BRB No. 03-0472

CULLEN R. SPIVEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:MAR 9, 2004
	)	
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 on Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Reconsideration (01-LHC-1415, 1416, 1417) of Administrative Law Judge Richard E. Huddleston 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 longshoreman, suffered several injuries to his right shoulder during the course of his employment. Claimant filed three claims for compensation arising out of injuries sustained on April 30, 1981, January 26, 1982, and August 7, 1996.[1]

In his Decision and Order, the administrative law judge accepted the stipulations of the parties and awarded claimant temporary total disability compensation for the periods of January 3, 1983 through January 31, 1983; March 1, 1983 through April 6, 1983, August 24, 1992 through January 2, 1993 and permanent partial disability compensation from August 9, 1996, and continuing, 33 U.S.C. §908(c)(21). The administrative law judge denied employer relief under Section 8(f) of the Act, 33 U.S.C. §908(f), upon the application of the absolute defense in Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3).

Employer filed a motion for reconsideration arguing that the Director, Office of Workers' Compensation Programs (the Director), had waived application of the Section 8(f)(3) defense. The administrative law judge agreed, noting the Director's pre-hearing response that he would not be asserting the absolute defense in this case. The administrative law judge then addressed the issue of employer's entitlement to Section 8(f) relief for the injury of January 22, 1982. The administrative law judge, however, denied Section 8(f) relief, finding that employer failed to establish two critical elements for such relief: that the pre-existing condition was manifest and that contribution of the pre-existing condition to the current disability had been quantitatively proven.

Employer appeals, arguing that the administrative law judge erred in finding that claimant's pre-existing disability was not manifest and that it failed to establish the contribution element. The Director responds, urging affirmance.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial

[1] Since claimant's first traumatic shoulder dislocation on May 1, 1982, he has recurrent chronic pain and aggravation of his condition; claimant underwent two surgeries for the repair of his shoulder injury on November 15, 1982 and August 24, 1992. CXS 1, 4, 8.

disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998); *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. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds,* 514 U.S. 122, 29 BRBS 87 (1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

Employer contends that the administrative law judge erred in finding that it did not establish the manifest element. A 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. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656 (3d Cir. 2000); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997). 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. *See Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992), *aff'g Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988); *Wiggins,* 31 BRBS at 142.

In the instant case the administrative law judge found that there was no evidence prior to the second injury on January 26, 1982, of a serious, lasting condition. Without a documented diagnosis of the underlying disability, the medical records must contain sufficient unambiguous, objective, and obvious indication of a disability. *Ceres Marine Terminal v. Director, OWCP [Allred]*, 118 F.3d 387, 31 BRBS 91 (CRT)(5th Cir. 1997). In the instant case, claimant's April 30, 1981, injury was diagnosed as a mild shoulder strain. His x-rays and physical examination were normal. EX 1. Following light duty work for one week, claimant returned to full duty. Although claimant complained of pain on two occasions subsequently,[2] his physical examinations were negative. EX 2; CX 8b. While these records may indicate that claimant had some physical problems related to his right shoulder, the administrative law judge rationally found that they do not establish the existence of a serious, lasting condition. *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998). The diagnosis of Dr. Williams after the 1982 injury

[2] The medical records reflect that claimant experienced pain on May 4, 1981, while lifting groceries, EX 1, and on September 2, 1981, after cutting grass. EX 2.

that claimant suffers from chronic recurrent subluxation of the right shoulder, CX 5, also supports the conclusion that claimant did not have a diagnosed serious condition prior to his 1982 injury. Consequently, the administrative law judge's finding that employer did not establish the manifest element for Section 8(f) relief is affirmed. As employer has failed to establish one the elements essential to Section 8(f) relief, the administrative law judge's denial of such relief is affirmed.[3]

Accordingly, the administrative law judge's Decision and Order on Reconsideration is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[3] Because we affirm the administrative law judge's finding that employer failed to establish that claimant's pre-existing condition was manifest, we need not address his finding that employer also failed to establish the contribution element.