BRB No. 98-1039

MARIO PESIC	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
SOUTHWEST MARINE, INCORPORATED	)	DATE ISSUED: April 26, 1999
	)	
and	)	
	)	
HAMILTON BALLARD, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Approving Stipulations, Awarding Benefits and Attorney Fees of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Daniel F. Valenzuela (Samuelsen, Gonzales, Valenzuela & Sorkow), San Pedro, California, for employer/carrier.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Officer of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Approving Stipulations, Awarding Benefits and Attorney Fees (96-LHC-2392) of Administrative Law Judge Daniel L. Stewart 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, a marine machinist, suffered a fall on April 10, 1993, during the course of his employment, resulting in injuries to his back, neck, and head. In his decision, the administrative law judge found claimant to be entitled to compensation for temporary total disability from April 10, 1993 to May 7, 1996, for permanent total disability from May 8, 1996 to December 31, 1997, and for permanent partial disability from January 1, 1998, and continuing; he also approved the parties' stipulation that claimant's counsel was entitled to a fee of $11,725, plus costs of $994.80. However, based upon his conclusion that employer failed to demonstrate that claimant suffered a pre-existing permanent partial disability, the administrative law judge denied employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer now appeals, contending that the administrative law judge erred in finding that it failed to establish the existence of a pre-existing permanent partial disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of relief under Section 8(f).

Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks where an employee suffers from a manifest pre-existing permanent partial disability which combines with a subsequent work-related injury, resulting in a permanent disability which is not solely due to the work-related injury. *See Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1333 (1997); *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990); *Dillingham Corp. v. Massey*, 505 F.2d 1126 (9th Cir. 1974). In addition, where claimant is permanently partially disabled following a work injury, his disability must be "materially and substantially" greater than would have resulted from the work injury alone. *See Quan v. Marine Power & Equip. Co.*, 31 BRBS 178 (1977). The issue in this case is whether employer met its burden of proving claimant suffered from a permanent partial disability prior to his work injury.

A pre-existing permanent partial disability has been defined as a serious, lasting physical condition such that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of compensation liability. *See, e.g., Lockheed*

Shipbuilding v. Director, OWCP, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991). In this regard, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has noted that the "cautious employer" standard is but one way to demonstrate a pre-existing permanent partial disability. *Mayes*, 913 F.2d at 1429, 24 BRBS at 30 (CRT). Moreover, a medical condition need not be economically disabling in order to constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *See Dugas v. Durwood Dunn, Inc.*, 21 BRBS 277 (1988).

In challenging the administrative law judge's denial of Section 8(f) relief, employer contends that the administrative law judge erred in determining that claimant's pre-existing vertigo and debilitating headaches do not constitute pre-existing permanent partial disabilities which could serve as a basis for a Section 8(f) award.[1] We agree with employer that the administrative law judge's Section 8(f) determination cannot be upheld, as he did not discuss the evidence of record in light of the relevant standard. Specifically, in the instant case, the record reflects that claimant suffered a medically cognizable physical ailment, *i.e.*, vestibular neuronitis and Meuniere's Syndrome, and has a long history of medical problems related to his vertigo and headaches, which were diagnosed as early as 1970. *See* JX 25; *see Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989). The administrative law judge, however, concluded that claimant's vertigo did not constitute a pre-existing permanent partial disability because there was little objective evidence to support its existence as a disability, claimant worked from 1986 until 1993, the date of the work-related accident, without restrictions, claimant reported no occurrences of his malady from 1986 until 1993, and claimant failed to give a history of these complaints to all of the physicians who examined him post-injury.

[1]Based upon the record evidence, the administrative law judge accepted as a finding of fact the parties' stipulation that claimant suffered dizziness and vertigo beginning in 1986 and continuing, as documented by claimant's physicians and diagnosed as probable Meuniere's Syndrome. Decision and Order at 3.

However, our review of the record indicates that, contrary to the administrative law judge's finding that claimant reported no incidents resulting from his alleged disability from 1986 until 1993, *see* Decision and Order at 14, claimant sought medical attention for his condition in 1986, 1987, 1990, and 1992.[2] *See* JX 25. Moreover, the fact that claimant's medical condition did not cause an economic disability and may have been asymptomatic for periods of time is not dispositive in determining the existence of a permanent partial disability within the meaning of Section 8(f). *See Curie v. Cooper Stevedoring Co.*, 23 BRBS 420 (1990). Claimant's pre-existing permanent condition need not result in a measurable impairment or actual inability to perform his job. *See Strout v. General Dynamics Corp.*, 27 BRBS 160 (1993)(Brown, J., dissenting). Moreover, although the administrative law judge based his conclusion upon the "cautious employer" standard, *see* Decision and Order at 13, that is not the only method by which employer may establish the existence of a pre-existing permanent partial disability. Rather, in the instant case, claimant's prior documented history of disease may provide substantial evidence to meet employer's burden. *See Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988).

Additionally, although the administrative law judge considered the absence of strong objective findings to trivialize claimant's condition, he failed to note that claimant's treating physicians, both before and after his work accident, believed his descriptions of his symptomology and stated that he was disabled. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). Although the objective evidence underlying claimant's complaints may not be extensive, it does provide support for his symptomology and, in this respect, no physician disputed claimant's complaints of dizziness and vertigo. The interpretation of objective data is a medical function; an administrative law judge may not substitute his opinion for that of the physicians of record. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84 (CRT)(1st Cir. 1997); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990).

In light of the foregoing, we vacate the administrative law judge's denial of Section 8(f) relief and remand the case for findings pertaining to the pre-existing permanent partial disability element of Section 8(f) to be rendered under the appropriate standard. If he finds that employer established the pre-existing permanent partial disability element of Section 8(f), he should then consider whether that pre-existing condition contributed to claimant's current level of disability.[3] *See Sproull,* 86 F.3d at 900, 30 BRBS at 52 (CRT); *E.P. Paup*

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[2]The record reflects that claimant sought treatment for vestibular neuronitis and Meuniere's Syndrome in September and December 1986, January 1987, February 1990, and October 1992. JX 2.

[3]As there are numerous medical reports of record predating the subject injury relating to claimant's problems, these conditions were clearly manifest prior to the work injury. *See*

Co. v. Director, OWCP, 999 F.2d 1341, 1352, 27 BRBS 41, 52 (CRT)(9th Cir. 1993).

JX 25; *see also Director, OWCP v. Campbell Industries*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge