BRB No. 05-0534

ALBERT SODDEN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
FOSS MARITIME COMPANY	)	DATE ISSUED: 03/13/2006
	)	
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 Approving Stipulations for Compensation Order and Attorney Fees and Denying Section 908(f) Special Fund Relief of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for self-insured employer.

Mark A. Reinhalter (Howard M. Radzely, Solicitor of Labor; Allen H. Freedman, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Approving Stipulations for Compensation Order and Attorney Fees and Denying Section 908(f) Special Fund Relief (2004-LHC-0790) of Administrative Law Judge Gerald M. Etchingham 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).

Claimant injured his back while working for employer on July 20, 2000, and as a result stopped working on August 6, 2000. Employer voluntarily paid temporary total disability benefits from August 7, 2000, through February 28, 2003, and claimant thereafter sought additional benefits for his back injury. In response, employer requested Section 8(f) relief, 33 U.S.C. §908(f), based on alleged pre-existing disabilities to claimant's back and leg as a result of work injuries sustained in 1990 and 1995, and to claimant's right index finger which was amputated in 1958. The district director denied Section 8(f) relief and the case was forward to the Office of Administrative Law Judges for a formal hearing.

In light of the parties' stipulations, the administrative law judge awarded claimant temporary total disability benefits from July 21, 2000, through December 17, 2002, and ongoing permanent partial disability benefits thereafter. The administrative law judge denied employer's request for Section 8(f) relief as he found that claimant's prior back, leg and right finger injuries did not result in manifest, pre-existing permanent partial disabilities.

On appeal, employer challenges the administrative law judge's finding that it is not entitled to Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief based on claimant's prior back and leg injuries but stating that the case must be remanded for further consideration based on claimant's prior finger amputation.

Employer initially contends that the administrative law judge's decision violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), because he did not independently review and discuss all of the relevant evidence,[1] but instead accepted the Director's statement of facts as his own, and thus erroneously adopted the Director's position in its entirety, without sufficient explanation, as the basis for his denial of

[1] In particular, employer contends that the administrative law judge did not address evidence that claimant wore a back brace after his 1990 injury, that claimant declined certain available jobs on the waterfront between 1990 and 2000 because they were too strenuous, that claimant also was unable to perform numerous longshore jobs because of his amputated right finger, and that Dr. Thompson diagnosed a herniated disc in May 1991, which establishes the existence of a pre-existing permanent partial back disability.

Section 8(f) relief. Employer also argues that it has met its burden under Section 8(f) to establish a manifest pre-existing permanent partial disability by virtue of Dr. McCollum's opinions that there was objective evidence of a pre-existing low back impairment before the July 2000 injury, and that claimant's current disability is not due solely to his July 2000 work injury but also to his pre-existing low back condition and finger amputation.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Todd Pacific Shipyards Corp. v. Director, OWCP* [*Mayes*], 913 F.2d 1426, 24 BRBS 25(CRT) (9th Cir. 1990); *Todd Shipyards Corp. v. Director, OWCP* [*Cortez*], 793 F.2d 1012, 19 BRBS 1(CRT) (9th Cir. 1986).

A "pre-existing partial disability" can be an economic disability under 33 U.S.C. §908(c)(21) or a scheduled loss specified in 33 U.S.C. §908(c)(1)-(20), but it may also be "such a serious . . . disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of . . . compensation liability." *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977); *see Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 115(CRT) (1st Cir. 1992); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2nd Cir. 1992). The mere existence of a pre-existing condition, however, does not meet this requirement; rather, there must exist, as a result of that pre-existing condition, some serious lasting physical problem. *See Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT) (9th Cir. 1991). Additionally, any pre-existing condition must be manifest, and this requirement may be satisfied either by employer's actual knowledge of the pre-existing condition or by the production of medical records from which claimant's condition could be objectively determined and which were in existence prior to the subsequent injury. *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991).

In the instant case, the administrative law judge concluded, based on the credible medical evidence and on claimant's own statements and his full-time work history, that claimant's pre-existing injuries, if any, were not severe and significant enough to motivate a cautious employer to discharge him. Initially, the administrative law judge found that claimant "had not filed or received any disability award for a pre-existing

claim," nor had he mentioned any pre-existing conditions when giving his medical history to a majority of physicians. Decision and Order at 7. The administrative law judge thus analyzed the medical evidence to determine whether claimant had a pre-existing permanent disability.

Claimant's testimony establishes that he sustained a low back injury while working for Seattle Stevedoring in 1990, that the injury caused him to miss five to seven months of work, that he returned to light duty work with a back brace for two months, and then thereafter returned to full duty, again wearing the back brace. FX 6. The administrative law judge found that claimant gave no indication of having sustained a prior injury as a result of his 1990 and 1995 work accidents to his treating physician, Dr. Thompson, his treating neurosurgeon, Dr. Hoffman, or to Dr. Arguelles, with whom he sought a second opinion regarding his July 20, 2000, back injury.[2] In contrast, the administrative law judge found that claimant acknowledged to Dr. Reese on October 8, 2003, and to Dr. McCollum in April 2004, that he had some back problems, notably some pain and stiffness purportedly related to his 1990 and 1995 work injuries, intermittently up to and through the time of his July 20, 2000, injury.[3] In resolving this conflict, the administrative law judge found claimant's earlier recitations of his medical history to Drs. Thompson, Hoffman and Arguelles, omitting reference to any significant prior back problems, were more credible given that claimant's full-time work history, earnings history including occasional overtime, and lack of medical treatment, medical restrictions, or medications, are more consistent with those earlier statements. He thus concluded that claimant's comments to Drs. Reese and McCollum regarding any lingering effects of his prior work injuries were "insignificant as a manifest, physically disabling condition as claimant continued to work and because Dr. McCollum was hired by Employer and did not rely on any objective findings in support of any pre-existing permanent partial disability." Decision and Order at 8. The administrative law judge

[2] Specifically, the administrative law judge found: Dr. Thompson's February 21, 2001, report reflects that claimant's past medical history was significant only for a 1958 right index finger amputation and omitted reference to any alleged pre-existing back and/or leg conditions; Decision and Order at 3; EX 3; Dr. Hoffman's May 9, 2001, report reveals, based on the medical history provided by claimant, that claimant had no injuries or problems with his lower back, nor had he experienced any problems with his lower extremities, prior to the July 20, 2000, work accident; and Dr. Arguelles' November 27, 2001, report indicates a past medical history including only high blood pressure and an amputated right index finger.

[3] The administrative law judge, however, also observed that claimant initially stated to Dr. McCollum that he had "got over" both his 1990 and 1995 injuries entirely by the time of his July 20, 2000, work injury.

also acknowledged but rejected as unqualified, the physical therapist's diagnosis of a herniated nucleus pulpous or ruptured disc and Dr. Thompson's clinical note of a "herniated disc" from May 29, 1991, as those findings were not based on any objective evidence such as a physical examination, MRI or x-ray, and were contrary to claimant's actual work activities and statements subsequent to that date.[4]

While the administrative law judge's findings of fact, Decision and Order at 2-5, mirror the Director's recitation of the facts in his post-hearing brief, this alone does not demonstrate error in the administrative law judge's decision. *See generally Orange v. Island Creek Coal Co.*, 3 BLR 1-636, 1-638 (1981) (the administrative law judge's decision, which incorporated verbatim language in employer's brief, did not violate the APA). Rather, review of the administrative law judge's decision reveals that he independently analyzed and discussed the medical evidence and provided a rationale for his findings of fact and conclusions of law. *See* 5 U.S.C. §557(c)(3)(A); *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981). We thus reject employer's contention and hold that the administrative law judge's comports with the APA. *Id.*

Contrary to employer's contention, the administrative law judge specifically addressed the facts that claimant "wore a back brace when working" upon his return to work from in 1991, Decision and Order at 4, 6, that "claimant testified that he could not do all the jobs that he could perform before his 1990 injury," Decision and Order at 3, and that Dr. Thompson diagnosed a herniated disc in 1991. Decision and Order at 3, 8. In this regard, the administrative law judge reasonably concluded that wearing a back brace or turning down certain jobs is not tantamount to having a pre-existing permanent partial disability, particularly given the fact that following both his 1990 and 1995 injuries, as well as following his 1958 finger amputation, claimant returned to work without physical restrictions or continuing medical treatment or medications, and that he worked a number of overtime hours. Decision and Order at 3, 5, and 8; *see also Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Additionally, as evidenced above, the administrative law judge explicitly rejected Dr. Thompson's 1991 diagnosis of a herniated disc as it was unsupported by any objective evidence. Decision and Order at 8. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.* [*Carmines*], 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998).

[4] The only medical evidence regarding this condition pertains to claimant's work injury in 1990. Dr. Thompson's handwritten clinical note states that claimant had a "herniated disc," FX 1-12, but as the administrative law judge found there is no supporting documentation or further elaboration regarding that diagnosis and evidence of ongoing treatment other than a 6-8 month period of physical therapy.

Moreover, the administrative law judge found Dr. McCollum's opinion insufficient to establish a manifest pre-existing permanent partial disability. In particular, the administrative law judge determined that Dr. McCollum "acknowledged that based on the medical records he was provided, there was no diagnosis of degenerative disc disease prior to" claimant's July 20, 2000, injury, Decision and Order at 8, which the administrative law judge found was further supported by Dr. Thompson's opinion, dated August 7, 2000, that claimant had no pre-existing impairment of his injured lumbar spine area or any pre-existing condition which would complicate treatment or retard his recovery from the July 2000, work injury, and Dr. Hoffman's opinion, in May 2001, that claimant was asymptomatic prior to his July 2000, work injury. Thus, the credited opinions of Drs. Thompson and Hoffman, *see generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963), coupled with the fact that although claimant had prior back injuries before his July 20, 2000, injury, he was released to work full duty each time without restrictions, *see generally Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974, support the administrative law judge's conclusion that "claimant's back condition was asymptomatic until his July 2000 injury." Decision and Order at 8.

As determined by the administrative law judge, the record does not contain any documented diagnosis of a pre-existing disability related to claimant's back condition, nor is there any unambiguous, objective, or obvious indication of such a condition such that it could be considered manifest even though actually unknown by employer. *Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998). Moreover, the post-hoc diagnoses of claimant's pre-existing degenerative back condition are insufficient to satisfy the manifest requirement.[5] *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29, *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997); *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). Consequently, we affirm the administrative law judge's denial of Section 8(f) relief based on claimant's prior back injuries. The administrative law judge rationally found that the injuries cited by employer did not result in a "serious lasting physical condition," but rather only minor injuries with no lingering effects. *Cortez*, 793 F.2d 1012, 19 BRBS 1(CRT); *Campbell Industries, Inc.*,

[5] Thus while claimant's asymptomatic degenerative disc disease is a pre-existing serious physical condition, employer has not, as rationally determined by the administrative law judge, satisfied the manifest requirement of Section 8(f) for that condition. *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29, *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997); *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).

678 F.2d 836, 14 BRBS 974; *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Thus, substantial evidence supports the administrative law judge's conclusion that employer has not established the existence of a manifest pre-existing permanent partial disability related to claimant's back and leg conditions. As employer has not established a necessary element of entitlement to Section 8(f) relief for those conditions, the denial of such relief on those basis is affirmed.

Nonetheless, we agree with employer and the Director that the administrative law judge erred in concluding that claimant's 1958 traumatic right index finger amputation is not a manifest pre-existing permanent partial disability for purposes of establishing entitlement to Section 8(f) relief. Such an injury results in a scheduled permanent partial disability, 33 U.S.C. §908(c)(9), and thus satisfies the pre-existing permanent partial disability requirement of Section 8(f).[6] *C&P Telephone Co.*, 564 F.2d at 513, 6 BRBS at 415. As it was clearly manifest, employer has satisfied the first two elements for establishing entitlement to Section 8(f) relief with regard to claimant's 1958 right index finger amputation. As the administrative law judge did not address the contribution element, we must remand this case for consideration of whether claimant's right index finger amputation contributed to claimant's current disability. On remand, the administrative law judge therefore must determine whether employer has established, by medical evidence or otherwise, that claimant's disability as a result of the contribution of his pre-existing right index finger amputation is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *Sproull*, 85 F.3d 895, 900, 30 BRBS 49, 52(CRT).

[6] While the administrative law judge's finding that the amputation did not impede claimant's ability to perform longshore work is not relevant to the pre-existing permanent partial disability issue in this case, claimant's work capabilities are properly considered in addressing contribution. In this regard, employer asserts that claimant's finger amputation affects his employment opportunities, Brief at 12-13, while Director asserts it has no effect on his current wage-earning capacity.

Accordingly, the administrative law judge judge's denial of Section 8(f) relief based on claimant's prior back and leg injuries is affirmed. The administrative law judge's finding that claimant's 1958 right index finger amputation is not a manifest pre-existing permanent partial disability for purposes of Section 8(f) is reversed, his denial of Section 8(f) relief based on that condition is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge