BRB No. 88-3469

JOHN J. REILLY Claimant v. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY Self-Insured Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED:__________ DECISION AND ORDER

Appeal of the Decision and Order On Remand Granting Section 8(f) Relief and Decision and Order Denying Motion for Reconsideration of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Charles P. Monroe (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, DC, for self-insured employer.

Karen B. Kracov (Marshall Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

BEFORE: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs, appeals the Decision and Order On Remand Granting Section 8(f) Relief and the Decision and Order Denying Motion for Reconsideration (82-DCW-455) of Administrative Law Judge G. Marvin Bober 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., (1982), as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§501, 502 (1973) (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 the law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case, which is before the Board for the second time, involves the Director's appeal of the administrative law judge's award of relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Claimant worked for employer, Washington Metropolitan Area Transit Authority (WMATA), as a building maintenance supervisor from September 1977 until May 15, 1979, when he became seriously ill and sustained a psychiatric injury due to harassment by his supervisor. As a result of this psychological condition, claimant was unable to work in any capacity for approximately one-and-one-half years and received temporary total disability benefits during that period. After undergoing psychotherapy and taking antidepressive medication, in November 1980 claimant approached Dr. Tractenberg, his treating psychiatrist, regarding his possible return to work. In December 1980 or January 1981 claimant returned to work, on a trial basis, and was placed on the track inspection team.[1] Claimant satisfactorily performed this job for approximately 4-6 weeks until he had an unpleasant confrontation with his former supervisor. As a result, claimant immediately withdrew from the job and left the Washington, D. C. area. Claimant relocated in Rhode Island where he secured work in a nursing home from March through October 1981 and later as an engineer mechanic at Brown University. His continued panic attacks under pressure, however, eventually forced him to quit working in February 1983. Thereafter, he moved to Florida, where he was working part time cleaning boats at a marina as of the time of the hearing.

Administrative Law Judge Rudolf Sobernheim found that claimant was entitled to temporary partial disability compensation for various periods and permanent total disability compensation commencing March 5, 1983. The administrative law judge further determined that Section 8(f) was not applicable in this case because claimant was not an employee of WMATA in January 1981, the time of the alleged second injury. Employer appealed the denial of Section 8(f) relief.

In its initial May 22, 1987 Decision and Order, the Board reversed the administrative law judge's finding that claimant was not an employee of WMATA at the time of the alleged second injury, and remanded the case for the administrative law judge to consider employer's eligibility for Section 8(f) relief on the merits. Reilly v. Washington Metropolitan Area Transit Authority, 20 BRBS 8 (1987).

[1] During this trial period, claimant did not receive a salary, but instead continued to receive temporary total disability benefits.

In a Decision and Order On Remand dated April 21, 1988, Administrative Law Judge Bober,[2] crediting Dr. Trachtenberg's testimony, found that claimant's psychiatric condition, diagnosed in 1979 as acute depressive reaction with severe anxiety features, constituted a manifest pre-existing permanent partial disability and that claimant's exposure to his former supervisor upon attempting to return to work in 1981, constituted a second aggravating injury. Consequently, he found that employer was entitled to Section 8(f) relief. The Director subsequently filed two motions for reconsideration, which were denied. This appeal followed.

On appeal, the Director contends that the administrative law judge's finding that claimant sustained a second aggravating injury upon returning to work in 1981 which combined with his 1979 injury to result in his total disability is not supported by substantial evidence. Employer responds, urging affirmance of the award of Section 8(f) relief.

Section 8(f) shifts liability to pay compensation for permanent disability compensation from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if the employer establishes the following three prerequisites: 1) the injured employer had a pre-existing permanent partial disability; 2) the pre-existing disability is manifest to employer; and 3) the permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. See C & P Telephone Co. v. Director, OWCP, 564 F.2d 503, 6 BRBS 399 (D. C. Cir. 1977). Employment-related aggravation of a pre-existing disability will suffice as contribution to the disability for purposes of Section 8(f). Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991).

We agree with the Director. As the Director asserts, in finding that claimant sustained a second aggravating injury in 1981, the administrative law judge took Dr. Tractenberg's statement that upon returning to work in 1981 "claimant's symptoms recurred in full force" out of the context of his overall testimony. Dr. Tractenberg testified that following the 1979 work incident, claimant suffered from hyperventilation, difficulty talking, severe insomnia, profuse sweating , depression and rage, difficulty with memory and mental organization, headaches, and a feeling of inability to function. He diagnosed claimant's condition as an acute depressive reaction with severe anxiety features. Dr. Tractenberg also testified that he had hoped that if claimant returned to work in a setting in which he was not

[2]Judge Bober heard the case on remand because Judge Sobernheim had retired.

going to meet his former boss he would be able to return to work, but that as he approached the job at Metro, all his symptoms recurred in full force. Depo. at 15. Dr. Trachtenberg related that when claimant left the job with WMATA in February 1981, he left the area and did not return to see him again until June 17, 1981, at which time he appeared vague, distracted, tense, wide-eyed, bewildered, somewhat incoherent and depressed. Dr. Tractenberg testified that at that time it appeared that he was suffering from a severe post-traumatic stress disorder with features of anxiety and depression which were the evolution of the original diagnosis of acute depression and anxiety. Depo. at 18. Dr. Trachtenberg initially stated that he believed that claimant was permanently disabled from performing any kind of regular work as of June 17, 1981. Depo. at 31. He subsequently revised his opinion, however, stating that in retrospect claimant had reached maximum medical improvement sometime between the time he stopped working in 1979 and the time he returned to work in 1981, that he never improved even close to the kind of stability that would be required for regular employability, and that although "we thought he had a chance of returning to work in December 1980, we were wrong." Depo. at 32-33.

We hold that Dr. Trachtenberg's opinion, which indicates that claimant's 1981 symptoms were the natural evolution of the original diagnosis of acute depression and anxiety made in 1979 and that claimant was permanently disabled from meaningful employment prior to the time he attempted to return to work in 1981, is insufficient to support a finding of Section 8(f) contribution as a matter of law. Although the administrative law judge relied on Director, OWCP v. Potomac Electric Power Co. (PEPCO), 606 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979), aff'g Brannon v. Potomac Electric Power Company, 6 BRBS 527 (1977), in awarding employer Section 8(f) relief, PEPCO is distinguishable from the present case. The claimant in PEPCO sustained a severe electrical shock at work. This initial injury caused a work-related psychological condition which was aggravated by his subsequent exposure to electricity after his return to work, resulting in his suicide. Thus, in PEPCO, the court held employer entitled to Section 8(f) relief because the aggravation caused by his exposure on his return to work was a second injury which combined with the prior injury to result in his disability. In the present case, however, claimant had an initial psychological injury and suffered an exacerbation of his symptoms in 1981 when he returned to work; in Dr. Tractenberg's opinion, the exacerbation represented the natural evolution of his pre-existing 1979 condition. This case is thus factually similar to Director, OWCP v. Cooper Associates, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979), rev'g Cooper v. Cooper Associates, 7 BRBS 853 (1978), which was issued on the same day as PEPCO. In Cooper Associates, the court held that Section 8(f) was not applicable where claimant's depression over a business decline constituted one continuous

injury leading to his suicide. Since we conclude that Cooper Associates is controlling, the administrative law judge's award of Section 8(f) relief is reversed.

Accordingly, the administrative law judge's Decision and Order granting employer Section 8(f) relief is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge