BRB No. 01-0841

ARTHUR CARPENTER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS, INCORPORATED	)	DATE ISSUED: July 17, 2002
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert A. Rapaport and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for self-insured employer.

Whitney R. Given (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1999-LHC-1399) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).

This is the second time this case has come before the Board, and the sole issue is whether employer is entitled to relief from compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). On January 5, 1992, claimant injured his back during the course of his employment. An MRI revealed degenerative disc disease at L4-5 and L5-S1 and a bulging disc at L5-S1. Claimant underwent back surgery on April 21, 1992, and employer voluntarily paid permanent total disability benefits from January 16, 1992. Claimant previously sustained injuries to his back in 1978, 1985 and 1987, and employer asserted before the administrative law judge that the five previous injuries resulted in a manifest pre-existing permanent partial disability which contributed to claimant's ultimate disability. The Director, Office of Workers' Compensation Programs (the Director), conceded that claimant's degenerative disc disease constitutes a pre-existing permanent partial disability which contributed to claimant's ultimate condition, but disputed that claimant's previous injuries resulted in any manifest permanent disability.

The administrative law judge reviewed the pertinent evidence, stated that it was unlikely that any of the injuries caused permanent harm, and found that a *post hoc* diagnosis of degenerative disc disease cannot establish the manifest element for Section 8(f) relief. Thus, he found that employer failed to establish the manifest requirement, and he denied Section 8(f) relief. Decision and Order at 5. The Board vacated the denial, remanding the case for the administrative law judge to consider and explain with greater detail whether claimant's five previous back injuries resulted in a serious lasting physical problem which was manifest to employer prior to claimant's 1992 work injury. *Carpenter v. Ceres Marine Terminals, Inc.*, BRB No. 00-742 (April 20, 2001).

On remand, the administrative law judge reviewed the details of claimant's five back injuries. He found that claimant's two 1978 injuries fully resolved with no residual effects. However, he found that claimant's two 1985 injuries and his 1987 injury had permanent and lasting effects and, thus, constituted a permanent partial disability prior to claimant's 1992 injury. Decision and Order on Remand at 4. Although employer knew about the prior injuries to claimant's back, the administrative law judge concluded that the permanent disability caused by these injuries was not manifest to employer prior to the 1992 injury. Rather, his conclusion as to the pre-existing permanent disability was based on medical reports generated after the 1992 injury, as the medical reports contemporaneous with the earlier injuries lacked any indication that those injuries would cause a permanent disability. *Id.* at 5-6. Accordingly, the administrative law judge found that employer failed to establish the manifest element, declined to address the issue of contribution, and he denied employer's request for Section 8(f) relief. Employer appeals, and the Director responds, urging

affirmance.

Section 8(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. §§908(f), 944. An employer may be granted Special Fund relief, in the case of permanent total disability, if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability was not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996). In this case, it is undisputed that claimant has a pre-existing permanent partial disability, degenerative disc disease, which contributed to his ultimate total disability. As this condition was not discovered until after claimant's 1992 injury, the parties agree it cannot be used to satisfy the manifest element necessary for Section 8(f) relief. Rather, the issue is whether any or all of claimant's five previous back injuries caused a serious lasting physical problem which was manifest to employer prior to the January 1992 injury.

In 1978, claimant fell 67 feet from the hatch of a ship to the deck below, injuring his head, neck, right shoulder and scapular area, and his right wrist and hand. In November 1978, claimant suffered interscapular back pain after lifting a 150-pound bag. The administrative law judge found, and the record confirms, that Dr. Heide, who treated claimant for these injuries, predicted the effects of these injuries would subside within two or three months. Emp. Ex. 13. As the administrative law judge stated, there is no evidence to contradict Dr. Heide's opinion, and there is no mention of continued problems with claimant's upper back or scapular areas. Decision and Order on Remand at 4-5. Accordingly, it was reasonable for the administrative law judge to determine that neither 1978 injury resulted in a serious lasting physical condition. *Todd Shipyards Corp. v. Director, OWCP [Cortez]*, 793 F.2d 1012, 19 BRBS 1(CRT) (9th Cir. 1986).

In March 1985, April 1985, and December 1987, claimant injured his low back while lifting bales of rubber, lifting 200 pounds of cocoa beans, and removing some pins, respectively. Emp. Ex. 1. In 1994 and 1999, Dr. Wagner opined that claimant's 1985 and 1987 injuries resulted in permanent damage to claimant's back, leading to the present, cumulative, condition. Emp. Exs. 1j, 3. Based on Dr. Wagner's opinion, the administrative law judge found that these injuries left residual effects constituting a permanent partial disability which could have motivated a cautious employer to discharge claimant because of a greatly-increased risk of compensation liability. Decision and Order on Remand at 4 (citing *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977)); Emp. Exs. 1j, 3, 11. Consequently, the record supports, and we affirm, the administrative law judge's determination that claimant's 1985 and 1987 injuries caused a

permanent partial disability. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

Employer asserts, therefore, that as claimant sustained a permanent partial disability from his prior back injuries, and as it was aware of claimant's prior back injuries, the administrative law judge erred in concluding that employer did not satisfy the manifest requirement. In order to establish the manifest requirement for Section 8(f) relief, an employer must show that it was actually aware of the claimant's pre-existing permanent partial disability or that the condition was objectively determinable from existing medical records. *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983); *Wiggins*, 31 BRBS at 147. While the medical records need not indicate the severity or the precise nature of the pre-existing condition, they must "contain sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem." *Esposito v. Bay Container Repair Co.*, 30 BRBS 67, 69 (1996); *see Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992).

In this case, the administrative law judge rationally found that the medical records, as they existed prior to claimant's 1992 injury, were "decidedly upbeat" and lacked any indication that claimant's earlier injuries would cause serious and lasting damage to claimant's back. *See* Decision and Order at 5; Decision and Order on Remand at 5. In fact, Dr. Wagner, who treated claimant's back injuries, released claimant to return to his usual work without restrictions following each of the 1985 and 1987 injuries, and he specifically stated: "I do not feel [claimant] will have any permanent disability as a result of his [1985] injury." Emp. Ex. 1c; *see also* Emp. Exs. 1a-f. As opinions regarding any permanent disability caused by the 1985 and 1987 injuries did not exist until after the 1992 injury, the administrative law judge correctly found that employer failed to demonstrate the existence of a manifest, serious, lasting physical problem with claimant's back prior to the 1992 injury. *Callnan v. Morale, Welfare & Recreation Dep't of the Navy*, 32 BRBS 246 (1998); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). To the extent employer argues that the mere fact claimant sustained back injuries in the past, about which it knew, establishes he had a manifest pre-existing permanent partial disability to his back, we reject such assertion. A history of past problems is insufficient to constitute a manifest pre-existing permanent partial disability absent some evidence of a serious lasting condition such as impairment, work restrictions, or significant medical problems. *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146(CRT) (D.C. Cir. 1985); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). Therefore, we affirm the administrative law judge's conclusion that employer did not satisfy the manifest requirement and is not entitled to Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order on Remand is

affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge