BRB No. 98-0249

ELLEN H. CALLNAN	)	
	)	
Claimant	)	DATE ISSUED: Nov. 4, 1998
	)	
v.	)	
	)	
MORALE, WELFARE & RECREATION, DEPARTMENT OF THE NAVY	)	
	)	
	)	
and	)	
	)	
ESIS/CIGNA INSURANCE COMPANY	)	
	)	
	)	
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 - Awarding Attorney Fee and Denying Section 8(f) Relief of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Elisa A. Roberts (Hamilton, Westby, Marshall & Antonowich, L.L.C.), Atlanta, Georgia, for employer/carrier.

LuAnn B. Kressley (Martin Krislov, Deputy Solicitor for National Operations; 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Attorney Fee and Denying Section 8(f) Relief (90-LHC-1746) of Administrative Law Judge David W. Di Nardi 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 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the third time. Claimant was awarded temporary total disability compensation for severe psychiatric problems resulting from a work-related incident in January 1984, and, in 1990, sought to modify her award to one for permanent total disability compensation. Claimant also sought payment of several disputed medical expenses. At an informal conference held via telephone on October 15, 1990, employer raised the issue of its entitlement to Section 8(f), 33 U.S.C. §908(f), relief and was afforded until November 8, 1990, to submit a completed application to the district director. On November 7, 1990, employer submitted its application. By letter dated November 14, 1990, the district director found employer's Section 8(f) application deficient because no medical evidence had been submitted documenting a pre-existing condition, no diagnosis or conclusion regarding a psychiatric test conducted in January 1980 had been provided, and no medical evidence had been submitted establishing the extent of all impairments and the date of maximum medical improvement. The district director informed employer that it had until November 28, 1990, to correct these deficiencies and advised that failure to do so would result in invocation of the Section 8(f)(3), 33 U.S.C. §908(f)(3), absolute defense. Employer did not respond.

The case was referred to the Office of Administrative Law Judges, and a formal hearing was held on November 14, 1991. The Director, Office of Workers' Compensation Programs (the Director), opposed employer's Section 8(f) application by raising the Section 8(f)(3) defense in a brief submitted to the administrative law judge. In his Decision and Order on Modification - Awarding Benefits dated May 1, 1992, Administrative Law Judge Di Nardi awarded claimant permanent total disability compensation commencing January 26, 1985, as well as the disputed medical expenses. In addition, Judge Di Nardi held that employer was entitled to Section 8(f) relief without addressing whether its Section 8(f) petition was sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations. The Director appealed Judge Di Nardi's decision to the Board, requesting remand on the grounds that

Judge Di Nardi improperly awarded Section 8(f) relief without first giving *de novo* consideration to whether the application submitted by employer is sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulations.

On appeal, the Board granted the Director's motion to remand, and thus vacated Judge Di Nardi's denial of the Director's motion to dismiss employer's Section 8(f) application as well as Judge Di Nardi's award of Section 8(f) relief. *Callnan v. Morale, Welfare & Recreation Department, Department of the Navy*, BRB No. 92-1795 (Apr. 27, 1995)(unpub.). The Board instructed Judge Di Nardi, on remand, to determine whether employer's Section 8(f) application was sufficient to meet the requirements of Section 8(f)(3) of the Act and its implementing regulation, 20 C.F.R. §702.321. In all other respects, Judge Di Nardi's Decision and Order on Modification - Awarding Benefits was affirmed.

On remand, Judge Di Nardi concluded that the Section 8(f) application filed by employer with the district director was not sufficiently documented pursuant to Section 702.321, and he noted that employer did not request an extension of time within which to file additional medical evidence to cure the deficiencies in its Section 8(f) application. Accordingly, the Director's Absolute Defense Motion was granted and employer's Section 8(f) application was denied. Employer appealed Judge Di Nardi's Decision and Order on Remand - Denying Section 8(f) Relief to the Board.

In its decision dated May 14, 1997, the Board again remanded the case to the administrative law judge for independent consideration of whether employer's Section 8(f) application dated November 7, 1990, met the requirements of Section 8(f)(3) and Section 702.321.[1] *Callnan v. Morale, Welfare & Recreation Department,*

[1]Claimant subsequently sought and was awarded additional medical benefits for treatment of her work-related psychological injury by Administrative Law Judge Joel F. Gardiner. Judge Gardiner also awarded claimant's counsel an attorney's fee. This aspect of the case likewise has a protracted procedural history, and was the subject of a prior appeal to the Board. However, given the limited nature of the instant appeal, *i.e.*, employer exclusively challenges Judge Di Nardi's decision regarding Section 8(f) relief, it is not necessary to provide a detailed discussion of the facts surrounding Judge Gardiner's decisions. In short, the appeal of Judge Gardiner's decisions, assigned BRB No. 96-1073, was consolidated with employer's appeal of Judge Di Nardi's decision, BRB No. 96-0529, and those appeals were disposed of in the Board's decision dated May 14, 1997. *Callnan v. Morale, Welfare & Recreation Department, Department of the Navy* [*Callnan II*], BRB

Department of the Navy [*Callnan II*], BRB Nos. 96-0529 and 96-1073 (May 14, 1997)(unpub.). The Board observed that on its first remand to the administrative law judge, it had directed the administrative law judge to conduct a *de novo* review of employer's application, but that on remand, the administrative law judge had not complied, as he merely accepted the district director's rationale for finding the Section 8(f) application deficient. Consequently, the Board reiterated its instructions to the administrative law judge with regard to his consideration of employer's Section 8(f) application on remand.

On remand, Judge Di Nardi (the administrative law judge) considered employer's November 7, 1990, petition for Section 8(f) relief and again found that it was, as presented to the district director, ||not complete, not fully documented and not sufficient,= under the criteria of Section 8(f)(3) of the Act and Section 702.321 of the regulations. Decision and Order on Remand - Awarding Attorney Fee and Denying Section 8(f) Relief (Decision and Order) at 18. Accordingly, the administrative law judge concluded that employer's request for Section 8(f) relief is barred by the absolute defense set out at Section 8(f)(3).[2]

On appeal, employer challenges the administrative law judge's application of the Section 8(f)(3) absolute defense to bar its request for Section 8(f) relief. The Director responds, urging affirmance.

Employer argues that the administrative law judge again did not render a *de*

Nos. 96-0529 and 96-1073 (May 14, 1997)(unpub.). In this decision, the Board vacated Judge Gardiner's award of attorney's fees and remanded the case to the Office of Administrative Law Judges for reconsideration of this issue. Judge Gardiner's award of medical benefits was affirmed.

[2]On remand, Judge Di Nardi, upon noting that Judge Gardiner is no longer available to the Office of Administrative Law Judges, re-assigned the attorney's fee portion of the Board's remand order to himself, and accordingly, through consolidation addressed all of the outstanding issues remaining in claimant's claims for benefits. After considering the attorney's fee petition in light of the Board's remand order, Judge Di Nardi reaffirmed Judge Gardiner's award of an attorney's fee. This aspect of Judge Di Nardi's decision is not challenged on appeal, and therefore is affirmed.

novo review of its Section 8(f) application as directed by the Board's decision on May 14, 1997, but instead again erroneously accepted, at face value, the district director's determination that employer's original application was insufficient. Specifically, employer avers that a *de novo* review, at the very least, requires the administrative law judge to determine whether the documents purport to satisfy the regulatory requirements, and that the administrative law judge, in this case, has not performed this requisite inquiry. Employer also asserts that contrary to the administrative law judge's determination, all of the statutory and regulatory requirements of Section 8(f)(3) and Section 702.321(a)(1) have been met with regard to employer's original application, and thus employer requests that the Board reverse the administrative law judge's application of the Section 8(f)(3) absolute defense and direct that it is entitled to Section 8(f) relief.

Section 8(f)(3) of the Act states:

> Any request, filed after September 28 1984, for apportionment of liability to the special fund established under section 944 of this title for the payment of compensation benefits, and a statement of the grounds therefore (sic), shall be presented to the [district director] prior to the consideration of the claim by the [district director]. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3) (1994). In his decision, the administrative law judge clearly articulates the Board's instructions for remand and the standard required for procedurally reviewing employer's Section 8(f) application under the holding in *Tennant v. General Dynamics Corp,* 26 BRBS 103, 108 (1992); *i.e.*, once the Director has properly raised the Section 8(f)(3) defense, the administrative law judge may not consider the merits of employer's Section 8(f) application without first fully considering *de novo* whether the application, as filed with the district director, is complete, fully documented and/or sufficient to satisfy the criteria of Section 8(f)(3) and the applicable regulation, 20 C.F.R. §702.321.[3] Decision and Order at 5, 14-16.

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[3]Section 702.321(a)(1) defines "fully documented" as:

> A fully documented application shall contain the following information: (i) a specific description of the pre-existing condition relied upon as constituting an existing permanent partial disability; (ii) the reasons for believing that the claimant's permanent disability after the injury would be less were it not for the pre-existing permanent disability . . . These reasons must be supported by medical evidence as specified in paragraph (a)(1)(iv) of this section; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest to the employer; and (iv) documentary medical evidence relied upon in support of the request for Section 8(f) relief. This medical evidence shall be included, but not be limited to, a current medical report establishing the extent of all impairments and the date of maximum medical improvement.

After setting out and reviewing the evidence which employer submitted with its Section 8(f) application dated November 7, 1990, the administrative law judge determined that employer's application for Section 8(f) relief is not complete, not fully documented and thus, not sufficient to meet the requirements of Section 8(f)(3) and Section 702.321. In particular, the administrative law judge found that the documents submitted by employer failed to negate invocation of the Section 8(f)(3) absolute defense because the January 1, 1980, psychiatric test relied upon by employer as evidence that claimant had a manifest, pre-existing psychological condition is admittedly invalid, and thus, not credible evidence to support employer's application. Additionally, the administrative law judge determined that employer did not submit evidence which was in existence prior to the injury on January 5, 1984, of a manifest pre-existing condition of such severity that an employer would have been tempted to discharge the employee because of an increased risk of compensation liability by retaining such an employee. Moreover, the administrative law judge found that there were no medical records to indicate a date of maximum medical improvement, other than the fact that claimant raised the issue of permanency at the October 15, 1990, telephone informal conference.

Contrary to the administrative law judge's determination, we hold that employer's application for Section 8(f) relief satisfies Section 8(f)(3). As the application presented to the district director the grounds for employer's asserting entitlement to Section 8(f) relief and contains the information required by Section 702.321(a)(1), it is complete, fully documented and sufficient to preclude application of the Section 8(f)(3) bar. In accordance with the pertinent regulation, employer's application sets out: (i) a specific description of a pre-existing condition: cyclothymic personality (*i.e.*, a bipolar disorder of at least two years' duration), insomnia and major depression were all diagnosed on November 22, 1983; (ii) the reasons for believing that claimant's permanent disability would be less were it not for the previous permanent impairment: Dr. Gould opined in his letter dated June 23, 1990, that claimant's condition most likely resulted from her being subjected to severe emotional and probably sexual abuse as a child and that her firing in 1984 precipitated the development of these symptoms to create her current condition; (iii) the basis for the assertion that the pre-existing condition relied upon was manifest to employer prior to January 5, 1984: the Bath/Brunswick Mental Health Records dated November 1983 to January 1984, provide a basis for an assertion that the pre-existing condition was manifest to the employer prior to her January 5, 1984, dismissal; and (iv) documentary medical evidence relied upon in support of its request for Section 8(f) relief. The administrative law judge's basis for finding the application insufficient is not that the documents submitted fail to provide the

information specified in subsections (i)-(iv), but that the information provided does not establish the elements of Section 8(f) entitlement on the merits. As employer suggests, however, the test for whether it has submitted a sufficient application under Section 702.321(a)(1) is not whether it has affirmatively proven its entitlement to Section 8(f) relief but whether it has provided the required documentation of the basis for its claim to such relief. Employer's application meets the threshold requirements of Section 702.321(a)(1).

Thus, in purporting to review employer's application, the administrative law judge actually addresses whether employer met its burden of proving its entitlement to Section 8(f) relief.[4] This analysis merges the inquiry as to the merits of Section 8(f) entitlement into a review of the application for compliance with Section 702.321. Any error by the administrative law judge in so doing is harmless in this case, however, as the administrative law judge addressed all the evidence and properly found employer did not prove the necessary elements for Section 8(f) relief.

Section 8(f) of the Act shifts the liability to pay compensation for permanent disability and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. To obtain the benefit of Section 8(f) relief in a case where claimant is permanently totally disabled, employer must show (1) that the employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent injury, and (3) that the subsequent injury alone would not have caused claimant's permanent total disability. *See generally Director, OWCP v. General Dynamics Corp. (Bergeron),* 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992). It is well-established that 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. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). 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, or in this case, emotional problem. *See Director, OWCP v. General*

[4]We note that despite his statement, Decision and Order at 20, the administrative law judge did not address the merits of employer's Section 8(f) application in his decision dated November 13, 1995.

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 determined that there was no evidence in existence prior to the injury on January 5, 1984, of a *manifest* pre-existing condition. In an effort to establish the manifest requirement, employer submitted claimant's 1983 records from the Bath/Brunswick Hospital which diagnosed her with a cyclothymic personalty and indicate that claimant was receiving counseling from therapists to help her cope with problems she was facing with her work and marriage. While these records indicate that claimant had some emotional problems, the administrative law judge rationally found that they do not establish the existence of a *serious, lasting* emotional problem.[5] Decision and Order at 19. In addition, the subsequent deposition testimony of Drs. Gould, Brenner and Michals supports the conclusion that claimant did not have a diagnosed permanent psychiatric condition prior to her work injury.

In his deposition dated August 17, 1990, Dr. Gould testified that while claimant had some problems prior to January 1984, "they did not appear to be limiting her functioning," and that he did not believe that "there was a psychiatric condition," at that time.[6] Deposition of Dr. Gould dated August 17, 1990, at 11, 16. Dr. Brenner testified that claimant had a *latent* dissociative identity disorder (DID) prior to January 5, 1984, which was "triggered" by the work-related incident on January 5, 1984, and thus, speculated that her condition may not have manifested itself if she had not experienced what had happened on the job. Deposition of Dr. Brenner dated July 13, 1995, at 21, 135. Dr. Brenner observed that there are many

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[5]While the administrative law judge briefly discusses the deposition testimony of Dr. Voss that claimant had significant problems back into 1980, that her problems pre-existed the work-related incident and that claimant's condition of borderline personality disorder existed prior to January 5, 1984, this testimony cannot be used to establish the manifest requirement as it was made *subsequent* to the date of the work incident. *See generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993).

[6]Additionally, when asked whether claimant's borderline personality disorder would have been manifest to some extent back in 1983, Dr. Gould replied, "I don't know." Deposition of Dr. Gould at 22.

individuals who have been functioning, working people for many years with a latent DID, which may never manifest itself unless it gets triggered sometime in adulthood. Brenner Dep. at 95-97, 135. Similarly, Dr. Michals agreed that claimant had functioned as a normal, adequate human being up until January 1984, when the work-related incident, which perhaps was the last straw, combined with other life stressors, *e.g.*, her troubled marriage for one, to bring her latent psychiatric disorder to the forefront. Deposition of Dr. Michals dated January 6, 1995, at 24-30. Drs. Brenner and Michals therefore each opined that any pre-existing psychiatric condition remained latent, and thus, was essentially undetected until it became manifest at the time of claimant's work-related incident in January 1984, which served, at least in part, as a trigger for claimant's diagnosable work-related psychiatric condition. Consequently, the administrative law judge's finding that employer

has not shown a manifest pre-existing disability is affirmed.[7] *See generally Bunge Corp. v. Director, OWCP,* 951 F.2d 1109, 25 BRBS 82 (CRT) (9th Cir. 1991); *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.,* 946 F.2d 1565 (D.C. Cir. 1991). The administrative law judge's denial of Section 8(f) relief is therefore affirmed.

Accordingly, Judge Di Nardi's Decision and Order on Remand - Awarding Attorney Fees and Denying Section 8(f) Relief is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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[7]The record indicates that employer has already had the benefit of a formal hearing before the immediate administrative law judge in which to present evidence and partake in oral argument with regard to its Section 8(f) application. Specifically, a formal hearing was held on November 14, 1991, at which time employer raised its entitlement to Section 8(f) relief and submitted evidence relevant to its request. The Director subsequently argued, by brief, the applicability of the Section 8(f)(3) absolute bar and employer has had ample opportunity to respond in support of its application. Consequently, as employer has already had the opportunity to be heard on its Section 8(f) request, and the instant record contains all of the evidence required to enable the administrative law judge to give *de novo* consideration as to whether employer submitted a sufficient application requesting Section 8(f) relief, and to allow him to make a determination regarding the validity of employer's Section 8(f) request on the merits, there was no need for the administrative law judge to hold an additional formal hearing on this issue on remand.