BRB No. 91-144

DORMA JEAN BOWKER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
VANDENBERG AIR FORCE BASE EXCHANGE	)	
	)	
and	)	
	)	
ESIS	)	DATE ISSUED:_____
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand and Order Denying Petition for Reconsideration of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Jack Williams, Glendale, California, for employer/carrier.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. 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, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and Order Denying Petition for Reconsideration (84-LHC-2502) of Administrative Law Judge Alexander Karst 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *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. To reiterate, claimant, a warehouse worker, injured her shoulder, back and wrist on October 3, 1980, when she fell from a ladder and landed on the concrete floor. Employer paid claimant temporary total disability benefits from October 3, 1980, through July 29, 1982. Thereafter, claimant sought permanent total disability benefits because of her orthopedic, cardiovascular, and psychiatric problems. Employer did not present evidence of suitable alternate employment, and the administrative law judge determined that claimant is permanently totally disabled due to each of her orthopedic, cardiovascular and gastric, and psychiatric conditions alone. Decision and Order at 3-4. The administrative law judge also granted employer's request for Section 8(f), 33 U.S.C. §908(f), relief.[1] *Id.* at 5.

On appeal, the Board determined that the administrative law judge's discussion of Section 8(f) was cursory and that it could not be upheld. Therefore, the Board vacated the Section 8(f) award and remanded the case for the administrative law judge to consider all the evidence and fully discuss the issue. The Board affirmed all other aspects of the administrative law judge's decision. *Bowker v. Vandenberg Air Force Base Exchange*, BRB No. 85-1483 (Nov. 30, 1988) (unpublished).

In his Decision and Order on Remand, the administrative law judge set aside the Section 8(f) award. He determined that claimant did not have either a pre-existing orthopedic disability or a pre-existing psychiatric disability. He also found that claimant's manifest pre-existing cardiovascular and gastrointestinal disabilities did not contribute to her total disability, as she is totally disabled by each of the October 1980 injuries alone. Decision and Order on Remand at 3-4, 6-7. The administrative law judge then summarily denied employer's motion for reconsideration. Employer appeals the administrative law judge's decisions, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.[2]

[1]In his original Decision and Order, the administrative law judge determined that claimant was not underpaid by virtue of employer's policy requiring her to turn over her workers' compensation checks until she exhausted her annual and sick leave. Decision and Order at 5. Further, he held employer liable for medical benefits, interest, a Section 14(e), 33 U.S.C. §914(e), penalty, and an attorney's fee, but he granted employer a credit for temporary total disability benefits already paid. *Id.* at 5-6.

[2]Employer replies to the Director's response, reasserting its satisfaction of the Section 8(f)

Employer contends it is entitled to Section 8(f) relief. Specifically, employer argues that the administrative law judge used an improper standard for determining the existence of a pre-existing permanent partial disability and that the administrative law judge violated its due process rights by failing to follow the "law of the case" rule. Further, employer asserts that it satisfied the requirements for relief from continuing liability for compensation. We reject employer's arguments.

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 a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that her current permanent total disability is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992).

Employer first argues that the administrative law judge used an incorrect standard for defining a pre-existing permanent partial disability. It avers that the "cautious employer" test is not a valid definition of a pre-existing permanent partial disability, citing *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25 (CRT) (9th Cir. 1990), and that the administrative law judge erroneously used this test in addressing claimant's situation. The United States Court of Appeals for the D.C. Circuit has stated that a claimant has a pre-existing permanent partial disability if she has such a serious, lasting, physical problem that a cautious employer would be motivated to discharge her because of a greatly increased risk of compensation liability. *Director, OWCP v. Belcher Erectors, Inc.*, 770 F.2d 1220, 17 BRBS 146 (CRT) (D.C. Cir. 1985); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Contrary to employer's argument, the United States Court of Appeals for the Ninth Circuit did not eliminate the "cautious employer" test as a method of defining a pre-existing permanent partial disability. Instead, it stated that the "cautious employer" situation is not a necessary component of the definition but is merely one way of demonstrating the existence of a permanent partial disability. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991); *Mayes*, 913 F.2d at 1430, 24 BRBS at 30 (CRT). Thus, use of the "cautious employer" test, provided there is serious, lasting, physical problem, is a valid means for ascertaining whether claimant has a pre-existing permanent partial disability. *See id.*; *see also Belcher Erectors*, 770 F.2d at 1220, 17 BRBS at 146 (CRT); *C & P Telephone*, 564 F.2d at 503, 6 BRBS at 399.

Next, employer asserts that the administrative law judge violated its due process rights and the "law of the case" rule by separating the components of claimant's permanent total disability. In his original decision, the administrative law judge clearly stated that each of claimant's separate

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elements and contending the Director abandoned the credit issue. The case presently before the Board involves only the Section 8(f) issue, as the Board previously affirmed the administrative law judge's resolution of the credit issue and remanded the case for reconsideration of the applicability of Section 8(f). *See Bowker*, slip op. at 5-6; n.1, *supra*.

conditions alone resulted in permanent total disability. Decision and Order at 3-4. In its remand order, the Board specifically advised the administrative law judge to consider the medical evidence with regard to claimant's orthopedic, cardiovascular, and psychiatric problems and determine whether any of them constitutes a pre-existing permanent partial disability. *Bowker*, slip op. at 3-4. The Board also instructed the administrative law judge to address the manifest and contribution elements necessary for Section 8(f) relief. *Id.* at 4. Therefore, contrary to employer's argument, the administrative law judge did not violate the law of the case rule or deny employer due process. *See generally Stokes v. George Hyman Construction Co.*, 19 BRBS 110 (1986) (administrative law judge bound by Board's mandate on remand).

Employer also contends the administrative law judge erred in finding that it has not satisfied the elements necessary for Section 8(f) relief. Contrary to employer's contention, the record contains substantial evidence which supports the administrative law judge's finding that claimant did not have a pre-existing back disability. The evidence in this case indicates that claimant sustained an acute lumbar sprain with radiculitis in July 1977 and that she returned to work prior to being released by her doctor. There is no evidence of additional treatment for this injury and there is no indication that it caused an impairment. Cl. Ex. H-1; Emp. Ex. 13; Tr. at 20. As mere evidence of previous injuries does not establish the existence of a permanent disability unless the condition produces a serious lasting physical problem, *CNA Insurance Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991); *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 correctly determined that claimant did not have a pre-existing orthopedic disability.

The administrative law judge also rationally concluded that claimant's pre-October 1980 psychiatric condition was not a serious or lasting problem. The administrative law judge acknowledged that claimant was a chronic worrier and that she had a vulnerable emotional make-up prior to October 3, 1980, but he reasonably determined that this condition was not permanent or disabling. The record demonstrates that although claimant faced emotional turmoil prior to her work injury, she did not seek psychiatric treatment prior to October 3, 1980.[3] Cl. Ex. 3; Emp. Ex. 31; Tr. at 27. After her 1980 work injury, claimant became severely depressed and at times suicidal, and she has been treated for chronic major depression. Cl. Exs. D-E; Emp. Ex. 31. Dr. Lunianski and Dr. Hyman stated that her post-October 1980 psychiatric condition is permanently disabling, and Dr. Hyman specifically noted that a return to her former employment would likely exacerbate her suicidal tendencies. Cl. Ex. D.

Finally, the administrative law judge found that claimant had a manifest, pre-existing cardiovascular and gastrointestinal disability but that it did not contribute to claimant's permanent total disability.[4] Although claimant's cardiovascular and gastrointestinal disability was caused by

[3]The administrative law judge found that claimant was understandably upset over her father's death, her mother's illness, and her own physical condition. *See* Decision and Order on Remand at 3-4.

[4]Claimant was hospitalized twice in February 1980 due to chest pain. Doctors diagnosed

work stress, as was her psychiatric disability, the administrative law judge determined that these disabilities were separate and distinct. Decision and Order on Remand at 6-7. Moreover, he stated that, even absent her cardiovascular and gastrointestinal condition, claimant was totally disabled due to each of her work-related orthopedic and psychiatric disabilities alone. *Id.*; *see also* Decision and Order at 3-4. Employer asserts the reports of Drs. Gaskell, Gelbard, and Lunianski in general as demonstrating its satisfaction of the contribution element; however, each doctor discussed claimant's condition with regard to only his or her specialty. None of them stated that claimant's total disability was based on the combination of her problems. *See* Cl. Exs. E-G. Therefore, we reject employer's contention that it satisfied the contribution element, and we affirm the administrative law judge's denial of Section 8(f) relief because he rationally found that claimant did not have a pre-existing orthopedic or psychiatric disability and that her pre-existing cardiovascular and gastrointestinal disability did not contribute to her permanent total disability. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *Legrow*, 935 F.2d at 430, 24 BRBS at 202 (CRT); *FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989).

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coronary artery disease, fluctuating blood pressure, hypertension, anxiety reaction, and functional central nervous system and gastrointestinal symptomatology. They prescribed medication and advised her to have her heart monitored regularly. Cl. Exs. H-2, H-3; Emp. Ex. 33 at 32, 35, 37-38; Tr. at 40.

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge