BRB No. 07-0100

B.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED: 09/26/2007
	)	
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 Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (Marcia J. Cleveland, LLC), Bath, Maine, for claimant.

Stephen Hessert (Norman, Hanson & DeTroy, LLC), Portland, Maine, for self-insured employer.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-LHC-2108, 2005-LHC-2109) of Administrative Law Judge Daniel F. Sutton 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 worked for employer from 1987 until March 15, 2004, when he stopped work due to increasing back pain. The parties stipulated that claimant has a totally disabling work-related back condition, which reached maximum medical improvement on May 25, 2004. Thus, they agreed that claimant is entitled to temporary total disability benefits from March 15, 2004 through May 24, 2004, and to ongoing permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). In addition, claimant sought benefits for a 16.3 percent binaural hearing loss, based on an October 24, 2004, audiogram. Employer contended that a scheduled award for this stipulated loss cannot run concurrently with an award for total disability. Employer also sought relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

The administrative law judge found that a permanent partial disability award for hearing loss and a total disability award for the back injury can run concurrently so long as they do not exceed the statutory maximum compensation rate for total disability. As claimant's compensation rate times two ($471.59 x 2=$943.18), is less than the applicable Section 6(b) maximum rate of $1,030.78, 33 U.S.C. §906(b), the administrative law judge awarded benefits for both injuries. With regard to the claim for Section 8(f) relief, the administrative law judge found that claimant's pre-existing back problems were not manifest to employer. Therefore, he denied Section 8(f) relief.

On appeal, employer challenges the concurrent awards for permanent total disability and scheduled permanent partial disability. Employer also challenges the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the concurrent awards. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's denial of Section 8(f) relief be affirmed.

Employer first contends that the administrative law judge erred in awarding claimant concurrent benefits for permanent total disability and scheduled permanent partial disability. In *Rupert v. Todd Shipyards Corp.*, 239 F.2d 276 (9th Cir. 1956), the claimant had a serious fall at work which left him totally disabled, as well as with serious facial disfigurement. The Ninth Circuit affirmed the district court's disallowance of concurrent permanent total disability and permanent partial disability awards, as a permanent total disability award "presupposes a permanent loss of all earning capacity." *Id.* at 276-277. The court's holding also rested on the language of Section 8(c) of the Act, 33 U.S.C. §908(c), which states that permanent partial disability "shall be in addition to compensation for temporary total disability or temporary partial disability," but does

not state it should be paid in addition to permanent total disability. Similarly, in *Korineck v. General Dynamics Corp.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987), the Second Circuit affirmed a denial of concurrent awards. The claimant was temporarily totally disabled from March 16, 1978 to September 10, 1978, and permanently totally disabled from September 11, 1978, due to back injuries. Claimant's hearing loss was diagnosed in July 1979. The court followed *Rupert* in holding that claimant was not entitled to a scheduled award for the hearing loss, as claimant was already permanently totally disabled.

The Board also has addressed several cases presenting the issue of whether claimant can receive permanent partial disability for hearing loss concurrently with total disability, either temporary or permanent, for a different injury. In *James v. Bethlehem Steel Corp.*, 5 BRBS 707 (1977), and *Collins v. Todd Shipyards Corp.*, 5 BRBS 334 (1977), the Board held that the claimants were not entitled to concurrent temporary total disability and scheduled permanent partial disability, citing *Rupert* for this principle. The Board later explained that the theory behind the cases is that a claimant cannot be more than totally disabled regardless of whether the disability is permanent or temporary. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985). If the total disability lapses, however, the scheduled award can be paid. *Id.*

In addition, it is well established that the primary consideration regarding a claimant's entitlement to concurrent total disability and scheduled benefits is whether the onset of the scheduled disability preceded or post-dated the onset of the total disability. *See Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem sub nom. Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); *see also Rathke v. Lockheed Shipbuilding & Constr. Co.*, 16 BRBS 77 (1984). In *Mahar v. Todd Shipyards Corp.*, 13 BRBS 603 (1981), the onset of the claimant's total disability due to lung disease pre-dated the audiogram demonstrating hearing loss. The Board held that claimant was not entitled to hearing loss benefits even if the claim for hearing loss was filed first. The Board stated that claimant can receive the scheduled permanent partial disability award only "where claimant is able to show that the permanent partially disabling injury occurred prior to the onset of permanent total disability...[c]laimant can receive scheduled benefits for the period of time, if any, between the permanent partially disabling injury and the onset of permanent total disability." *Id.* at 606; *see also Bouchard v. General Dynamics Corp.*, 14 BRBS 839 (1982).

In this case, claimant is a retiree for purposes of his hearing loss claim, as his back condition forced his retirement in March 2004. *See Manders v. Alabama Dry Dock & Shipbuilding Co.*, 23 BRBS 19 (1989). Claimant's claim is based on a audiogram administered on October 20, 2004, demonstrating a 16.3 percent binaural hearing loss. CX 3. Pursuant to *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS

151(CRT) (1993), the benefits of a retiree with an occupational hearing loss commence on the date of last exposure to injurious noise. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993); *cf. Byrd v. J.F. Shea Constr. Co.*, 18 BRBS 48, *aff'd mem.*, 802 F.2d 1483 (1986) (in this pre-*Bath Iron Works* case, the Board held claimant not entitled to concurrent permanent total disability benefits for a back injury and scheduled hearing loss benefits as hearing loss onset, under the 1984 Amendments, is the date of receipt of audiogram and report which post-dated the onset of permanent total disability). If claimant's October 2004 audiogram was the only audiogram of record, *see infra,* the onset of claimant's disability due to the hearing loss would not predate his onset of total disability. Claimant's total disability commenced March 15, 2004, the day he stopped working, and the administrative law judge summarily found this date also to be claimant's date of last exposure to injurious noise. Thus, claimant would not be entitled to benefits for his hearing loss claim, premised on a March 15, 2004, date of injury, as the hearing loss did not predate his total disability. *See Korineck,* 835 F.2d at 44, 20 BRBS at 66(CRT); *Tisdale,* 13 BRBS at 172.

In his decision, the administrative law judge did not discuss these concurrent award cases. Rather, he discussed cases permitting concurrent awards where claimant has an ongoing permanent partial disability due to a loss in wage-earning capacity at the time he suffers a permanently totally disabling second injury, *see, e.g., Brady Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.,* 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied,* 449 U.S. 905 (1980), or where claimant suffers consecutive or concurrent partially disabling injuries, either scheduled or unscheduled. *See I.T.O. Corp. of Baltimore v. Green*, 185 F.3d 239, 33 BRBS 139(CRT) (4th Cir. 1999); *Padilla v. Pedro Boat Works*, 34 BRBS 49 (2000); *Frye v. Potomac Electric Power Co.,* 21 BRBS 194 (1988). In such cases, concurrent awards are permitted so long as the maximum rate for the combined awards does not exceed the maximum compensation rate, *see Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005), and the administrative law judge may fashion an award to accomplish this purpose without diminishing claimant's compensation. *Green,* 185 F.3d 239, 33 BRBS 139(CRT). These cases are, in fact, consonant with the cases discussed above, as the key factor is the existence of a permanent partial disability *prior to* the occurrence of a totally disabling injury. They do not, however, support concurrent awards in this case merely because claimant's total recovery would be less than the statutory maximum compensation rate. That concept is limited to loss of wage-earning capacity cases, and is based on the theory that both the prior permanent partial disability award and the subsequent permanent total disability award are necessary to make claimant whole, as the first injury diminished claimant's wage-earning capacity. *Price*, 382 F.3d 878, 38 BRBS 51(CRT); *Brady-Hamilton Stevedore Co.*, 58 F.3d 419, 29 BRBS 101(CRT). These concerns are not present where the total disability occurs first and the award therefore

fully compensates claimant for this loss. *See Rupert*, 239 F.3d 276; *Turney*, 17 BRBS at 235 n.4.

Therefore, because the administrative law judge's award of concurrent benefits is not in accordance with law, we vacate the award of scheduled permanent partial disability. We must remand this case as the record contains several audiograms pre-dating the onset of claimant's total disability. *See* CX 7. These audiograms were not interpreted under the American Medical Association *Guides to the Evaluation of Permanent Impairment* at the time they were administered at employer's facility, but were subsequently interpreted by some method by employer. BF EX 12; 33 U.S.C. §908(c)(13)(E). Claimant, in his response, notes the existence of these audiograms in the record and urges that they support the administrative law judge's award of scheduled permanent partial disability benefits in his case. Thus, remand is required for the administrative law judge to consider claimant's entitlement to benefits for a hearing loss based on the audiograms pre-dating the onset of claimant's March 15, 2005, total disability. Claimant may receive a scheduled award for hearing loss for the appropriate number of weeks up to the point he became totally disabled, at which point any scheduled hearing loss award would terminate.[1]

We next address the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent total disability from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) claimant's permanent total disability is not solely due to the subsequent work-related injury. *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992); *see also Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The administrative law judge found that claimant had pre-existing degenerative back problems that were sufficiently serious so as to require cortisone injections. The administrative law judge found, however, that employer did not have actual or constructive knowledge of claimant's pre-existing back problems. Thus, the administrative law judge found that the manifest element was not satisfied. 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

[1] In his consideration of the prior audiograms, the administrative law judge must discuss any other issues that may arise including the extent of any impairment, average weekly wage, date of last exposure and onset of hearing loss.

disability or there were medical records in existence from which the condition was objectively determinable. *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987); *Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998).

On appeal, employer contends that Dr. Thibodeaux's opinion establishes that claimant's pre-existing back condition would have been observable in objective tests taken in 2000, or even earlier, and, thus, that the manifest element is satisfied. We reject this contention.

Claimant first sought medical treatment for his work-related back pain on January 17, 2004, and was given restricted duty work. CX 7. There are no medical records pre-dating January 27, 2004, that discuss any degenerative conditions in claimant's back. It is insufficient to contend that a medical condition would have been shown to exist had the proper medical tests been performed. *White*, 812 F.2d 33, 19 BRBS 70(CRT); *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983). Moreover, a post hoc diagnosis of a pre-existing condition will not satisfy the manifest element. *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). As claimant's degenerative back condition was neither actually nor constructively manifest to employer, the administrative law judge properly denied Section 8(f) relief. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993).

Accordingly, the administrative law judge's award of scheduled permanent partial disability compensation for claimant's work-related hearing loss is vacated. The case is remanded for further consideration of claimant's entitlement to benefits for this loss, consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge