition has not reached maximum medical improvement; otherwise, the failure of an employer to present to the district director a timely and fully documented application for Section 8(f) relief may be excused only where the employer could not have reasonably anticipated the liability of the Special Fund while the case was before the district director. *See generally Cajun Tubing Testors, Inc. v. Hargrave,* 951 F.2d 72, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on recon.*, 29 BRBS 103 (1995); *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991), *aff'd. sub nom. Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991).

In the present case, it is not disputed that employer timely raised Section 8(f) based on a pre-existing hearing loss and ankle injury; the dispute concerns employer's addition of prior back injuries

[4]Employer did not appeal the award of benefits for the ankle injury, but asserts that unless Administrative Law Judge von Brand's causation finding is overturned, then the conclusion that the ankle injury is a sequelae of the back must be accepted. Thus, if Section 8(f) relief is available for the back injury, in employer's view, it is also established for the ankle injury and employer is liable only for one period of 104 weeks.

as a basis for Section 8(f) relief. The administrative law judge in effect found that employer's claim for Section 8(f) relief based on claimant's pre-existing back injuries was not barred pursuant to Section 8(f)(3) because employer could not have reasonably anticipated the liability of the Special Fund with regard to these injuries because it was unaware of critical information concerning claimant's prior back injuries prior to referral of the case to the Office of Administrative Law Judges. In the present case, there was evidence regarding claimant's prior back injuries in existence and available to employer while the case was before the district director, *see, e.g.,* EX-A, exhibits 13-20, including diagnoses of various back strains and recurrent sciatica. Dr. Reid's April 10, 1995, report, however, is the first indication that these pre-existing back problems rendered claimant susceptible to a greater level of resulting disability and materially and substantially contributed to his ultimate disability. *See* EX-A. Thus, prior to receipt of this report, employer lacked a sufficient basis for entitlement to Section 8(f) relief based on the prior back injuries.[5] Inasmuch as the administrative law judge's determination that employer could not have reasonably anticipated the liability of the Special Fund based on claimant's pre-existing back injuries while the case was before district director is rational and consistent with the record, we reject the Director's argument that employer was barred from raising this theory pursuant to Section 8(f)(3). The administrative law judge's finding on this issue is therefore affirmed. *See generally Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228, 237-238 (1991); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990).

Having rejected the Director's arguments regarding the absolute defense of Section 8(f)(3), we direct our attention to the Director's alternate argument that the administrative law judge erred in awarding employer Section 8(f) relief. 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 three 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. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992). *See also E. P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984).

The Director argues initially that the administrative law judge erred in finding that claimant's prior back problems constituted a pre-existing permanent partial disability based on the medical

[5]Although the Director also argues on appeal that Dr. Reid's opinion was discoverable while the case was before the district director, we need not address this argument which has been raised for the first time on appeal. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). As the Section 8(f)(3) bar is an affirmative defense, it was incumbent on the Director to come forward with the necessary evidence to support his claim that employer failed to comply with Section 8(f)(3). *Tennant v. General Dynamics Corp.*, 26 BRBS 103 (1992).

opinion of Dr. Reid, because this opinion was based solely on three isolated incidents of back pain over five years. We disagree. After reviewing claimant's clinic and medical records, Dr. Reid noted that claimant first hurt his lower back on June 14, 1978, when he slipped and twisted it and that he was provided with a back brace and remained on light duty for at least three weeks. Dr. Reid further stated that after injuring his lower back again at work on June 8, 1979, claimant was instructed to wear his back brace and continued to have pain for at least a week. Dr. Reid also found that on April 21, 1983, claimant re-injured his lower back in an auto accident, as a result of which he remained out of work for three months. In addition, Dr. Reid noted that claimant had intermittent problems with pain and weakness in his legs prior to his 1987 work injury and reported pain to both employer's clinic and to Dr. Phillips in February and December 1985 and in January 1986; Dr. Phillips diagnosed claimant's pain as sciatica. After reviewing these records, Dr. Reid opined that these recurrent lower back strains, especially when coupled with episodes of sciatica, indicate that claimant suffered from a permanent and serious defect of the back which predisposed him to a much higher level of additional injury with a greater level of disability. The administrative law judge rationally determined based on Dr. Reid's testimony that employer established that claimant had a serious lasting physical problem in his back which pre-existed his 1987 back injury. Therefore, the administrative law judge's finding that employer satisfied the pre-existing permanent partial disability requirement of Section 8(f) is affirmed. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). *See also Shrout v. General Dynamics Corp.*, 27 BRBS at 160 (1993)(Brown, J., dissenting); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1996); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988).

The Director next contends that the administrative law judge erred in determining that employer satisfied the manifest requirement of Section 8(f). 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 v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Medical records need not indicate the severity or precise nature of the pre-existing condition in order for the manifest requirement to be satisfied, as long as there is sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem which would motivate a cautious employer to consider terminating the employee because of the increased risk of compensation liability. *See Eymard & Son Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT)(5th Cir. 1989); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984).

In the instant case, the administrative law judge rationally determined that although claimant's pre-existing back disability was not expressly diagnosed until Dr. Reid's *post-hoc* opinion, claimant's pre-1987 back disability was nonetheless constructively manifest to employer because it was evident from the litany of medical records submitted, particularly Dr. Phillips's diagnosis of recurrent sciatica, that claimant suffered from a serious lasting physical problem. EX-A, ex 13 - 20. *See generally Esposito*, 30 BRBS at 68-69; *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). We therefore affirm the administrative law judge's determination that claimant's pre-1987

back condition was constructively manifest to employer.

The Director also contends that the administrative law judge erred in finding that employer established the contribution element of Section 8(f) entitlement. 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 total disability. *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *see also E.P. Paup Co.*, 999 F.2d at 1341, 27 BRBS at 41 (CRT); *Two "R" Drilling Co.*, 894 F.2d at 748, 23 BRBS at 34 (CRT). Where claimant is permanently partially disabled, employer must also demonstrate that the contribution of the prior disability rendered claimant's ultimate disability materially and substantially greater. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 115 S.Ct. 1278, 29 BRBS 87 (CRT) (1995).

In finding that employer established the contribution element of Section 8(f) entitlement, the administrative law judge credited the medical opinion of Dr. Reid. In his April 13, 1995, report, Dr. Reid stated that if claimant had a normal back his subsequent 1987 back injury would have resolved with no permanent disability, but because of the series of prior injuries, surgery was eventually required, and claimant now has a 5 percent whole body disability. EX-A. On appeal, the Director reiterates the argument made below that Dr. Reid's opinion cannot properly support a finding of contribution because it is unexplained and unsubstantiated. The administrative law judge, however, explicitly considered this argument and rejected it based on his determination that Dr. Reid's opinion was supported by the documentary evidence. Moreover, acting within his discretion, the administrative law judge credited Dr. Reid's explanation that claimant's 1987 injury was a relatively minor non-traumatic strain from which claimant would have recovered without permanent disability but for his pre-existing back problems. Inasmuch as such credibility determinations are solely within the purview of the administrative law judge, and the Director does not otherwise contest the sufficiency of Dr. Reid's testimony, the administrative law judge's finding of contribution based on Dr. Reid's testimony and consequently his award of Section 8(f) relief are affirmed.

Finally, we reject the Director's assertion that the administrative law judge erred in finding that employer was liable for only one 104-week period of compensation commencing on the date he first received permanent disability benefits without considering separate application of Section 8(f) to the ankle injury claim. In this case, however, the disability of claimant's ankle is compensable only as a sequelae of the 1987 back injury. On these facts, the administrative law judge rationally determined that it was not necessary to apply Section 8(f) separately to each claim. *See Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988) (no requirement to apply Section 8(f) element separately to death claim which was compensable on the basis that claimant was permanently totally disabled at time of death; employer liable for one period of 104 weeks). *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT) (4th Cir. 1990); *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd on other grounds*, 705 F.2d 562, 15 BRBS 130 (CRT)(1st Cir. 1983). Consequently, we affirm his determination that employer is liable for only one period of 104 weeks of compensation in this case.

Accordingly, the administrative law judge's Decision and Order Granting Section 8(f) Relief, and Order Granting Motion for Reconsideration and for Entry of an Errata Order are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge