BRB No. 08-0694

L.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROFTON DIVING CORPORATION	)	DATE ISSUED: 05/21/2009
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Awarding Benefits and Denying Employer's Requested Section 908(f) Relief of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Ralph Rabinowitz (Rabinowitz, Swartz Taliaferro, Swartz & Goodove, P.C.), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Kathleen H. Kim (Carol DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits and Denying Employer's Requested Section 908(f) Relief (2006-LHC-00425) of Administrative Law Judge Alan L. Bergstrom 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for a second time. On May 27, 1999, claimant, a diving supervisor, sustained a work-related injury to his neck and right upper extremity. Claimant performed light-duty work for employer until he underwent surgery at C5/6 on July 26, 2002. Claimant's condition deteriorated, and Dr. Spears, a pain management specialist, opined that from a "physiatry standpoint" claimant reached maximum medical improvement on April 30, 2003.

On July 7, 2003, Dr. Koen recommended that claimant undergo a fusion surgery. On August 6, 2003, Dr. Ordonez concurred in this recommendation. After advising Dr. Koen that he would consent to this additional cervical surgery, claimant instead visited Dr. Gurtner on January 6, 2004, for a third opinion. Dr. Gurtner reviewed claimant's December 2003 MRI and performed a physical examination. Dr. Gurtner stated that claimant would not benefit from further surgery and that conservative treatment of the muscle spasm was indicated. Dr. Gurtner also recommended that claimant "get better control of his diabetes," and instructed him to return in a year with a new MRI. By January 12, 2005, Dr. Gurtner reported that claimant was slightly worse than the year before and she offered cervical surgery after claimant's diabetes was better controlled. On June 22, 2005, Dr. Gurtner opined that claimant would be unable to tolerate a stressful working environment because of his diabetes, coronary artery disease and hypertension. By October 6, 2005, Dr. Gurtner placed the claimant in a no work status. Dr. Gurtner testified that she disapproved claimant for specific jobs she had earlier approved, and stated she would schedule claimant for cervical fusion when his depression lifted and he was medically stable to undergo surgery. Claimant has not worked anywhere since his last day with employer.

In the claim before the administrative law judge, claimant sought compensation for permanent total disability beginning April 30, 2003, the date Dr. Spears found claimant had reached maximum medical improvement from a physiatric standpoint. The parties agreed that claimant is unable to return to his usual pre-injury work, but employer maintained that it had established the availability of suitable alternate employment for

claimant as of May 17, 2005. Employer also contended that it is entitled to relief from continuing compensation liability under Section 8(f) of the Act, 33 U.S.C. §908(f).

In his original decision, the administrative law judge found that claimant had not yet reached maximum medical improvement and that employer established the availability of suitable alternate employment as of May 17, 2005, based on a labor market survey and testimony of Ms. Byers. Accordingly, he awarded claimant compensation for temporary total disability from April 16, 2003, through May 16, 2005, and for temporary partial disability thereafter based on a loss in wage-earning capacity. 33 U.S.C. §908(b), (e), (h). Because the administrative law judge found that claimant's condition was not yet permanent, he did not reach the issue of employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f). Claimant appealed to the Board alleging the administrative law judge erred in finding that his condition was not permanent and in finding that employer established the availability of suitable alternate employment.

On appeal, the Board held that claimant's cervical condition is permanent as it has continued for a lengthy period and neither surgery nor further improvement is anticipated. *L.G. v. Crofton Diving Corp.*, BRB No. 07-0273 (Oct. 30, 2007)(unpub.). Therefore, the Board vacated the administrative law judge's finding and remanded the case for the administrative law judge to determine the date on which claimant's condition became permanent.[1] The Board also vacated the administrative law judge's finding that employer established the availability of suitable alternate employment because Dr. Gurtner revoked her approval of jobs as of October 2005, on the grounds, *inter alia*, that claimant is medically unable to work. The Board remanded the case for the administrative law judge to address whether employer established the availability of suitable alternate employment between May 2005 and October 5, 2005. *L.G.*, slip op. at 8.

On remand, the administrative law judge requested and received briefs from claimant, employer and the Director, Office of Workers' Compensation Programs (the Director). The administrative law judge found that claimant's condition became permanent on January 12, 2005, that employer established the availability of suitable alternate employment from May 2, 2005 through October 5, 2005, that claimant was totally disabled as of October 6, 2005, and that employer did not establish its entitlement to Section 8(f) relief. Accordingly, the administrative law judge awarded claimant permanent partial disability benefits from May 2, 2005 through October 5, 2005, and continuing permanent total disability benefits beginning October 6, 2005.

[1] The administrative law judge thus was instructed to address employer's entitlement to Section 8(f) relief.

On appeal, employer contends the administrative law judge erred in finding that claimant's date of permanency is January 12, 2005, that employer did not establish suitable alternate employment after October 6, 2005, and that it presented insufficient evidence to establish its entitlement to Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's findings regarding his permanent disability awards. The Director responds only to employer's appeal of the denial of Section 8(f) relief, contending that the Board should remand for additional findings.

Employer first contends that the administrative law judge erred in finding that claimant reached maximum medical improvement on January 12, 2005, based on Dr. Gurtner's opinion. Employer contends the administrative law judge should have relied on Dr. Spears's opinion that claimant reached maximum medical improvement on April 30, 2003. Alternatively employer argues for a date of January 6, 2004, when Dr. Gurtner first opined that surgery would not benefit claimant.

The administrative law judge thoroughly and accurately detailed the course of treatment claimant received and recommended by claimant's doctors. Decision and Order at 6-8. The administrative law judge found that:

> This course of treatment indicates that the option of cervical fusion was viable in the opinion of treating physician, Dr. Koen and consulting physician Dr. Ordonez in the fall of 2003. Even Dr. Gurtner in January 2004 considered conservative treatment for a year to be a prudent course of action before surgery. The option of surgical intervention was not abandoned until January 12, 2005, when Dr. Gurtner ruled out surgical intervention until the claimant's diabetic medical condition became stable. The claimant's condition never stabilized and he continued to deteriorate until Dr. Gurtner placed the Claimant in a permanent no-work status in October 2005.

Id. at 8. The administrative law judge could properly find that claimant's condition remained temporary while claimant was undergoing treatment to improve his condition. *See, e.g., Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). Thus, although Dr. Spears stated in April 2003 that claimant had reached permanency from a "physiatrist standpoint," the administrative law judge rationally found based on the opinions of Drs. Koen and Ordonez that the possibility of surgery to improve claimant's condition existed after this date. *See, e.g., Monta v. Navy Exchange Service Command*, 39 BRBS 104 (2005). In addition, Dr. Gurtner recommended additional conservative treatment in January 2004, which claimant underwent for a year. CX 1. In January 2005, Dr. Gurtner opined that claimant would be a surgical candidate if his diabetes were controlled. Claimant's condition did not stabilize after January 2005

and, in fact, it continued to deteriorate. CX 1 at 8, 9, 12, 13, 17; CX 12 at 7-17. Based on this evidence the administrative law judge did not err in finding that claimant's condition reached maximum medical improvement on January 12, 2005, after conservative treatment failed and additional surgery was not imminent. *McCaskie v. Aaeborg Ciserv Norfolk, Inc.*, 34 BRBS 9 (2000). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's award of permanent disability benefits as of January 12, 2005.

Employer next contends the administrative law judge erred in finding that it presented insufficient evidence to establish the availability of suitable alternate employment after October 5, 2005. Specifically, employer contends that Ms. Byers took into account claimant's physical and psychological restrictions imposed in Dr. Gurtner's opinion when she updated the labor market survey in May 2006. Employer emphasizes Ms. Byers's testimony that employment often assists with relieving symptoms of depression and can be beneficial.

We reject employer's contention of error. In its prior decision the Board held that Dr. Gurtner's uncontradicted opinion that claimant was medically unable to work as of October 2005 establishes that claimant is totally disabled. *L.G.*, slip op. at 6-7. On remand, the administrative law judge noted Dr. Gurtner's "no work" restriction had not changed, and he found that claimant is entitled to total disability benefits as of October 5, 2005. As employer has not offered any basis for our departure from the law of the case doctrine, we affirm the award of total disability benefits. *See J.R. v. Bollinger Shipyard, Inc.*, 42 BRBS 95 (2008); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003).

Employer further contends that the administrative law judge erred by denying its application for Section 8(f) relief on claimant's award of permanent total disability.[2] In this regard, employer argues that it has presented sufficient medical and vocational evidence to establish the elements required to obtain Section 8(f) relief. The Director responds that substantial evidence does not support the administrative law judge's cursory determination that employer failed to satisfy the "pre-existing permanent partial disability" and "manifest" requirements of Section 8(f). Therefore, the Director contends that the denial of Section 8(f) must be vacated and the case remanded for further findings.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33

[2] In its appellate brief, employer states that it is not seeking Special Fund relief for any periods of permanent partial disability. Emp. Br. at 13, n.6.

U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that claimant had a pre-existing permanent partial disability, that the pre-existing disability was manifest to employer prior to the compensable injury, and that the compensable disability is not due solely to the subsequent injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982).

Employer contends that claimant suffered from the following medical conditions prior to the May 27, 1999, work-related injury: degenerative disc disease of the cervical spine, mild osteoarthritis of the cervical spine, right hand carpal tunnel syndrome, left knee patellofemoral joint compartment narrowing, diabetes, coronary artery disease, hypertension, high cholesterol, irritable bowel syndrome, anxiety and depression. The administrative law judge found employer did not establish a manifest pre-existing permanent partial disability both because no physician placed any permanent work restrictions on claimant prior to May 27, 1999 due to his medical conditions and the conditions treated prior to May 27, 1999 "responded well to prescribed treatment within a relatively short period of treatment following presentation by the claimant."[3] Decision and Order at 12. Thus, the administrative law judge concluded that these medical conditions were not long-lasting problems that constituted manifest existing partial disabilities prior to May 27, 1999, as required by Section 8(f) of the Act.[4]

We cannot affirm the administrative law judge's denial of Section 8(f) relief as he did not adequately discuss the medical evidence or make sufficient findings of fact regarding either the pre-existing permanent partial disability or manifest elements. As employer and the Director contend, the administrative law judge did not discuss claimant's diabetes or pre-existing left-knee patellofemoral joint compartment narrowing. Moreover, the administrative law judge did not address claimant's other conditions under the appropriate test. A pre-existing disability need not result in economic harm or missed work and has been defined as "such a serious physical disability that a cautious employer… would [be] motivated to discharge the…employee because of a greatly

[3] The administrative law judge found that prior to May 27, 1999, claimant was being treated for: hyperlipidemia with Lipitor, urinary tract infections, serum sickness reaction to a tetanus shot in 1998, anxiety and irritable bowel syndrome in May 1994, anxiety and suspected diabetes in March 1996, anxiety in February 1997, and left knee mild narrowing of the patellofemoral joint compartment. Remand Decision at 12. The administrative law judge noted that the anxiety was treated mainly with medication. *Id.*

[4] The administrative law judge did not reach the element of "contribution" because he found that employer did not establish the existence of a pre-existing permanent partial disability which was manifest to it prior to claimant's March 27, 1999 work injury.

increased risk of employment-related accident and compensation liability." *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1997). The mere existence of a prior condition is not sufficient to satisfy this element. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). However, a medical condition that is controlled or asymptomatic, such as hypertension or a degenerative disease, may be a pre-existing disability if it nonetheless is serious and lasting. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989); *see also Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988). On remand, therefore the administrative law judge must make explicit findings as to the pre-existing permanent partial disability element in light of this law.

If this element is satisfied, the administrative law judge should address, with reference to specific medical evidence, whether the manifest element is met with regard to each specific condition. Employer 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 determinable. *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983). 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. *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT)(11th Cir. 1994); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989). If the pre-existing permanent partial disability and manifest elements are met, the administrative law judge should address the contribution elements. *See, e.g., John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93; 12 BRBS 229 (4th Cir. 1980); *see also Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

Accordingly, we affirm the administrative law judge's award of benefits to claimant. We vacate the denial of Section 8(f) relief and remand the case to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge