

EDWARD R. BRAUS)

Claimant)

v.)

UNITED DIESEL, INCORPORATED)

and)

CNA CASUALTY OF CALIFORNIA)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:
10/14/200510/14/20052005

DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Lee J. Romero, Jr.,
Administrative Law Judge, United States Department of Labor.

Robert A. Davee (Mills Shirley, L.L.P.), Galveston, Texas, for
employer/carrier.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H.
Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),
Washington, D.C., for the Director, Office of Workers Compensation
Programs.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2003-LHC-2325) of Administrative Law Judge Lee J. Romero, 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a marine mechanic, suffered an injury to his elbow and alleged he sustained a psychological injury on September 6th or 7th, 1998, while attempting to switch out a pump from the bow-thruster of the *Gulf Island V*, an off-shore jack-up rig, during Hurricane Danielle. Claimant asserted that he is permanently totally disabled by his psychological condition, *i.e.*, post-traumatic stress disorder (PTSD), arising out of his experiences on the *Gulf Island V*.¹

In his Decision and Order, the administrative law judge found that although claimant's injury to his elbow had totally resolved, he remains totally disabled by his PTSD which arose out of his employment. Consequently, he awarded claimant permanent total disability compensation based on an average weekly wage of \$1,134.88. Additionally, he found that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

Employer appeals, arguing that the administrative law judge erred in not finding it entitled to relief under Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Employer challenges the administrative law judge's determination that claimant's pre-existing psychological condition did not constitute a pre-existing permanent partial disability which contributed to his permanent total disability. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, an employer may be granted Special Fund relief if it establishes that the claimant had a manifest pre-existing permanent partial disability and that his permanent total disability is not due

¹ Claimant alleged that he was psychologically injured because he believed he was going to die. JX 1. The crew was rescued by the *Gulf Fleet 53*, an offshore supply boat, and watched the *Gulf Island V* capsize shortly thereafter. EX 5.

solely to the subsequent work-related injury.² See 33 U.S.C. §908(f)(1); *Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 31 BRBS 91(CRT) (5th Cir. 1997); *Two “R” Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

A “pre-existing partial disability” has been defined as “such a serious . . . disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of . . . compensation liability.” *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); see *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 115(CRT) (1st Cir. 1992); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2^d Cir. 1992). The administrative law judge found that employer failed to establish that claimant suffered from a pre-existing permanent partial disability. With regard to claimant’s pre-existing psychological condition, the administrative law judge found that there is no evidence of a psychological disability pre-dating the work accident. He found that claimant was prescribed Prozac by his family physician, Dr. LeBouef, a general practitioner, for his symptoms of depression, stress and insomnia,³ but that no diagnosis of a psychological condition or referral to a mental health professional was made prior to the work injury. EX 8. Moreover, the administrative law judge found that the severity of such a condition was never addressed by a psychologist or psychiatrist; rather, claimant testified that his depression was mild and under control at the time of the work incident. JX 2. Finally, the administrative law judge found that the Prozac prescription in and of itself was insufficient to conclude that prior to 1998 claimant’s condition constituted a serious disability, especially in light of Dr. Gad’s statement that family physicians widely over-prescribed such mild anti-depressants.⁴ JX 4; Decision and Order at 31.

² The administrative law judge found that employer had knowledge of claimant’s mild depression and his taking Prozac prior to the time of his work accident and therefore satisfied the manifest requirement for Section 8(f) relief. Decision and Order at 32-33. This finding is not challenged on appeal.

³ Claimant’s symptoms were related to the death of his mother, the diagnosis of a brain tumor in his sister, and stress on the job working as a supervisor. EX 8 at 12-14.

⁴ Dr. Gad, a board-certified psychiatrist, began treating claimant in May 1999, on referral from Dr. Aurich, a psychologist, who began treating claimant on March 4, 1999, when he presented with significant anxiety, fear and depression following the offshore incident. CX 13.

The administrative law judge concluded that as claimant's condition had been controlled by medication and had allowed him to function fully both at work and in society, his mild depression did not constitute a serious lasting impairment that satisfies the "cautious employer" test. We affirm this finding as it is rational, supported by substantial evidence, and in accordance with law. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). The mere existence of a pre-existing condition does not establish that claimant had a serious, lasting psychological problem. *Callnan v. Morale Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998); *see also 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). The administrative law judge rationally found, based on claimant's testimony and Dr. Gad's opinion that claimant was fully functional prior to the work injury, that his condition did not expose employer to a greater risk of compensation liability. Inasmuch as the administrative law judge's determination that claimant did not suffer from a serious, lasting psychological condition prior to his development of PTSD is rational and supported by the record, this finding is affirmed. *See Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2^d Cir. 1997).

In addition, we affirm the administrative law judge's finding that employer did not establish the contribution element. To establish the contribution element, employer must show that claimant's subsequent injury alone would not have resulted in his permanent total disability. *Ceres Marine Terminal*, 118 F.3d 387, 31 BRBS 91(CRT); *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Dominey*, 30 BRBS 134. Dr. Gad testified by deposition that claimant suffers from PTSD arising out of his work injury, which is permanently and totally disabling. He stated claimant also has major depressive disorder which is a differential diagnosis of PTSD. JX 4 at 61-71, 80-87. Dr. Culver diagnosed claimant as suffering with a decompensation personality disorder with psychotic process, and not PTSD. JX 5. However, as correctly noted by the administrative law judge, neither physician offered an opinion that claimant's work injury was not the sole cause of claimant's total disability. Contrary to employer's contention, Dr. Culver's opinion that claimant's underlying depressive condition combined with the work injury to make claimant's ultimate condition worse is not legally sufficient to establish that claimant's total disability is not due solely to the condition resulting from the work injury. *Gulf Best Electric, Inc. v. Methé*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge