BRB No. 01-0643

JAMES T. SULLIVAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAYTHEON ENGINEERS	)	DATE ISSUED: April 25, 2002
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Denying Section 8(f) Relief of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Craig A. Alexander (Lange, Simpson, Robinson & Somerville LLP), Birmingham, Alabama, for claimant.

Kurt A. Gronau (Law Offices of Kurt A. Gronau), Glenwood Springs, Colorado, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Denying Section 8(f) Relief (2000-LHC-2535) of Administrative Law Judge Robert J. Lesnick 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*., as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a hazardous waste coordinator on Johnston Atoll, injured his back at work on November 12, 1995. At about the same time, claimant left the island for seven weeks to seek medical treatment for his swollen left leg. During the time he was off the island, claimant was diagnosed with back problems. When he returned in February 1996, he was restricted to modified duty due to his back problems.[1] Claimant resigned in September 1996 because of his perceived inability to perform the job and because it was "time to go." Currently, he is working in a sedentary position as a control room operator in Alabama. Claimant sought permanent partial disability benefits.

The administrative law judge awarded claimant permanent partial disability benefits based on his finding that claimant's current, reduced earnings fairly and reasonably represent his post-injury wage-earning capacity. The administrative law judge did not address whether employer established the availability of suitable alternate employment at its facility, finding it irrelevant as claimant's claim is for partial, and not total, disability benefits. The administrative law judge denied employer's request for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's failure to fully address the extent of claimant's disability and the administrative law judge's denial of Section 8(f) relief. Claimant responds in support of the administrative law judge's award of benefits to which employer replies. The Director has not responded to this appeal.

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[1]Claimant was restricted from lifting heavy objects and using a forklift, which were duties required of his usual work. Tr. at 40-41, 90, 96.

Employer initially asserts that the administrative law judge erred by not addressing whether claimant is capable of working at employer's facility. Employer contends claimant is capable of such work and therefore has no loss of wage-earning capacity. A claimant establishes his *prima facie* case of total disability if he is unable to perform his usual employment duties due to his work-related injury. *See Gacki v. Sea-Land Serv., Inc.*, 33 BRBS 127 (1998). If claimant succeeds in establishing that he is unable to perform his usual work duties, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 1539 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Employer may meet this burden by offering claimant a suitable light duty position in its facility. *See Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT)(5th Cir. 1996); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

Although employer is correct, we hold that any error in the administrative law judge's failure to address these issues is harmless in light of the uncontradicted medical and lay evidence which establishes that claimant is unable to physically perform his usual work, his modified post-injury work with employer, or any supervisory job that employer may have offered him. The opinions of Drs. Savage and Hrynkiw establish that claimant cannot return to his usual work which required medium to heavy labor because Dr. Savage restricted claimant to medium work and Dr. Hrynkiw restricted claimant to sedentary to light work. Emp. Exs. 4 at 31, 32, 37, 5 at 12. Moreover, claimant's testimony, corroborated by the testimony of Mr. Carmack, claimant's former supervisor, establishes that claimant's modified post-injury job was not suitable in that claimant testified that he was having difficulty performing this job and Mr. Carmack testified that claimant's back injury occasionally affected his ability to perform his post-injury modified duty job and caused him to miss work. Tr. at 40-41, 50, 82, 96-97, 104, 110. Additionally, claimant's uncontradicted testimony that he was physically unable to perform in a supervisory capacity establishes that any supervisory job employer may have offered him is not suitable. Tr. at 88-90. Lastly, the testimony of Mr. Jones, employer's safety manager, that employer could have accommodated claimant's 40-pound lifting restriction does not establish that employer offered claimant suitable employment at its facility. Tr. at 135. Mr. Jones testified that he had no hiring authority and conditioned his ability to recommend claimant for a modified duty job on claimant's ability to pass employer's required annual physical examination. Tr. at 135-136, 143. Thus, as the evidence does not establish the suitability of any job at employer's facility, we affirm the administrative law judge's award of partial

disability benefits based on claimant's current wages as a control room operator.[2] 33 U.S.C. §908(c)(21), (h).

Employer also contends that the administrative law judge erred in denying it Section 8(f) relief as Dr. Savage's opinion establishes that claimant suffered from a manifest pre-existing permanent partial back disability and claimant's torn right rotator cuff constitutes a manifest pre-existing permanent partial disability. Section 8(f) shifts liability to pay compensation for permanent partial disability from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if employer establishes the following three prerequisites: 1) the employee had an existing permanent partial disability; 2) the disability was manifest to employer prior to the employment injury; and 3) the current disability is not due solely to the subsequent injury, and is materially and substantially greater due to the contribution of the pre-existing disability than that which would have resulted from the subsequent injury alone. *Marine Power & Equip. v. Dep't of Labor,* 203 F.3d 664, 33 BRBS 204(CRT)(9th Cir. 2000). A pre-existing permanent partial disability is a serious lasting physical condition that would motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85(CRT)(9th Cir. 1991); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). The manifest requirement of Section 8(f) is satisfied if, prior to the subsequent injury, employer had actual knowledge of the pre-existing disability or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82(CRT)(9th Cir. 1991); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

We affirm the administrative law judge's finding that claimant did not have a manifest pre-existing permanent partial disability within the meaning of Section 8(f). The administrative law judge acted within his discretion in rejecting Dr. Savage's opinion that claimant suffered from a 10 to 11 percent pre-existing permanent partial back disability with an additional 3 percent caused by the work injury, finding the opinion speculative since it was given two years after claimant's 1995 work injury and Dr. Savage stated he did not perform a full rating examination on claimant. *See Campbell Industries*, 678 F.2d 836, 14 BRBS 974*; Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); Decision and Order at 18; Emp. Ex. 4

[2]This finding is not challenged on appeal.

at 38. Moreover, the administrative law judge properly concluded that claimant's medical records from the Veterans Administration, listing certain back problems and the date they occurred - low back syndrome on August 4, 1969, degenerative joint disease of the cervical spine on November 6, 1988, and degenerative joint disease of both hips and spine on July 19, 1990 - do not establish that claimant had a disabling back injury. No award was made for any back condition, Emp. Ex. 6 at 69, 71, 72, and the mere fact of prior injury does not establish that claimant had a serious lasting physical problem to his back. *See Todd Shipyards Corp. v. Director, OWCP*, 793 F.3d 1012, 19 BRBS 1(CRT) (9th Cir. 1986). Additionally, Dr. Hrynkiw stated that claimant suffered no back impairment prior to the work injury. Emp. Ex. 5 at 9. Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not have a manifest pre-existing back disability.

Contrary to employer's remaining contention, the administrative law judge acted within his discretion in not addressing whether claimant's torn right rotator cuff is a pre-existing permanent partial disability as employer's merely stated in its Section 8(f) application that the rotator cuff injury is an unscheduled injury.[3] Emp. Ex. 3 at 4. Therefore, we affirm the administrative law judge's denial of Section 8(f) relief.[4] *Campbell Industries,* 678 F.2d 836, 14 BRBS 974*.*

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Denying Section 8(f) Relief is affirmed.

SO ORDERED.

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[3]Employer's Section 8(f) application contains the following relevant two sentences regarding claimant's rotator cuff injury under the heading of "The pre-existing permanent partial impairment to Claimant's back."

> [Claimant] was awarded a 30% disability based upon various partial disabilities to include a hiatal hernia, duodentis (sic) and history of diverticulitis, tinnitus and degenerative joint disease with history of rotator cuff tear, right shoulder. Like the back, this latter impairment is an unscheduled injury pursuant to §8 of the LHWCA.

Emp. Ex. 3 at 4.

[4]Based on our affirmance of the administrative law judge's findings that employer did not establish a manifest pre-existing permanent partial disability, we need not address the administrative law judge's finding regarding the contribution requirement of Section 8(f) relief.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge