

BERNARD D. BOROSKI )  
 )  
 Claimant )  
 )  
 v. )  
 )  
 DYNCORP INTERNATIONAL )  
 )  
 and )  
 )  
 INSURANCE COMPANY OF THE STATE ) DATE ISSUED: 04/16/2012  
 OF PENNSYLVANIA/AIG )  
 WORLDSOURCE )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

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

Roger A. Levy and Stephanie N. Seaman (Laughlin, Falbo, Levy & Moresi), San Francisco, California, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Relief (2004-LHC-02359) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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). This is the third time this case is before the Board on the issue of employer's entitlement to Section 8(f) relief, 33 U.S.C. §908(f).

Claimant, who began working for employer in Bosnia as a helicopter mechanic in January 2000, was exposed to chemical vapors while working in employer's blade shop. As a result of this exposure, claimant's eyes would become irritated and water. In April 2002, claimant's vision was reduced to distinguishing shapes and he lost color vision. His visual acuity at that time was measured at 20/400 in each eye. Claimant was diagnosed with atrophic maculopathy with reduced cone function and pigmentary dystrophy, or choroidal sclerosis.<sup>1</sup> Claimant sought benefits for permanent total disability, 33 U.S.C. §908(a), from his last day of employment on April 19, 2002. The parties agreed that claimant is permanently totally disabled and that he would be entitled to benefits under the Act at the maximum compensation rate. Employer contested the cause of claimant's eye condition, and it submitted an application for Section 8(f) relief.

In his initial decision, the administrative law judge found that claimant's working conditions with employer aggravated his underlying genetic eye impairment and he thus ordered employer to pay claimant benefits for permanent total disability from April 19, 2002, at the maximum compensation rate.<sup>2</sup> The administrative law judge also found that employer is not entitled to Section 8(f) relief, as the evidence did not establish that claimant's pre-existing eye disorder was manifest to employer. The Board affirmed the administrative law judge's award of benefits, vacated his denial of Section 8(f) relief, and remanded the case for further consideration of that issue. *B.B. [Boroski I] v. DynCorp*

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<sup>1</sup>Choroidal sclerosis, also known as choroideremia, is a genetic disorder of sight that usually affects males. Major symptoms of this disorder include a progressive loss of the peripheral field of vision and night blindness.

<sup>2</sup>*See Boroski v. DynCorp Int'l*, 662 F.3d 1197 (11<sup>th</sup> Cir. 2011), *pet. for cert. filed*, 80 U.S.L.W. 3459 (U.S. Jan. 25, 2012) (Nos. 11-926, 11-936), *abrogated by Roberts v. Sea-Land Services, Inc.*, 566 U.S. \_\_\_, 2012 WL 912953 (March 20, 2012).

*Int'l*, BRB No. 08-0550 (Jan. 30, 2009) (unpub). Specifically, the Board stated that the administrative law judge did not adequately discuss the medical evidence or make sufficient findings of facts regarding the pre-existing permanent partial disability and manifest elements. *Id.*

On remand, the administrative law judge granted employer Section 8(f) relief, as it established that claimant had a pre-existing visual disorder that was manifest to employer, and that claimant's current disability is not due solely to his work-related injury but rather was contributed to by his pre-existing visual disorder. The Board affirmed the administrative law judge's finding that employer established the pre-existing permanent partial disability element of Section 8(f), vacated his finding that employer satisfied the manifest element, and remanded the case for the administrative law judge to address the medical evidence pre-dating claimant's April 19, 2002, work injury to discern whether, at that time, employer was constructively or actually aware of any serious and lasting physical condition, irrespective of whether the exact nature of claimant's condition was known. *Boroski v. Dyncorp Int'l [Boroski II]*, BRB No. 09-0874 (Sept. 16, 2010) (unpub). On remand, the administrative law judge found, after review of the pertinent evidence, that employer did not meet the manifest element. He thus denied employer's request for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's finding that it did not satisfy the manifest element of, and thus, 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. Employer filed a reply brief.

Employer contends that claimant's records documenting medical treatment and evaluation of his eyes prior to his work in Bosnia for employer establishes that it was constructively aware that claimant had a serious and lasting physical condition sufficient to meet the manifest element for purposes of Section 8(f). Employer asserts that this evidence, regardless of the belief that claimant's vision was correctable, is sufficient to establish that claimant had a serious, lasting physical condition which would prompt a cautious employer viewing such records to consider terminating or not hiring claimant.

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 from which the condition was objectively determinable. *See C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11<sup>th</sup> Cir. 1994); *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91(CRT) (5<sup>th</sup> Cir. 1997); *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31

BRBS 142 (1997); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). The medical records pre-existing the injury need not indicate the precise nature of the pre-existing condition in order for the condition to be manifest; however, without a documented diagnosis, there must be sufficient unambiguous information in the available record regarding a serious, lasting physical condition. *See, e.g., Wiggins*, 31 BRBS 142. It is not sufficient if the disability would have been “discoverable” by means of further testing. *C.G. Willis*, 31 F.3d 1112, 28 BRBS 84(CRT); *White v. Bath Iron Works Corp.*, 812 F.2d 33, 19 BRBS 70(CRT) (1<sup>st</sup> Cir. 1987). Also insufficient are *post hoc* interpretations of pre-existing medical records, *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 (9<sup>th</sup> Cir. 1993).

In *Boroski II*, the Board held that Dr. Goldberg’s September 2006 statements explaining that claimant’s medical records from 1988 through 2002, in conjunction with his present optical findings, establish that claimant has a long-standing eye condition, are, a *post hoc* interpretation of claimant’s pre-existing medical records. Thus, his opinion is insufficient to satisfy the manifest element as a matter of law.<sup>3</sup> *See Boroski II*, slip op. at 6, *citing B.S. [Stinson] v. Bath Iron Works Corp.*, 41 BRBS 97 (2007). The Board additionally stated that the administrative law judge improperly relied on Dr. Goldberg’s 2006 statement that the disorder would have been apparent to a specialist on an examination prior to 2002, as it is insufficient, for purposes of Section 8(f), to contend that a medical condition would have been shown to exist had the proper medical tests been performed. *See Boroski II*, slip op. at 6, *citing White*, 812 F.2d 33, 19 BRBS 70(CRT); *Lambert’s Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4<sup>th</sup> Cir. 1983). Consequently, the Board vacated the administrative law judge’s finding that employer satisfied the manifest element and remanded the case for him to address the medical evidence pre-dating claimant’s April 19, 2002, injury. *Boroski II*, slip op. at 6.

On remand, the administrative law judge concluded that claimant’s eye impairment was not manifest to employer prior to the April 2002 work accident. The administrative law judge found that while it is clear that visual abnormalities were noted beginning in 1988 and that these defects were reported to be more serious on each examination through 2000, claimant’s visual acuity was considered correctable until after claimant’s last day of work with employer in April 2002. Decision and Order at 5 (June 1, 2011). The administrative law judge added that given the correctable nature of claimant’s eye condition up to the April 2002 work event, none of the optical examiners

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<sup>3</sup>The Board also held that the June and August 2002 opinions of Drs. Gass and Sonkin, as well as the March 23, 2006 deposition testimony of Dr. Routledge, are *post hoc* interpretations which likewise cannot satisfy the manifest element. *Boroski II*, slip op. n. 5 at 6.

“made a dire prognosis which would have placed the employer on notice of the potential of future impairment.” *Id.* He thus concluded that employer did not meet the manifest element for purposes of Section 8(f) relief.

Claimant had eye examinations from August 1988 through May 2001, which document a deterioration of claimant’s vision. EXs 13, 15, 18, 39. Nonetheless, the records pre-dating claimant’s April 2002 injury also indicate, as the administrative law judge found, that the decline in his vision was correctable. *Id.* These records also document abnormalities in claimant’s ocular fundi, pigment clumping, and paracentral and central scotomas, but they do not contain any contemporaneous explanation for these findings. *Id.* It is not until after claimant last worked for employer, on April 19, 2002, when he lost his color vision and his vision was otherwise reduced to distinguishing shapes, that the prior ocular anomalies were explained in terms of a long-term disease entity. Specifically, on August 2, 2002, Dr. Sonkin opined that claimant has a “degenerative retinal condition” that is “most consistent with a hereditary disease.” EX 14.

The administrative law judge rationally found that claimant had degenerating vision, with some color vision loss, prior to the date that he last worked for employer, but that the pre-2002 evidence did not contain a documented diagnosis or sufficient and unambiguous information regarding the existence of a serious, lasting physical problem.<sup>4</sup> *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9<sup>th</sup> Cir. 1991). Additionally, the record contains no medical evidence that claimant was considered seriously impaired by a degenerative eye condition prior to April 2002. There is no evidence that claimant received medications or underwent any specific medical treatment or surgical procedures for any eye condition prior to that date. Moreover, there is no evidence that claimant missed work before 2002 due to his vision, or that he was subject to any vision related restrictions or limitations, other than wearing prescription glasses. Thus, substantial evidence supports the administrative law judge’s finding that while claimant had visual abnormalities beginning in 1988 which were reported to be increasingly serious on each examination through 2000, claimant’s visual acuity was essentially correctable until after he last worked for employer in April 2002. Similarly, substantial evidence supports the administrative law judge’s conclusion that none of the

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<sup>4</sup>For example, while Major Cook, M.D., indicated, as of November 1, 1988, that he “suspects hereditary pigment dystrophy” due to the presence of the paracentral scotomata and pigment clumping in the retina, he did not further explain these findings. In fact, he recommended against performing any further tests and stated that he expected claimant to have normal vision throughout his life. EX 13, 34-35.

examiners prior to that date made a “dire prognosis” which would have placed the employer on notice of the potential of future impairment.

The administrative law judge fully addressed the pre-April 2002 medical evidence, and his finding that employer did not establish the manifest element is rational, supported by substantial evidence, and in accordance with law. We thus affirm the administrative law judge’s denial of Section 8(f) relief. *C.G. Willis*, 31 F.3d 1112, 28 BRBS 84(CRT); *see generally Callnan*, 32 BRBS 246.

Accordingly, the administrative law judge’s Decision and Order Denying Section 8(f) Relief 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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BETTY JEAN HALL  
Administrative Appeals Judge