BRB No. 05-0649

RUDOLPH WILLIAMS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	DATE ISSUED: 04/28/2006
	)	
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 of Larry W. Price, Administrative Law Judge, United States Department of Labor.

F. Nash Bilisoly and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Matthew W. Boyle (Howard M. Radzely, 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.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-1019) of Administrative Law Judge Larry W. Price 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 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 suffered two head injuries during the course of his employment. In 1989, claimant jammed his head against a door and suffered an acute cervical injury, but he returned to work despite continuing parasthesia. EX 2. On December 20, 1991, claimant again hit his head while climbing stairs. He has been unable to return to work since the date of the second injury. EX 8.

Employer did not contest the compensability of claimant's claim and paid claimant permanent total disability benefits. Employer sought relief under Section 8(f) of the Act, 33 U.S.C. §908(f). In his Decision and Order, Administrative Law Judge Campbell addressed the justiciability of the claim for Section 8(f) relief, concluding that despite the absence of evidence that a claim had been filed and a compensation order issued, he could address the merits of employer's entitlement to Section 8(f) relief. Judge Campbell, however, found that employer failed to establish such entitlement and denied Section 8(f) relief.

Employer appealed to the Board contending that Judge Campbell erred in denying Section 8(f) relief. The Director filed a motion to dismiss employer's appeal, contending that until there was an Order finding the underlying claim compensable there could be no determination regarding the applicability of Section 8(f) relief.

In its Order, *Williams v. Metro Machine Corp.*, BRB No. 00-0977 (Feb. 28, 2001)(unpub.), the Board granted the Director's motion to dismiss, stating that Judge Campbell was procedurally prevented from addressing Section 8(f) without an underlying award as relief cannot be granted if there is no award for permanent disability in excess of 104 weeks. *See* 33 U.S.C. §908(f)(1). Accordingly, the case was remanded for a decision on the merits of the claim or for the issuance of an order based on the parties' stipulations.

On remand, Administrative Law Judge Price issued an order awarding compensation benefits for permanent total disability based upon the stipulations of the parties.[1] Judge Price also adopted Judge Campbell's Decision and Order of June 7, 2000, denying employer's petition for relief under Section 8(f) of the Act.

Employer appeals, arguing that Judges Price and Campbell erred in denying it Section 8(f) relief. The Director responds, urging affirmance.

[1] The parties stipulated to claimant's entitlement to temporary total disability benefits from December 21, 1991, to February 6, 1996, the date of maximum medical improvement, and to permanent total disability benefits thereafter. Price Decision and Order at 4.

Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability is not due solely to the subsequent work-related injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982).

The administrative law judge found that although employer established that claimant had a pre-existing disability, *i.e.*, cervical spondylosis and degenerative disc disease, it failed to establish that this pre-existing disability was manifest to employer. The administrative law judge thus did not address the contribution element necessary for Section 8(f) relief.

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 condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *Director, OWCP v. Universal Terminal & Stevedoring Corp*., 527 F.2d 452, 8 BRBS 498 (3d Cir. 1978). The medical records pre-existing the subsequent injury need not indicate the severity or precise nature of the pre-existing condition in order for the manifest requirement to be satisfied; rather, medical records will satisfy this requirement as long as they contain sufficient, unambiguous and obvious information regarding the existence of a serious, lasting physical problem. *See Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992), *aff'g Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988).

Employer relies on claimant's medical records relating to the 1989 cervical injury to support its claim for Section 8(f) relief based on claimant's degenerative neck condition. The appropriate legal standard for establishing the manifest requirement is a showing of objective evidence of a serious physical condition, *i.e.*, a medically significant condition that would motivate a cautious employer to discharge the employee because of the increased risk of liability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69(CRT) (D.C. Cir. 1990). A diagnosis made after the second injury of a pre-existing condition based on medical records in existence prior to the date of injury is insufficient to meet the manifest requirement. *Caudill v. SeaTac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. SeaTac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993) (table); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984).

The administrative law judge found that an x-ray taken at the time of claimant's first accident in 1989, which had been destroyed, was not sufficient to meet this standard. The administrative law judge relied on the contemporaneous reading of the radiologist that the 1989 x-ray was a "normal study." EX 6. The administrative law judge found Dr. Klara's opinion, given in 1999, that the x-ray would have shown claimant's congenital shallow spinal canal and spondylosis, EX 7 at 7, cannot satisfy the manifest element, as a *post hoc* diagnosis may not be used to meet employer's burden. The administrative law judge also found that Dr. Klara's supposition about what the x-ray would have shown cannot be credited over the contemporaneous reading of the x-ray as normal.[2] Campbell Decision and Order at 5.

We affirm the administrative law judge's finding that Dr. Klara's opinion is insufficient to satisfy the manifest element, as his finding is in accordance with law and as he rationally gave Dr. Klara's opinion diminished weight. *Caudill*, 25 BRBS at 99; *Hitt*, 16 BRBS at 356. We agree with employer, however, that the case must be remanded because the administrative law judge did not discuss all the relevant evidence relating to whether claimant's arthritic condition was manifest to employer. *See generally Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting). Specifically, employer correctly contends that the administrative law judge did not address the form filled out by Dr. Mistry at the time the x-ray was taken. Dr. Mistry wrote that claimant had an "irregularity at C-5" and "mild OA." EX 5 at 1. In addition, claimant was advised to wear a cervical collar as a result of his 1989 injury. Employer thus contends that it had actual knowledge of claimant's pre-existing disability. On remand, the administrative law judge must discuss whether this evidence provides sufficient, unambiguous information regarding the existence of the serious, lasting problem that constitutes claimant's pre-existing disability, *i.e.*, the degenerative disc disease. *See generally C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994); *Vlasic v. American President Lines*, 20 BRBS 188 (1987). If, on remand, the administrative law judge finds that claimant's pre-existing permanent disability was manifest, he must address the contribution element. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).

[2] As a contemporaneous reading of the x-ray is in existence, we reject employer's contention that the manifest element is met because the x-ray itself has been destroyed. *Cf. Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987) (conditions constructively manifest based on circumstantial evidence where actual medical records have been destroyed).

Accordingly, the administrative law judge's Decision and Order awarding benefits to claimant is affirmed. The case is remanded for the administrative law judge to further address employer's entitlement to Section 8(f) relief consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge