BRB No. 97-255

WESLEY A. WIGGINS, SR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING & 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 Denying Section 8(f) Relief and the Decision and Order on Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Melissa Robinson Link (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Section 8(f) Relief and the Decision and Order on Motion for Reconsideration (94-LHC-2445) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On June 11, 1986, while working for employer as a rigger, claimant sustained an acute lumbar strain. Employer furnished claimant with medical services and compensation for various periods. By letter dated March 16, 1994, the district director acknowledged receipt of claimant's attorney's request for an informal conference on the issue of permanent partial disability commencing June 5, 1992, and notified employer that if it intended to present an application for relief under Section 8(f), 33 U.S.C.§908(f), the fully documented application should be submitted to the district director by June 3, 1994. Director's Exhibit 1. Employer thereafter filed a Section 8(f) application dated June 3, 1994, which was not received by the district director until June 14, 1994, eleven days after the aforementioned deadline. By letter dated June 17, 1994, the district director informed employer that in light of its failure to comply with the June 3, 1994, deadline, its request for Section 8(f) relief was denied on the basis of the absolute defense of Section 8(f)(3), 33 U.S.C.§908(f)(3)(1994). At an unspecified date thereafter, the case was referred to the Office of Administrative Law Judges.

As of the time of the formal hearing, the sole issue in dispute involved employer's request for Section 8(f) relief.[1] In his Decision and Order Denying Section 8(f) relief issued on April 10, 1996, the administrative law judge found that employer's claim for Section 8(f) relief was not barred by the absolute defense but nevertheless denied employer Section 8(f) relief, finding that employer failed to establish that claimant's pre-existing back problems and hearing loss constituted serious and lasting physical problems. On reconsideration, however, based on employer's submission of additional evidence, the administrative law judge found that claimant's pre-existing back problems constituted a pre-existing permanent partial disability and awarded employer Section 8(f) relief. The

[1]Prior to the hearing, the parties stipulated that as result of the injury, claimant was temporarily totally and temporarily partially disabled for various periods from 1986 to 1990. They further stipulated that claimant was permanently partially disabled as a result of the work-related injury commencing June 5, 1992, during which period his earning capacity was reduced by $64.52 per week. Finally, the parties stipulated that employer had paid compensation totaling $15,707.05 as of September 3, 1995. Employer's Exhibit 1.

administrative law judge also reaffirmed his prior findings regarding the inapplicability of the absolute defense and his denial of Section 8(f) relief based upon claimant's alleged pre-existing hearing loss.

On appeal, the Director contends that the administrative law judge erred in finding that the absolute defense of Section 8(f)(3) does not bar employer's claim for Section 8(f) relief. In the alternative, the Director argues that the administrative law judge erred in awarding employer Section 8(f) relief on reconsideration as claimant's pre-existing back problems did not constitute a manifest pre-existing permanent partial disability. Employer responds, urging affirmance.

Section 8(f)(3) requires an employer to present a request for Section 8(f) relief to the district director prior to his consideration of the claim; failure to do so bars the payment of benefits by the special fund, unless the employer demonstrates it could not have reasonably anticipated that special fund liability would be at issue.[2] 33 U.S.C. §908(f)(3) (1994). The regulation accompanying this provision, 20 C.F.R. §702.321, provides that an employer seeking relief under Section 8(f) must request the relief and file a fully documented application with the district director prior to referral of the claim for adjudication. Section 702.321(b)(3) states that an application need not be filed with the

[2]Section 8(f)(3) of the Act states:

> Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3) (1994).

district director where claimant's condition has not reached maximum medical improvement and no claim for permanent benefits is raised by the date of referral, but it provides that in all other cases failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the special fund. Such a failure may be excused only where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director. The regulation also states that the Section 8(f)(3) bar is an affirmative defense which must be raised and pleaded by the Director; the Director timely raised the defense in this case.

We agree with the Director that administrative law judge's finding that the absolute bar does not apply in this case cannot be affirmed, as his rationale is not supported by the evidence and is not consistent with the regulation. The administrative law judge initially determined that under Section 8(f)(3), the absolute defense may be raised only where employer fails to file a fully documented application for Section 8(f) relief prior to the district director's "consideration" of the claim, and he found no evidence here that the district director had "considered" the claim prior to employer's submission of its petition. Contrary to the administrative law judge's determination, however, the district director's March 16, 1994, letter not only informed employer of claimant's pending claim for permanent partial disability compensation and set the date for submission of the Section 8(f) application, but it also discussed the issue of permanent partial disability based on loss in overtime earnings raised by claimant and the general view of the office on this issue. The letter gave notice that the case was under consideration and that consideration by the district director was, in fact, nearing completion. The letter specifically directed employer to file its application by the deadline, and if it were not going to file, to advise "as soon as possible so as not to delay the case further if the claimant/representative wish to take this matter before the Office of Administrative Law Judges for formal adjudication of the issue." Director's Exhibit 1. Thus, as the claim was under consideration prior to employer's submission of its Section 8(f) petition, the administrative law judge's finding that the absolute bar did not apply on this basis cannot be affirmed. *See generally Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 1548, 24 BRBS 213, 218 (CRT) (9th Cir. 1991).

The administrative law judge also erred in finding that the absolute defense did not apply because the deadline set by the district director for submission of employer's Section 8(f) application was a nullity. In making this determination, the administrative law judge reasoned that Section 702.321(b)(1) of the regulation only grants the district director the authority to set a date for submission of a fully documented application following an initial request for Section 8(f) relief. As employer had not previously requested Section 8(f) relief, the administrative law judge concluded that the district director acted outside of his authority by imposing a deadline for submission of the Section 8(f) application. We do not agree that the district director's authority to set deadlines is so restricted.

Section 702.321(b)(1) provides that a request for Section 8(f) relief should be made as soon as the permanency of claimant's condition is known or is an issue in the case. It further states that the district director shall, at the time of the request for Section 8(f) relief, fix a date for submission of the fully documented application where the documentation does

not accompany the request. However, the administrative law judge's conclusion that the only circumstance in which the district director has the authority to set a date for submission of a documented request is after an initial request has been made does not follow. Initially, the regulation contemplates the submission of an application prior to discussion of permanent benefits at an informal conference or at the conference itself, *see* 20 C.F.R. §702.321(b)(1)(i), and the district director's letter here was written in response to a request by claimant for a conference to discuss permanent partial disability benefits. Thus, regardless of the district director's deadline, employer's Section 8(f) application was due if it was to be timely. Moreover, while Section 702.321(b)(1) details the requirements for timely submission in cases involving permanency and the informal conference, Section 702.321(b)(2) grants the district director authority under other circumstances to fix a date for submission of the application or to grant an extension, providing that "the district director shall consider all the circumstances of the case ...." *See generally Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 72, 25 BRBS 109 (CRT) (5th Cir. 1992). Section 702.321(b)(3) further states that except in those cases where claimant's condition has not reached permanency, the failure to file a fully documented application *by the date established* by the district director shall be an absolute defense and that failure to file a fully documented application may be excused only where employer could not have reasonably anticipated the liability of the special fund. Limiting the authority to set deadlines to only applications submitted after a separate request would permit employer to avoid deadlines by delaying its initial request and submitting its Section 8(f) documentation just prior to referral to the Office of Administrative Law Judges, in contravention of the statute and regulations. We reject this narrow interpretation of the regulation and hold the district director is authorized to set deadlines for the Section 8(f) application regardless of whether a separate prior request has been made in accordance with Section 702.321.

While the administrative law judge's reasons for finding that the absolute bar of Section 8(f)(3) does not apply are improper, we are nonetheless unwilling to reverse his award of Section 8(f) relief on this basis as is urged by the Director. Rather, we conclude that the case must be remanded for further consideration. Because he found the absolute bar did not apply on the grounds discussed above, the administrative law judge did not consider whether employer's failure to timely submit a petition for Section 8(f) relief to the district director should be excused. Section 8(f)(3) provides that the failure to file a timely application for Section 8(f) relief shall be an absolute defense "unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order," and Section 702.321 also allows an administrative law judge to excuse the failure to file on this basis. In this regard, the permanency of claimant's condition is not the sole relevant criterion in determining whether employer should have anticipated fund liability; the administrative law judge should address when employer reasonably knew the case might meet the legal requirements for obtaining Section 8(f) relief, when evidence relevant to these requirements was available, and any other facts having an impact on employer's filing a Section 8(f) application. *See, e.g., Ortiz v. Todd Shipyards Corp.,* 25 BRBS 228 (1991); *Currie v. Cooper Stevedoring Co., Inc.,* 23 BRBS 420 (1990). In addition, any deadline must be reasonable, and the administrative law judge

may address the timeliness of employer's submission to the district director.[3] Accordingly, the administrative law judge's finding that employer's entitlement to Section 8(f) relief is not barred under Section 8(f)(3) is vacated, and the case is remanded for consideration of this issue.

While the case is being remanded for the administrative law judge to reconsider the applicability of the absolute defense, for the purpose of judicial economy we will address the Director's arguments regarding the administrative law judge's award of Section 8(f) relief on the merits. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In this case, the Director does not contest the administrative law judge's finding that claimant's disability is not due solely to the work-related injury, but challenges only the conclusion that claimant had a manifest permanent partial disability pre-existing his work injury.

The Director initially argues that the administrative law judge erred in reversing his prior determination that employer failed to establish that claimant's pre-existing back problems did not constitute a pre-existing permanent partial disability within the meaning of Section 8(f) in his Decision and Order On Reconsideration. The Director notes that in his initial Decision and Order, the administrative law judge discredited Dr. Hall's opinion that claimant suffered from a pre-existing chronic back disability due to prior back injuries he sustained in 1981 and 1984 on the bases that Dr. Hall referred to an October 11, 1991, back injury which was not mentioned elsewhere in the record and that his conclusions were

[3]The regulation requires the district director to consider "all circumstances" in setting a deadline. The administrative law judge here described the deadline as "arbitrary" and noted the fully documented application was received within 11 days of the date set. The administrative law judge on remand may address whether the deadline was reasonable under all the circumstances of the case, and any reasons provided by employer for its late submission.

not well-supported. The Director thus contends that the administrative law judge erred in reversing this determination on reconsideration based on Dr. Reid's April 23, 1996, letter.

After review of the administrative law judge's Decisions in light of the record evidence and the Director's arguments, we affirm his finding on reconsideration that claimant's prior back injuries constituted pre-existing permanent partial disabilities within the meaning of Section 8(f). In order to constitute a pre-existing permanent partial disability for Section 8(f) purposes, claimant must have a serious, lasting physical condition which pre-existed the work injury. *See, e.g., Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992). In his initial decision, the administrative law judge found employer's evidence insufficient to meet its burden, rejecting Dr. Hall's opinion that claimant had a chronic back disability preexisting his work injury. On reconsideration, employer submitted an April 23, 1996, letter from Dr. Reid which addressed the administrative law judge's concerns about Dr. Hall's opinion. While the Director argues that Dr. Reid's opinion did no more than clarify that Dr. Hall's reference to an October 11, 1991 injury was a typographical error, we disagree. In addition to this explanation, after reviewing the documentation which formed the basis for Dr. Hall's June 3, 1994 opinion, Dr. Reid stated that Dr. Hall's statements regarding claimant's additional prior back injuries were well-supported. Moreover, while the administrative law judge initially found Dr. Hall's opinion that claimant suffered from a pre-existing chronic back disability incredible because no other doctors voiced an opinion that claimant's pre-1986 back problems resulted in permanent disability, Dr. Reid's letter corroborated Dr. Hall's opinion; he stated that to a reasonable degree of medical certainty he agreed with Dr. Hall that claimant had a chronic back disability which pre-dated his July 11, 1986, work injury. Dr. Reid's letter thus cured the deficiencies which the administrative law judge initially perceived in Dr. Hall's opinion, and provided additional evidence substantiating that claimant's pre-existing back problems were serious and lasting. Accordingly, we affirm the administrative law judge's finding that employer met its burden of establishing that claimant's pre-existing back problems constituted a pre-existing permanent partial disability, as it is rational and supported by substantial evidence. *See generally Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991).

Finally, the Director contends that the administrative law judge erred in finding that employer established that claimant's pre-existing permanent partial disability was manifest because the medical records in existence prior to claimant's June 11, 1986, work injury do not reflect the seriousness or permanency of claimant pre-existing back condition. We disagree. 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 from which the condition was objectively determinable. *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). The medical records pre-existing the subsequent injury, however, need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious lasting physical problem. *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).

In the instant case, the administrative law judge found that claimant's pre-existing back problems were well-documented by employer's own medical clinic records, as well as other outside medical reports available to employer. Employer's clinic records reflect that claimant sustained 5 back injuries in 7 years and, in addition, document numerous occasions since October 1981 when claimant's back problems required the use of prescription medication and the imposition of work restrictions. *See* Employer's Ex. 2. The administrative law judge's finding that claimant's pre-existing back condition was manifest prior to claimant's June 1986 work injury is therefore affirmed, as it is supported by substantial evidence. *See generally Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Accordingly, as the Director does not otherwise contest the administrative law judge's findings regarding Section 8(f) on the merits, if the administrative law judge finds on remand that employer is not barred from receiving Section 8(f) relief under Section 8(f)(3), employer is entitled to Section 8(f) relief.

Accordingly, the administrative law judge's findings regarding the inapplicability of Section 8(f)(3) 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 Denying Section 8(f) Relief and Decision and Order on Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge