B. B. Claimant-Respondent v. DYNCORP and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ AIG WORLDSOURCE Employer/Carrier-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	BRB No. 08-0550 DATE ISSUED: 01/30/2009
B. B. Claimant-Petitioner v. DYNCORP and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/ AIG WORLDSOURCE Employer/Carrier-Respondent	)	BRB No. 08-0875 DECISION and ORDER

Appeals of the Decision and Order Granting Benefits and Denying Relief Under Section 8(f) of the Longshore Act and the Decision and Order Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, and the Amended Supplemental Compensation Order of Charles D. Lee, District Director, United States Department of Labor.

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Roger A. Levy (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Kathleen H. Kim (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Granting Benefits and Denying Relief Under Section 8(f) of the Longshore Act and the Decision and Order Denying Employer's Motion for Reconsideration (2004-LHC-02359) of Administrative Law Judge Richard K. Malamphy and claimant appeals the Amended Supplemental Compensation Order (Case No. 02-131801) of District Director Charles D. Lee 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).[1] We must affirm the administrative law judge's

[1] Claimant has filed a timely Notice of Appeal of the district director's Amended Supplemental Compensation Order, which was filed by the district director on September 16, 2008. This appeal is assigned the docket number BRB No. 08-0875. All correspondence pertaining to this appeal must bear this number. We consolidate this appeal with BRB No. 08-0550 for purposes of decision. 20 C.F.R. §802.104(a).

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). The determinations of the district director must be affirmed unless he has been shown to have abused his discretion, or his findings are arbitrary, capricious or not in accordance with law. *Durham v. Embassy Dairy*, 40 BRBS 15 (2006).

Claimant worked for employer in Bosnia beginning in January 2000 as a helicopter mechanic responsible for repairing rotor blades. Employer's blade shop was poorly ventilated, and claimant was exposed to chemical vapors. Employer did not provide claimant with protective eyewear or respiratory equipment, and 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 was initially measured at 20/400 in each eye. Claimant was diagnosed with atrophic maculopathy with reduced cone function and pigmentary dystrophy. 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, 33 U.S.C. §908(f).

In his decision, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), based on his severe eye impairment and the opinions of Drs. Roberts and Meggs that claimant's vision loss is attributable to his working conditions of chemical exposure and poor ventilation. The administrative law judge found that the opinions of Drs. Becker and Goldberg are sufficient to rebut the presumption. The administrative law judge credited the opinion of Dr. Goldberg that claimant has a genetic eye disorder. However, the administrative law judge credited the opinions of Drs. Roberts and Meggs to conclude that claimant's working conditions aggravated his underlying genetic eye impairment. The administrative law judge next addressed employer's application for Section 8(f) relief. The administrative law judge found the medical records establish positive signs of an eye disorder sufficient to establish a pre-existing disability. However, the administrative law judge found that significant vision loss was not apparent to claimant or employer prior to April 2002. Accordingly, the administrative law judge found that claimant's pre-existing disability was not manifest, and he denied the application for Section 8(f) relief. The administrative law judge ordered employer to pay claimant benefits for permanent total disability at the maximum compensation rate.

Subsequent to the administrative law judge's decision, claimant applied for a supplemental order declaring employer in default pursuant to Section 18(a) of the Act, 33 U.S.C. §918(a). Claimant alleged that employer delayed benefit payments as of June 3, 2008, and that employer used an inappropriate maximum compensation rate. The district director stated that employer did not make timely payments from June 3 to July 8, 2008, but that employer had voluntarily paid claimant the additional compensation due under Section 14(f) of the Act, 33 U.S.C. §914(f). The district director rejected claimant's contention that employer improperly calculated the maximum compensation rate, and he therefore rejected claimant's request for a default order.

On appeal, employer challenges the administrative law judge's finding that claimant's genetic eye disorder was aggravated by his working conditions. BRB No. 08-0550. Claimant responds, urging affirmance. Employer also appeals the denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs responds, urging affirmance. Claimant appeals the district director's denial of a default order under Section 18.[2] BRB No. 08-0875. Employer responds, urging affirmance.

Employer contends the administrative law judge erred by invoking the Section 20(a) presumption. Specifically, employer argues claimant presented no credible evidence that his working conditions could have caused or aggravated his eye impairment. The aggravation rule provides that employer is liable for the totality of the claimant's disability if the work injury aggravates a pre-existing condition. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. Claimant is not required to affirmatively prove that his working conditions in fact caused or aggravated the harm; rather, claimant need only establish that the working conditions could have caused or aggravated the harm alleged. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Damiano v. Global Terminal & Container Service.*, 32 BRBS 261 (1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

It is uncontested that claimant suffered a harm, *i.e.*, loss of central vision acuity to 20/400 in each eye and color blindness. In finding the Section 20(a) presumption invoked, the administrative law judge credited the testimony of claimant and his co-workers, Warren Griggs and Roland Hill, that claimant was exposed to chemical solvents

[2] In his Petition for Review, claimant also moved for an expedited decision. Claimant's motion is rendered moot by this decision.

in a poorly ventilated workplace. Tr. at 71-72, 84-92, 199-200, 232-234; *see also* CXs T at 19-20, U at 19, 41. The administrative law judge also credited the testimony of Dr. Roberts and Dr. Meggs. Dr. Roberts opined that claimant's working conditions led to the induction of, or the acceleration of, the damage to his eyes. Tr. at 328; CX R at 6. Dr. Meggs opined that claimant has organic solvent induced macula atrophy with cone dysfunction. Tr. at 444, 476; CXs S at 5, Z at 48-49. As substantial evidence supports the administrative law judge's finding claimant established that his working conditions with employer could have caused or aggravated claimant's eye injury, we affirm the administrative law judge's finding claimant established his *prima facie* case, and his consequent invocation of the Section 20(a) presumption that claimant's eye injury is related to his working conditions. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005).

Employer next challenges the administrative law judge's finding, based on the record as a whole, that claimant's eye condition is related to his working conditions. Where, as here, the administrative law judge finds that the Section 20(a) presumption is invoked and rebutted, then all relevant evidence must be weighed to determine if a causal relationship has been established, with claimant bearing the burden of persuasion. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

In weighing the evidence as a whole, the administrative law judge relied on the opinion of Dr. Goldberg that claimant has a genetic eye disorder. However, he also credited the opinions of Drs. Roberts and Meggs, who disagreed with Dr. Goldberg's opinion that claimant's exposure to solvents could not have contributed to his eye disorder. In this regard, these doctors found it significant that claimant has cone dysfunction with normal rod dysfunction, a condition which they stated is associated with organic solvent exposure. Tr. at 328, 446-447. They stated that attributing this type of vision loss to chemical exposure is based on peer-reviewed research and is widely accepted within the scientific community. CX R at 2; *see* Tr. at 445, 453. Moreover, their opinions are based on claimant's having no family history of sudden vision loss. Tr. at 450; CX R at 2. Dr. Roberts specifically opined that claimant's vision loss was either caused or was at least accelerated by his working conditions. Tr. at 328; CX R at 6. The medical experts in this case agreed that chemical exposure can cause color blindness, Tr. at 303, 529; EXs 20, 42 at 157, and that claimant has blue/yellow color vision loss. CX LL. Finally, the administrative law judge found claimant to be a credible witness; he testified that he had minimal vision problems prior to working for employer in Bosnia and that he experienced sudden vision loss upon leaving there. Tr. at 107, 143.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, employer's specific challenges to the administrative law judge's finding of a work-related injury essentially urge the Board to reweigh the voluminous medical evidence presented by both parties and the credentials of the expert medical witnesses, which is beyond our scope of review. Employer does not challenge the administrative law judge's finding that claimant was exposed to chemical solvents in a poorly-ventilated, enclosed work space. The reports of Drs. Roberts and Meggs are substantial evidence linking claimant's eye condition, at least in part, to his work exposure to these chemical solvents.[3] *See Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999). Thus, based on these opinions and claimant's testimony of the sudden onset of his vision problems, the administrative law judge rationally found that claimant's eye condition is related, at least in part, to his workplace chemical solvent exposure. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). As the administrative law judge's finding is rational and supported by substantial evidence, we affirm his conclusion claimant established that his eye condition is related to his employment in Bosnia. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Accordingly, we affirm the award of permanent total disability benefits.

Employer next argues the administrative law judge erred by denying its application for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that claimant had a preexisting permanent partial disability, that the preexisting disability

[3] Employer argues that the administrative law judge was obligated to credit the causation opinion of Dr. Goldberg, since he stated that he would defer to his expertise as a board-certified ophthalmologist. The administrative law judge credited Dr. Goldberg's diagnosis that claimant has a genetic-based eye disorder. However, merely because the administrative law judge recognized the credentials of Dr. Goldberg does not preclude him from crediting the causation opinions of Dr. Roberts, who has a doctorate in organic chemistry, and Dr. Meggs, who is board-certified in internal medicine and toxicology, to find that claimant's eye disorder was aggravated by his working conditions. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988).

was manifest to employer prior to the compensable injury, and that the compensable disability is not due solely to the subsequent injury. *C.G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84(CRT) (11th Cir. 1994); *see also Pennsylvania Tidewater Dock Co. v. Director, OWCP*, 202 F.3d 656, 34 BRBS 55(CRT) (3d Cir. 2000); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). The administrative law judge found evidence of a preexisting eye disability. He found that there were positive signs of a severe eye disorder as early as 1988, and that such signs were more apparent by 2000. Decision and Order at 29. The administrative law judge found, however, that claimant's pre-existing disability was not manifest because significant vision loss was not apparent to claimant or to employer before April 2002. Decision and Order at 30. Employer's motion for reconsideration of the administrative law judge's manifest finding was summarily rejected. Recon. at 4.

We cannot affirm the administrative law judge's denial of Section 8(f) relief as he did not discuss the medical evidence or make sufficient findings of fact regarding either the pre-existing permanent partial disability or manifest elements. The administrative law judge stated only that "there were positive signs of a severe eye disorder as early as 1988. Such signs were more apparent by 2000." Decision and Order at 29. The administrative law judge, however, did not discuss the medical evidence or state exactly what condition constituted the eye disorder. A specific finding in this regard is necessary so that it can be determined if the identified condition was manifest to employer. With regard to the manifest element, the administrative law judge stated that "significant visual loss was not apparent" prior to the work injury.

A pre-existing disability need not result in economic harm and has been defined as "such a serious physical disability in fact that a cautious employer . . . would [be] motivated to discharge the . . . employee because of a greatly increased risk of employment-related accident and compensation liability." *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977). The mere existence of a prior condition is not sufficient to satisfy this element. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149(CRT) (D.C. Cir. 1985); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). However, a medical condition that is controlled or asymptomatic, such as hypertension, may be a pre-existing disability if it is serious and lasting. *Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989); *see also Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988) (case remanded for administrative law judge to determine if degenerative disc condition was manifest, pre-existing permanent partial disability). On remand, therefore, the administrative law judge must first make an explicit finding as to the pre-existing permanent partial disability element.

If this element is satisfied, the administrative law judge should address, with reference to specific medical evidence, whether the manifest element is met with regard to that specific condition.[4] The 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. *Director, OWCP v. Universal Terminal & Stevedoring Corp.*, 575 F.2d 452, 8 BRBS 498 (3d Cir. 1978). The medical records pre-existing the subsequent injury, however, 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. *C.G. Willis, Inc.*, 31 F.3d at 1116, 28 BRBS at 87-88(CRT); *Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82(CRT) (9th Cir. 1991); *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11(CRT) (5th Cir. 1989). A post-hoc diagnosis of a pre-existing condition is insufficient to meet the manifest requirement for Section 8(f) relief. *Transbay Container Terminal v. U.S. Dep't of Labor, Benefits Review Board*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998); *Callnan v. Morale, Welfare & Recreation, Dep't of the Navy*, 32 BRBS 246 (1998). Therefore, as the administrative law judge did not make findings of fact sufficient for the Board's review, we vacate the denial of Section 8(f) relief and remand the case for findings consistent with this decision. *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997).

We next address claimant's appeal of the district director's Amended Supplemental Compensation Order. BRB No. 08-0875. Claimant appeals the district director's conclusion that employer is not in default under Section 18(a). Claimant asserts that employer improperly calculated the compensation rate, pursuant to the administrative law judge's finding that he is entitled to permanent total disability at "the maximum compensation rate." *See* 33 U.S.C. §906. Employer responds, urging affirmance.[5]

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[4] In the event that the pre-existing permanent partial disability and manifest elements are satisfied, the administrative law judge should address the contribution element, *i.e.*, whether employer established that claimant's current disability is not due solely to the subsequent injury but was contributed to by the pre-existing disability. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004).

[5] Employer also responds that claimant's appeal should be dismissed for lack of jurisdiction because claimant agrees that the denial of his motion for a default order is in accordance with the law as stated in *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65, (2006). We reject this contention. Claimant appropriately raised before the district director the issue of the proper compensation rate in view of the administrative law judge's statement

In his appeal, claimant acknowledges that, absent reconsideration by the Board of its decision in *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006), the district director's finding that employer complied with the administrative law judge's order that employer compensate claimant at the maximum compensation rate is in accordance with law. In *Reposky*, the Board held that the maximum compensation rate for permanent total disability benefits pursuant to Section 6 is that in effect at the time benefits commence, subject to subsequent Section 10(f) adjustments.[6] *Reposky*, 40 BRBS at 73-77.

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that employer is to pay claimant permanent total disability compensation "at the maximum compensation rate," without specifying the precise dollar amount. *See Bray v. Director, OWCP*, 664 F.2d 1045, 14 BRBS 341 (5th Cir. 1981). The district director ruled against claimant and an appeal was properly taken. *See* 33 U.S.C. §921(b)(3); 20 C.F.R. §802.201. That claimant has acknowledged precedent contrary to his position does not negate the propriety of his appeal.

[6] Section 6 provides:

> (b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
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> (3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after October 27, 1972.
>
> (c) Determinations under subsection (b)(3) of this section with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(b)(1), (3), (c).

In his order, the district director stated that employer furnished evidence of compensation payments at the initial compensation rate of $966.08, which is the maximum rate in effect in 2002, and at rates thereafter incorporating the appropriate Section 10(f) adjustments. *See* A BRBS 3-155 (2008). Claimant does not challenge the accuracy of employer's compensation payments pursuant to *Reposky*, and we decline to reconsider our holding in that case. Therefore, we affirm the district director's finding that employer has properly compensated claimant at the maximum compensation rate, and the district director's consequent declaration that employer is not in default under Section 18(a).

Accordingly, the administrative law judge's denial of Section 8(f) relief is vacated and the case is remanded for further findings on this issue. The administrative law judge's award of benefits to claimant is affirmed, as is the district director's Amended Supplemental Compensation Order.

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