



BRB Nos. 14-0378  
and 14-0378A

CHARLES ZUMWALT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL AND SHIPBUILDING	)	
COMPANY	)	
	)	
Self-Insured	)	DATE ISSUED: <u>July 16, 2015</u>
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order on Reconsideration of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Jeffrey Winter and Kim Ellis (Law Office of Jeffrey M. Winter), San Diego, California, for claimant.

Barry W. Ponticello, Renee C. St. Clair and Brittany S. Zummer (England Ponticello & St. Clair), San Diego, California, for self-insured employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order and the Decision and Order on Reconsideration (2011-LHC-00806, 2011-LHC-01935) of Administrative Law Judge Steven B. Berlin 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant began work for employer in 1996 as a machine operator. Approximately seven years into his career with employer and after a change in management, claimant began experiencing what he perceived as job-threatening harassment from his direct supervisor. CX 42 at 1291-1294. On January 8, 2006, claimant was assigned to work aboard ships as a tack welder, despite the fact that he had not passed the T1 certification test for tack welding.<sup>1</sup> Tr. at 32. Three days later, on January 11, 2006, claimant slipped and fell while boarding a ship and twisted his left knee. Tr. 117. Claimant blamed his supervisors for his knee injury and resulting disability. CX 42 at 1298-99. He testified that he felt he was being set up to fail, and that it made him angry and put him on edge that he was asked to tack weld when he was not qualified to do so. CX 13 at 115; CX 42 at 1297.

Claimant was off work due to his knee injury from January 12 – 26, 2006. He returned to light-duty work on January 27, 2006, where he saw coworkers he was “upset with” on a daily basis. CX 12 at 103. Claimant was off work from June 28 through July 13, 2006, for knee surgery, but he again returned to light-duty work. He became increasingly fixated on his supervisors, and he sought medical help to manage his escalating resentment. *Id.* On November 30, 2006, Dr. Pozos, a psychiatrist, opined that claimant was suffering from an adjustment disorder mixed with occupational problems. CX 21 at 269. In February 2007, claimant was evaluated by employer's expert, Dr. Ornish, who diagnosed “Adjustment disorder with mixed anxiety and depressed mood, mostly resolved, with mild residual symptom[s],” and “Attention-deficit hyperactivity disorder versus learning disorder not otherwise specified, non-industrial.” EX 2 at 26.

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<sup>1</sup> Employer provided tack welding training that allows for T1 certification after passing a test. CX 54 at 1654-55. The Navy requires T1 certification for tack welding. Employer conceded that tack welding without T1 certification raises serious safety concerns. CX 52 at 1627-28; CX 54 at 1654-55.

On January 26, 2007, claimant's light-duty job with employer ended, and except for helping a friend's aging mother between February 2008 and April 2009, he has not returned to work.<sup>2</sup> Claimant started vocational rehabilitation services on January 16, 2007, and he began a retraining program to prepare for work in medical coding or customer service on April 23, 2007. CX 38 at 1178. He remained in the vocational program through November 16, 2007, and was unable to secure a job in the open market thereafter. Claimant continued to receive psychiatric care, reporting to his physicians and therapists that he experienced nightmares, depression, hallucinations and two dissociative events on June 30 and July 27, 2008.

On October 5, 2006, claimant filed a claim under the Act for his January 11, 2006 left knee injury, and he amended his claim on January 4, 2007, to include a claim for a psychological injury. CX 1. Prior to the March 2012 hearing, the parties agreed to stipulations that effectively settled all issues on the left knee claim and a number of issues on the psychological claim. The administrative law judge, however, rejected the parties' stipulation that claimant's psychological injury reached maximum medical improvement on February 13, 2007, finding instead that this condition became permanent on January 15, 2008. The administrative law judge found that claimant's psychological condition prevents him from returning to his usual work; that employer established the availability of suitable alternate employment with its July 7, 2007 labor market survey; that claimant was in a vocational rehabilitation program from April to November 2007; and claimant diligently sought alternate employment after his program ended. The administrative law judge found that employer again established the availability of suitable alternate employment on September 20, 2010, and that claimant did not diligently seek work. Thus, the administrative law judge awarded claimant temporary total disability benefits from January 12-26, 2006, June 28 through July 13, 2006, and January 26, 2007 through January 14, 2008; permanent total disability benefits from January 15, 2008 through September 19, 2010; ongoing permanent partial disability benefits from September 20, 2010, for the psychological condition; and permanent partial disability benefits under the schedule for claimant's 24 percent left knee impairment. 33 U.S.C. §908(a), (b), (c)(2), (19), (21). Additionally, the administrative law judge denied employer's request for relief under Section 8(f), 33 U.S.C. §908(f).

In response to employer's motion and claimant's cross-motion for reconsideration, the administrative law judge issued a Decision and Order on Reconsideration on July 10, 2014. The administrative law judge corrected typographical and calculation errors that the parties agreed existed in the original Decision and Order. Further, the administrative law judge affirmed his findings that claimant rebutted employer's showing of suitable

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<sup>2</sup> Claimant provided caregiving services three days a week, eight to fourteen hours a day, for \$90 per week.

alternate employment in its 2007 labor market survey with a diligent job search, but did not rebut employer's 2010 showing of suitable alternate employment. The administrative law judge amended his Decision and Order to reflect that claimant retained a wage-earning capacity of \$90 per week as an in-home caregiver from February 2008 through April 2009 and, therefore, claimant was entitled to permanent partial disability, rather than permanent total disability, benefits during this period.

On appeal, claimant contends the administrative law judge erred in finding that he did not rebut employer's 2010 showing of available suitable alternate employment. Employer responds, urging rejection of this contention. Claimant filed a reply brief. BRB No. 14-0378. On cross-appeal, employer challenges the administrative law judge's rejection of the parties' stipulation that claimant's psychological condition reached maximum medical improvement on February 13, 2007. Employer also appeals the findings that claimant's psychological injury prevents him from returning to his usual job, that claimant diligently sought work following employer's 2007 showing of suitable alternate employment, and that employer is not entitled to Section 8(f) relief. Claimant responds, urging affirmance of the administrative law judge's rejection of the parties' stipulation as to the date his psychological condition reached maximum medical improvement. Claimant also urges affirmance of the administrative law judge's findings that he cannot return to his usual work and that he diligently sought work following the 2007 labor market survey. The Director, Office of Workers' Compensation Programs (the Director), responds, in part, to employer's appeal, urging the Board to affirm the administrative law judge's denial of Section 8(f) relief. Employer filed briefs in reply to both response briefs. 14-0378A.

We first address employer's challenge to the administrative law judge's rejection of the parties' stipulation that claimant's psychological condition reached maximum medical improvement on February 13, 2007.<sup>3</sup> This stipulation was based on Dr. Ornish's opinion that, as of the date of his second interview with claimant, February 13, 2007, claimant's psychological condition had reached maximum medical improvement.<sup>4</sup> EX 2

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<sup>3</sup> We reject claimant's assertion that employer waived this argument by failing to raise it before the administrative law judge on reconsideration, as an issue need not be raised on reconsideration in order for it to be preserved for appeal. A party who is "adversely affected or aggrieved" by the administrative law judge's decision may allege error in any of the adverse findings. 20 C.F.R. §802.201.

<sup>4</sup> Dr. Ornish opined that claimant had a good response to psychotherapy and antidepressants and his psychological condition reached permanency on February 13, 2007, because claimant did not appear to be clinically depressed during Dr. Ornish's two interviews with claimant on February 7 and February 13, 2007, and because Dr. Pozos's January 16, 2007 treatment records indicated that claimant's "mood/anxiety and

at 31; ALJX 1. In rejecting this stipulation, the administrative law judge found that the record did not support this date of maximum medical improvement because the “mental health treatment records show continued therapy sessions, continued medication changes, changes in diagnoses, and both further improvement at times and worsening at other times.” Decision and Order at 7. The administrative law judge observed that on March 29, 2007, claimant’s therapist “performed what he termed ‘intensive’ cognitive behavioral therapy to decrease claimant’s depression,” noting that “[i]t is difficult to understand how [c]laimant could be at maximum medical improvement if his treating therapist thought that ‘intensive’ therapy was needed or would be helpful.” *Id.* The administrative law judge subsequently found, without explanation, that claimant’s psychological condition reached maximum medical improvement on January 15, 2008.<sup>5</sup> *Id.* at 29.

Stipulations are binding upon the parties when they are received into evidence. 29 C.F.R. §18.83. An administrative law judge is not obligated to accept the parties’ stipulations, but if he rejects them, he must provide the parties with prior notice that he will not accept them, his rationale for doing so, and an opportunity to submit argument and evidence in support of their positions. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). As the record contains a clear and unambiguous statement signed by both parties agreeing to the date claimant’s work-related psychological condition reached maximum medical improvement, the administrative law judge erred in not providing the parties notice that the stipulation would not be accepted, and an opportunity to submit argument and evidence on this issue. *Id.* We therefore vacate the administrative law judge’s finding that claimant’s psychological condition reached maximum medical improvement on January 15, 2008. We remand the case for the administrative law judge to allow the parties the opportunity to present argument and evidence in support of their positions regarding this issue. *See Dodd*, 22 BRBS 245. The administrative law judge must explain, with reference to record evidence and law, the basis for his finding

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irritability” were “improved”, further noting that claimant was “very pleasant” and stated that he was “feeling better – much less irritable.” EX 2 at 32-33.

<sup>5</sup> The basis for the administrative law judge’s finding is unclear. The administrative law judge’s last notation in his summary of claimant’s psychological treatment is that claimant had a session with his therapist, David Grey, on January 16, 2008, in which claimant showed decreased anger and increased optimism regarding job prospects. Decision and Order at 10. However, progress notes continued through May 12, 2009, indicating claimant had good and bad days and make no reference to permanency. CX 17; EX 29.

regarding the date of maximum medical improvement. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010); *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

Employer next challenges the administrative law judge's finding that claimant's psychological injury prevents him from returning to his usual work. Employer contends that claimant's having worked in light-duty jobs for employer after his injury (February – June 2006 and August 2006 – January 2007) shows he is psychologically capable of returning to work for employer. The administrative law judge found, however, that claimant's temporary returns to work were early in the progression of claimant's psychological illness. He noted that, on January 15, 2010, Dr. Pozos stated that claimant should not return to work for employer because of his psychological condition; that Dr. Ornish, employer's expert, opined that it would not be prudent for claimant to return to work if he had to work under the same supervisors; and that Claims Supervisor Andrew Haghverdian stated there was no guarantee that, if claimant returned to work, he would not have to work with the same supervisors.<sup>6</sup> Decision and Order at 21; CX 46 at 1564; Tr. at 514. Thus, the administrative law judge rationally found the opinions of Drs. Pozos and Ornish support the conclusion that claimant cannot return to work with employer, and that claimant's prior light-duty work with employer does not undermine

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<sup>6</sup> In this respect, we reject employer's contention that the administrative law judge misinterpreted Mr. Haghverdian's testimony, which, it alleges was ambiguous. Mr. Haghverdian's hearing testimony on this issue was as follows:

Q: And so at some point in time, there's - - as you sit here today, there's no guarantee that if [claimant] went back to work, that he wouldn't end up working in the same department **or** the same area **or** under the supervision of any of the three [supervisors] that he was previously working under. Isn't that correct? (Emphasis added.)

A: I can't guarantee it.

Tr. at 514. Even if employer is correct in stating that Mr. Haghverdian's response could be interpreted as stating that he could not guarantee one of the conditions, as it may also be interpreted as stating he could not guarantee any of the conditions, the administrative law judge rationally credited Mr. Haghverdian as stating such. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9<sup>th</sup> Cir. 2010); *Rhine v. Stevedoring Services of Am.*, 596 F.3d 1161, 44 BRBS 9(CRT) (9<sup>th</sup> Cir. 2010).

their opinions.<sup>7</sup> See *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT). As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant cannot return to his usual work due to his work-related psychological condition. See *Marathon Ashland Petroleum v. Williams*, 733 F.3d 182, 47 BRBS 45(CRT) (6<sup>th</sup> Cir. 2013); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004).

Where, as in this case, claimant has established a prima facie case of total disability by demonstrating his inability to return to his usual employment due to his work injury, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9<sup>th</sup> Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9<sup>th</sup> Cir. 1980). In order to meet this burden, employer must establish the existence of realistically available job opportunities within the geographic area in which claimant resides, which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could realistically secure if he diligently tried. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1375, 27 BRBS 81, 82 (CRT) (9<sup>th</sup> Cir. 1993), cert. denied, 511 U.S. 1031 (1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

Claimant can rebut employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities, but was unable to secure a position. *Edwards*, 999 F.2d at 1376 n.2, 27 BRBS at 84 n.2(CRT); *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2<sup>d</sup> Cir. 1991). A "claimant, in proving due diligence, is not required to show that he tried to get the identical jobs the employer showed were available," but instead "merely must establish that he was reasonably diligent in attempting to secure a job, 'within the compass of employment opportunities shown by the employer to be reasonably attainable and available.'" *Palombo*, 937 F.2d at 74, 25

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<sup>7</sup> Contrary to employer's assertion, Dr. Pozos's 2010 statement that claimant's underlying adjustment disorder has remained the same since 2006, in conjunction with the fact that claimant performed light-duty work for employer in 2006 and 2007, does not necessitate the conclusion that claimant "has at all times been able to return to work at [employer]." Emp. Br. at 21. Dr. Pozos specifically stated that claimant's condition waxes and wanes, and that when his occupational problem is brought to the forefront, he experiences more symptoms. EX 14 at 296. Further, as the administrative law judge observed, claimant began treating his psychological condition in November 2006, four months after returning to work post-surgery, and claimant's symptoms worsened thereafter. Decision and Order at 21.

BRBS at 7(CRT) (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 156 (5<sup>th</sup> Cir. 1981)).

In this case, employer presented a July 2007 labor market survey and a September 2010 supplemental labor market survey.<sup>8</sup> The administrative law judge concluded that claimant was capable of performing all but the assembler jobs; therefore, employer established the availability of suitable alternate employment with both surveys. The administrative law judge further found, however, that although employer established the availability of suitable alternate employment as of July 6, 2007, claimant was entitled to total disability benefits for the duration of his vocational rehabilitation program, January 16 through November 16, 2007.<sup>9</sup> Decision and Order at 28; CX 38 at 1178. The administrative law judge further found claimant established that, through March 14, 2008, he diligently sought work after completing his vocational rehabilitation program. In this regard, the administrative law judge relied on “hard copies of emails that show [claimant] was sending resumes and conducting a diligent job search through March 14, 2008.”<sup>10</sup> Decision and Order at 26; CX 31-33. Although claimant also submitted a

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<sup>8</sup> In its July 2007 labor market survey, employer identified 10 information clerk positions, nine telephone solicitor positions, six assembler small products I positions, six assembler small products II positions, and four parking lot attendant positions which were within claimant’s geographic area and which were available on July 6, 2007. EX 20 at 533-547. In its September 20, 2010 supplemental labor market survey, employer identified four medical receptionist jobs, four companion jobs, eight customer complaint clerk jobs, four information clerk jobs, nine telephone solicitor jobs, seven assembler small products I jobs, eight assembler small products II jobs, and eight parking lot attendant jobs available in claimant’s geographic region with job openings at the time of the survey. *Id.* at 548-571.

<sup>9</sup> Employer conceded before the administrative law judge that, due to his left knee injury, claimant was entitled to total disability benefits during the course of his vocational rehabilitation. *See General Constr. Co. v. Castro*, 401 F.3d 963, 39 BRBS 13(CRT) (9<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006); *Louisiana Ins. Guar. Ass’n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5<sup>th</sup> Cir. 1994); Emp. Post-Trial Br. at 8 n.4.

<sup>10</sup> Claimant submitted hard copies of emails he sent, as well as responses thanking him for applying to various positions, including those of office assistant, vocational assistant, job coach, social services representative, department assistant, health information clerk, patient services representative, sales center administrator, independent living coach, supervised family visitation clerk, mental health worker, front desk position, library clerk, assembler, support specialist, job coach, bus aide, classroom aide, child development counselor, patient services representative, data coordinator, programs assistant, customer service representative, and job dispatcher. CX 31-33.

spreadsheet of his alleged job search from 2007 to 2011, which indicated he continued to search for work after March 14, 2008, and into 2011, the administrative law judge found claimant's credibility lapsed as of June 30, 2008, and therefore claimant's unsupported spreadsheet after that date was not credible. Decision and Order at 26. Thus, the administrative law judge found that claimant did not rebut employer's September 20, 2010 labor market survey with a diligent job search. Consequently, the administrative law judge awarded claimant partial disability benefits as of September 20, 2010.

Employer contends the administrative law judge erred in finding claimant rebutted its 2007 labor market survey by showing a diligent job search, because claimant did not apply to two of the assembler jobs in the 2007 labor market survey, and because the administrative law judge relied on claimant's job-search spreadsheet, which the administrative law judge found to be inaccurate and inconsistent. We reject employer's assertions of error. It is well established that a diligent job search does not require a claimant to apply for the exact jobs an employer shows to be available; rather, a claimant need only search for jobs that are similar to those employer demonstrates are suitable and available. *See Palombo*, 937 F.2d at 74, 25 BRBS at 7(CRT). In this case, the administrative law judge found that the assembler jobs were not suitable. Decision and Order at 22. Further, the only evidence on which the administrative law judge relied in finding claimant's job search was diligent through March 14, 2008, was the hardcopies of emails to and from potential employers, none of which the administrative law judge found to be inaccurate or inconsistent. Decision and Order at 26. As the emails support the administrative law judge's finding that claimant diligently pursued alternate work upon completing vocational rehabilitation and through March 14, 2008, we affirm the administrative law judge's finding that claimant rebutted employer's 2007 showing of suitable alternate employment. *Fortier v. Electric Boat Corp.*, 38 BRBS 75 (2004).

Claimant challenges the administrative law judge's finding that he did not diligently seek work in response to employer's 2010 labor market survey. The administrative law judge found claimant's credibility was undermined as of June 30, 2008, when he reported his first dissociative event, because Drs. Pozos, Ornish, and Becker did not believe claimant experienced the claimed dissociative events. Decision and Order at 24-25; *see* CX 17 at 201-202; CX 21 at 313-314; CX 25 at 405-408; CX 46 at 1542; CX 57 at 1715-1716. It is within the administrative law judge's discretion to determine the credibility of witnesses and to evaluate and draw inferences from the evidence of record. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge provided a rational reason for finding that claimant ceased to be credible as of June 30, 2008. *Id.* Thus, as it is rational and supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant's credibility lapsed as of June 30, 2008, when he reported his first dissociative event. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v.*

*Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9<sup>th</sup> Cir. 1988). As claimant's spreadsheet is the only evidence of his job search after September 20, 2010, and as all of claimant's unsubstantiated statements thereon post-date the lapse in claimant's credibility, the administrative law judge rationally found the spreadsheet insufficient to show that claimant engaged in a diligent job search. *See, e.g., Wilson v. Virginia Int'l Terminals*, 40 BRBS 46 (2006). We therefore affirm the administrative law judge's findings that claimant failed to rebut employer's showing of suitable alternate employment as of September 20, 2010, and that claimant is entitled to only partial disability benefits as of this date.<sup>11</sup> *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9<sup>th</sup> Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013).

Lastly, employer contends the administrative law judge erred in denying it Section 8(f) relief from continuing liability benefits for claimant's psychological injury. Although employer did not submit any evidence of a preexisting disability that predates claimant's January 11, 2006 injury, employer maintains that it satisfied the manifest requirement because claimant's preexisting ADHD could easily have been determined if employer had investigated claimant's background. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

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 totally disabled, if it establishes that the claimant had a manifest, preexisting permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury. If the claimant is permanently partially disabled, employer also must establish that claimant's disability "is materially and substantially greater than that which would have resulted from the

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<sup>11</sup> We reject claimant's contention that his 2008 and 2009 work is relevant to the diligence of his job search after September 2010. Additionally, we reject claimant's assertions that the administrative law judge erred in failing to address the diligence of claimant's job search in light of "the psychological limitations that affect his competitiveness in the labor market [e.g., claimant's ADHD]." Cl. Br. at 5, 22. These psychological limitations were properly considered in addressing whether the positions identified in employer's labor market surveys were suitable for and available to claimant. Decision and Order at 22; *see Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (*en banc*); *Hernandez v. Nat'l Steel & Shipbuilding Co.*, 32 BRBS 109 (1998); *Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986).

subsequent work injury alone.”<sup>12</sup> 33 U.S.C. §908(f)(1); *Marine Power & Equipment v. Dep’t of Labor [Quan]*, 203 F.3d 664, 33 BRBS 204(CRT) (9<sup>th</sup> Cir. 2000); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82(CRT) (9<sup>th</sup> Cir. 1991). A disability is manifest within the meaning of Section 8(f) if the employer either had actual knowledge of the preexisting disability, or if medical records exist such that the disability was objectively determinable before the employee suffered the compensable injury. *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11<sup>th</sup> Cir. 1994) (“[t]here must be information available which alerts the employer to the existence of a medical condition”). Although a specific diagnosis of the preexisting condition is not necessarily required, there must be “sufficient, unambiguous, objective, and obvious indication of a disability [] reflected by the factual information contained in the available records” to satisfy the manifest requirement. A “disability is not manifest when it is unknown to the employer and merely might have been discovered had proper testing been performed.” *Miller*, 951 F.2d at 1111, 25 BRBS at 84-85(CRT). Here, the administrative law judge properly found that employer failed to present any evidence that it was actually or constructively aware that claimant had any permanent disability prior to his January 11, 2006 injury. Therefore, as the manifest element is not satisfied, we affirm the denial of Section 8(f) relief. *Transbay Container Terminal v. U.S. Dep’t of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9<sup>th</sup> Cir. 1998).

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<sup>12</sup> In this case, the administrative law judge awarded claimant permanent total disability benefits for several months after the expiration of the 104-week period, followed by an ongoing award of permanent partial disability benefits. The “contribution element” is not at issue in this appeal.

Accordingly, we vacate the administrative law judge's finding that claimant's psychological condition became permanent on January 15, 2008, and we remand the case for the administrative law judge to reconsider this issue consistent with this decision. In all other respects, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge