

REYLANS TAPANES)	
)	
Claimant)	
)	
v.)	
)	
POMTOC)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	DATE ISSUED: 05/20/2010
ASSOCIATION, LIMITED c/o LAMORTE)	
BURNS & COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Granting the Petition for Section 8(f) Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Laurence F. Valle and Michael F. Kelley (Valle, Craig & Vasquez, P.A.), Miami, Florida, for employer/carrier.

Kathleen H. Kim (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting the Petition for Section 8(f) Relief (2007-LHC-02007) of Administrative Law Judge Richard K. Malamphy 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 right rotator cuff during the course of his employment as a mechanic for employer on October 31, 2005. Prior to the hearing on the claim, claimant and employer submitted stipulations of fact to the administrative law judge that resolved the outstanding issues between them. The parties stipulated that claimant is entitled to ongoing permanent partial disability benefits at the rate of \$900 per week. 33 U.S.C. §908(c)(21), (h). The administrative law judge accepted the stipulations and entered a compensation order awarding benefits to claimant. The administrative law judge left the record open for the receipt of briefs and evidence from the Director and employer concerning employer's request for Section 8(f) relief, 33 U.S.C. §908(f).

The administrative law judge awarded employer Section 8(f) relief, finding that claimant had a manifest, pre-existing cardiac disability that precludes claimant from undergoing surgery to repair his shoulder injury, thus increasing his disability over that which would result from the shoulder injury alone. Specifically, the administrative law judge found that claimant's absence from work for a month following his April 2005 heart attack establishes that claimant's pre-existing cardiac disability was manifest to employer. Decision and Order at 6. The administrative law judge credited the December 4, 2007, opinion of Dr. Sinnreich that the claimant had not been cleared for shoulder surgery from a cardiac standpoint, that if he could undergo this surgery claimant would be able to return to work, and that claimant's disability was "absolutely" materially and substantially greater than it would have been if claimant suffered from only a rotator cuff tear. Similarly, the administrative law judge credited Dr. Krichmar's opinion that claimant could not be cleared for surgery from a cardiovascular standpoint. *Id.* at 7. Accordingly, the administrative law judge awarded employer relief from continuing compensation liability upon the expiration of 104 weeks after June 13, 2008.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief, contending that none of the elements therefor is satisfied. Employer responds, urging affirmance of the administrative law judge's decision.

Section 8(f) of the Act shifts liability for compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that 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 injury alone. *See, e.g., Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief.

We first address the Director's contention that the administrative law judge erred in finding that employer satisfied the manifest element. The manifest element will be satisfied if employer had actual knowledge of the pre-existing condition or if there are medical records in existence that pre-date the work accident from which the condition was objectively determinable. *C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994). The medical records 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 generally Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989); *Callan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998).

The administrative law judge found that claimant's pre-existing cardiac disability was manifest because claimant self-reported that he had a heart attack in April 2005 that caused him to miss one month of work. Decision and Order at 6. The Director contends that this finding is not supported by substantial evidence because there was no testimonial evidence admitted into the record. Moreover, the Director contends that the record does not contain any medical records pre-dating the work accident in October 2005 from which any pre-existing condition was objectively determinable.

We reverse the administrative law judge's grant of Section 8(f) relief, as the administrative law judge's finding that the manifest element is satisfied is not supported by substantial evidence. The only evidence that claimant had a heart attack in April 2005 is contained in medical records post-dating the work accident, wherein claimant reported

to the physicians that he had had a heart attack.¹ Thus, there is no evidence of record from which it can be ascertained that employer had actual knowledge of claimant's heart attack prior to the work accident. *See, e.g., Armand v. American Marine Corp.*, 21 BRBS 305 (1988). In addition, employer did not introduce into evidence any medical records that pre-date the work accident. The manifest element cannot be satisfied with medical records post-dating the work accident. *B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007). Therefore, there is no evidence of record from which the administrative law judge could determine that employer had constructive knowledge of any prior heart attack and resulting serious, lasting physical condition. *C. G. Willis, Inc.*, 31 F.3d 1112, 28 BRBS 84(CRT); *see also C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3^d Cir. 2008). As employer did not satisfy its burden of proving all elements necessary for Section 8(f) relief, the administrative law judge's grant of such is reversed.²

¹ As the Director correctly contends, no formal hearing was held and thus claimant did not testify before the administrative law judge. Moreover, despite the administrative law judge's suggestion that claimant was deposed, no deposition was offered into evidence by employer in support of its claim for Section 8(f) relief.

² As the manifest element is not met, we need not address the Director's contentions that the pre-existing permanent partial disability and contribution elements also are not met. We note, however, that although claimant currently has some serious cardiac defects that contribute to his inability to have surgery, the Director correctly notes that it cannot be ascertained from the record whether they are the same as those that caused or resulted from claimant's 2005 heart attack.

Accordingly, we reverse the administrative law judge's Decision and Order Granting the Petition for Section 8(f) Relief.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge