BRB No. 10-0405

JOHN B. KOCH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
R. E. STAITE ENGINEERING, INCORPORATED	)	
	)	
and	)	
	)	
FREEMONT COMPENSATION	)	DATE ISSUED: 02/16/2011
	)	
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) Special Fund Relief and Decision and Order Denying Employer's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Richard C. Wootton and Marc T. Cefalu (Cox, Wootton, Griffin, Hansen & Poulos, LLP), 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) Special Fund Relief and Decision and Order Denying Employer's Motion for Reconsideration (2009-LHC-00772) of Administrative Law Judge Gerald M. Etchingham 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 sustained injuries to his head, neck, both shoulders, the left side of his rib cage, his back, hips, right knee and left ankle, in the course of his work for employer on June 5, 2000.[1] Employer voluntarily paid total disability and medical benefits from the date of the accident. A dispute, however, arose between the parties as to the effect of claimant's temporary part-time employment as an underwater welding instructor in 2006, 2007, and 2008. On August 3, 2009, the parties submitted stipulations to the administrative law judge seeking a compensation order relating to claimant's entitlement to benefits under the Act. In his August 12, 2009, decision, the administrative law judge approved the parties' stipulations and awarded claimant permanent total disability benefits from November 24, 2003. This decision was not appealed.

Employer separately pursued Section 8(f) relief, 33 U.S.C. §908(f), alleging that claimant suffered from pre-existing permanent partial disabilities to his neck and shoulders. The administrative law judge found that employer established the manifest element but not the contribution element with regard to claimant's neck injury, and did not establish either element with respect to the prior injuries to claimant's shoulders. Employer's motion for reconsideration, and accompanying requests to reopen the record and to have an oral argument on the issues contained in its motion for reconsideration, were denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's denial of its application for Section 8(f) relief. The Director, Office of Workers' Compensation

[1]On June 7, 2000, Dr. Hahn diagnosed multiple strains throughout claimant's spine and shoulders, a chest wall strain, right shoulder bursitis, bilateral hand neurapraxia, and temporomandibular joint disorder syndrome. EX A. Dr. Dodge subsequently diagnosed strains to claimant's cervical spine, lumbosacral spine, right knee, right wrist and hand, left elbow, and left and right shoulders. EX 17.

Programs (the Director), responds, urging affirmance. Claimant has not filed a response in this case.

Employer initially argues that the administrative law judge erred in finding that claimant currently suffers from a permanent total, rather than permanent partial, disability. Employer avers that it has always been its position that claimant is capable of returning to work, such that it was erroneous for the administrative law judge to find that the parties stipulated to claimant's entitlement to permanent total disability benefits.

In their application for a stipulated compensation order, the private parties acknowledged that they "have disputed the effect of [claimant's] temporary part time employment as an underwater welding instructor in 2006, 2007, and 2008." Joint Stipulations in Lieu of Trial and Request for Award of Benefits, Stip. 7. Nevertheless, the parties stipulated that:

> Provided Employer reinstates benefits effective 7/31/2009, [employer] shall make a onetime payment in the amount of $50 to resolve and satisfy: 1) Respondent's claim to credit in the amount of $21,100.24; 2) Claimant's claims to 10(f) adjustments commencing 10/1/02004; 3) Claimant's claim of non-payment of benefits and related penalties for compensation due April 28, 2009 through July 30, 2009; 4) Claimant's claim of non-payment of $5,000 and related penalties as set forth in paragraph 10 of the Stipulated Compensation Order of 3/14/2007; and 5) Claimant's claim for documented mileage reimbursements submitted to Respondent prior to 7/28/2009. *Employer agrees to re-instate benefits effective 7/31/2009 at a 10(f) adjusted rate of $729.25 per week with an initial payment issued and mailed on 7/31/2009 and every two weeks thereafter until further order of the court and employer agrees, in the future, if applicable, to make appropriate 10(f) adjustments effective each Oct. 1.*

Id. [emphasis added]. The administrative law judge relied on the latter part of this stipulation to order employer to resume payments to claimant of permanent total disability benefits at the Section 10(f) adjusted compensation rate of $729.25 per week. Neither party appealed the administrative law judge's compensation order. Instead, employer sought resolution of its application for Section 8(f) relief. In addressing employer's application, the administrative law judge noted that "the parties' individual positions related to the extent of claimant's disability currently at issue are unclear," since employer, in its original Section 8(f) petition to the district director, characterized claimant "as potentially having a permanent partial disability." Decision and Order Denying Section 8(f) Relief at 9. The administrative law judge, however, found that the parties' stipulation that claimant obtained permanent total disability status on November

24, 2003, is supported by substantial evidence in the form of Dr. Harris's report. Consequently, the administrative law judge analyzed employer's application for Section 8(f) relief from the perspective that claimant's work injury resulted in his permanent total disability.

On reconsideration of the denial of Section 8(f) relief, the administrative law judge viewed employer's motion as including a Section 22 modification request applicable to the extent of claimant's disability. The administrative law judge found that employer's challenge to the extent of claimant's disability is untimely as it stems from the administrative law judge's August 12, 2009, Stipulated Compensation Order, which employer did not appeal. Additionally, the administrative law judge declined to consider employer's Section 22 modification request since employer did not first file its request with the district director. The administrative law judge thus denied employer's motion for reconsideration.

Employer's first argument on appeal, that the administrative law judge erred in finding that the parties stipulated to claimant presently being permanently and totally disabled, is without merit. Although the stipulation does not explicitly use the term "permanent total disability," its reference to a Section "10(f) adjusted rate of $729.25,"[2] and employer's agreement "to make appropriate 10(f) adjustments effective each Oct. 1," supports the administrative law judge's finding that the parties agreed that employer would reinstate its payment of permanent total disability benefits effective July 31, 2009, and continuing "until further order of the court." *Id.* Moreover, as the Director states, the fact that the parties stipulated that claimant was "temporarily totally disabled from June 5, 2000, until November 23, 2003, and that "he became permanent and stationary [on] November 24, 2003," further supports a finding that claimant's disability became permanent and total from that date. Joint Stipulations in Lieu of Trial and Request for Award of Benefits, Stip. 6.

In addition, the administrative law judge properly found that employer's attempt to challenge the administrative law judge's initial award of permanent total disability benefits based on the parties' stipulations is untimely. Employer did not seek

[2]The parties stipulated that claimant's average weekly wage was $939.12 at the time of his June 5, 2000, injury, with a resulting temporary total disability rate of $626.08. The $729.25 rate reflects this base average weekly wage rate with appropriate 10(f) adjustments as of the date of maximum medical improvement. Joint Stipulations in Lieu of Trial and Request for Award of Benefits, Stip. 7, 8.

reconsideration of the administrative law judge's 2009 decision and an administrative law judge's compensation order becomes final and effective when it is filed with the district director unless it is appealed within 30 days after being filed. *See* 33 U.S.C. §921(a); *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989); 20 C.F.R. §§702.350, 702.393. In this case, employer did not timely appeal the administrative law judge's August 12, 2009, decision based on the parties' stipulations. Consequently, the administrative law judge's award of permanent total disability benefits cannot now be challenged on appeal. Thus, the administrative law judge did not err in addressing employer's application for Section 8(f) relief in terms of claimant's being permanently totally disabled.

Addressing employer's arguments on reconsideration, the administrative law judge refused to consider employer's request for modification under Section 22 because "employer has made no such application to the District Director." Decision and Order on Reconsideration at 3. Contrary to the administrative law judge's finding, modification need not be initiated with the district director. Rather, in cases arising under the Act, modification may be initiated with the administrative law judge while the case is pending before him or is on appeal. *See L.H. [Henderson] v. Kiewit Shea*, 42 BRBS 25 (2008); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Miller v. Central Dispatch, Inc.*, 16 BRBS 63 (1984); *Craig v. United Church of Christ*, 13 BRBS 567 (1981); *cf. Lee v. Consolidation Coal Co.*, 843 F.2d 159, 11 BLR 2106 (4th Cir. 1988); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2119 (6th Cir. 1987) (in cases arising under the Black Lung Act modification must be initiated with the district director).

Section 22 provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The fact that the administrative law judge's prior decision became final for purposes of appeal to the Board cannot bar a petition for modification, as Section 22 displaces traditional notions of finality and indeed provides the only recourse to a party where a prior decision has become final. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Relevant to this case, Section 22 requires a party to file a motion for modification within one year after the last payment of compensation.[3] 33 U.S.C. §922; *Alexander v.*

[3]Section 22 states, in relevant part,

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last

Avondale Industries, Inc., 36 BRBS 142, 144-145 (2002); *see also Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994) (award based on the parties' stipulations is subject to modification if the requirements of Section 22 are met). Pursuant to the administrative law judge's compensation order, claimant is still receiving permanent total disability compensation from employer and thus employer's motion is timely. Moreover, a party need not seek modification only on the basis of new evidence, as the "process is flexible, potent, easily invoked" and intended to secure justice under the Act. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2d Cir. 2003); *R.V.* [*Vina*] *v. Friede Goldman Halter*, 43 BRBS 22 (2009). Rather, a party may request that the administrative law judge "further reflect on the evidence initially submitted." *O'Keeffe*, 404 U.S. at 256. Therefore, we vacate the administrative law judge's decision to "not now consider" employer's request for Section 22 modification and remand for him to address employer's contentions, as well as its new evidence, giving claimant a chance to respond to it. *See generally Williams v. Ingalls Shipbuilding, Inc.*, 35 BRBS 92 (2001).

For purposes of administrative efficiency, we next consider the administrative law judge's findings that, assuming claimant is permanently totally disabled as a result of the recurring headaches and injuries to his right wrist, right knee, spine, and right and left shoulders sustained as a result of his June 5, 2000, work accident, employer has not established the manifest element for entitlement to Section 8(f) relief in this case.[4] Employer argues that, in contrast to the administrative law judge's finding, claimant had a pre-existing disability to both of his shoulders which was manifest, as established by claimant's statements regarding those injuries, in conjunction with claimant's Veterans' Administration (VA) medical records and the post-work injury opinions proffered by Drs. Yogaratnam and Dodge.

> payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

33 U.S.C. §922.

[4]As the administrative law judge did not address employer's entitlement to Section 8(f) relief in terms of claimant's being permanently partially disabled, we shall not address employer's arguments that it established the contribution element, under those circumstances, for purposes of Section 8(f) relief.

Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §944. In a case where a claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes (1) that the employee had an existing permanent partial disability prior to the employment injury; (2) that the disability was manifest to the employer prior to the employment injury; and (3) that his permanent total disability is not due solely to the most recent injury. *Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 1429, 24 BRBS 25, 28(CRT) (9th Cir. 1990); *see also E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, stated, in regard to the manifest element, that, "[t]he employee's appearance, medical reports and work experience are relevant, but the critical element is what the employer has available to him. . . ." and that the "key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it."[5] *Dillingham Corp. v. Massey*, 505 F.2d 1126, 1128 (9th Cir. 1974); *see also Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991). The medical records pre-existing the injury need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious lasting physical problem. *Transbay Container Terminal*, 141 F.3d 907, 32 BRBS 35(CRT). Without a documented diagnosis there must be "sufficient unambiguous, objective and obvious indication of a disability" contained in the available record. *Bunge*, 951 F.2d 1109, 25 BRBS 82(CRT). However, it is not sufficient if the disabilities would have been "discoverable" by means of further testing.

[5]Employer relies on the decision of the United States Court of Appeals for the Sixth Circuit in *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15(CRT) (6th Cir. 1989), that the manifest requirement is met when employer can show that the pre-existing disability is shown to have existed prior to the second injury, *i.e.*, that it was manifest to "someone." However, this case arises in the jurisdiction of the United States Court of Appeals for the Ninth Circuit which has not adopted such an interpretation of the manifest requirement and has held that in order to satisfy the manifest requirement for Section 8(f) relief, an employer must show that it was aware of the disability or that there are medical records available that would confirm the presence of the disability. *See generally Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991).

White v. Bath Iron Works Corp., 812 F.2d 33, 19 BRBS 70(CRT) (1st 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 (9th Cir. 1993).

The administrative law judge found that the evidence presented by employer is insufficient to establish the manifest element with respect to claimant's shoulder injuries. Claimant's VA clothing allowance forms listed his shoulders as among the disabling conditions, but the administrative law judge found that these records establish that the type of disability requiring the allowance was for claimant's "knee, back, [and] foot rash," CXs 46, 47, and that the money was provided for claimant to obtain a "TENS unit, ACL hinged knee brace, foot cream, and foot lotion." CX 45-47. Similarly, claimant's general statement on his employment application that he is a "disabled veteran" does not identify claimant's shoulder as an existing disability. As these records do not provide sufficient and unambiguous information regarding the existence of a serious lasting problem with regard to claimant's shoulders, we affirm the administrative law judge's finding that they are insufficient to establish the manifest element in this case.

Moreover, employer's contention that the post-work-injury diagnoses and opinions of Drs. Yogaratnam and Dodge constitute evidence that claimant's condition was manifest to employer is without merit, as a *post-hoc* diagnosis of a pre-existing condition is insufficient to meet the manifest requirement for Section 8(f) relief. *Caudill*, 25 BRBS 92. As the administrative law judge found, the record is devoid of any evidence pre-dating the work injury indicating that claimant was either permanently or seriously impaired by a shoulder condition. The administrative law judge found that, in contrast, the record shows that claimant performed physically demanding work without any restrictions for nine months prior to his June 2000 work accident and that he did not require shoulder surgery until after the occurrence of that accident. *Transbay Container*, 141 F.3d 907, 32 BRBS 35(CRT). We, therefore, affirm the administrative law judge's finding that employer did not establish the manifest element based on claimant's pre-existing shoulder condition.[6] *E.P. Paup Co.*, 999 F.2d 1341, 27 BRBS 41(CRT); *Dominey*, 30 BRBS 134. Consequently, the administrative law judge denial of employer's claim for Section 8(f) relief based on this condition is affirmed.[7] *Id.*

[6]In light of this, we need not address employer's contention that the administrative law judge erred in finding that it did not establish the contribution element.

[7]Employer does not challenge the administrative law judge's finding that it is not entitled to Section 8(f) relief based upon a pre-existing neck disability.

Employer lastly argues that the administrative law judge erred in denying its request, in conjunction with its motion for reconsideration, to submit additional evidence in support of its Section 8(f) claim. *See* Decision and Order Denying Reconsideration at 4. In an Order dated September 9, 2009, the administrative law judge noted that the parties waived a hearing in this case and he set November 16, 2009, as the final date for supplemental briefing with respect to the Section 8(f) issue as well as for the closing of the record. The administrative law judge found that employer did not provide justification for its failure to submit this evidence, which consisted of medical reports from 1978 and 1980, prior to the closing of the record and therefore denied employer's request to reopen the record. As the administrative law judge has great discretion concerning the admission of evidence, and since his decision regarding the exclusion of this post-hearing evidence is not arbitrary, capricious, or an abuse of discretion, we affirm his decision to not reopen the record for submission of this evidence. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Nonetheless, given that this case is being remanded for consideration of employer's petition for modification, this evidence may be offered in support of a mistake in fact in the administrative law judge's Section 8(f) finding. *G.K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008).

Accordingly, the administrative law judge's findings that claimant is entitled to permanent total disability benefits and that employer is not entitled to Section 8(f) relief relating to claimant's pre-existing shoulder condition are affirmed. The case, however, is remanded for the administrative law judge to consider employer's petition for modification regarding the administrative law judge's findings as to the nature and extent of claimant's work-related conditions, as well as, if necessary, further consideration of employer's application for Section 8(f) relief.

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