BRB No. 89-2087

WILLIAM McCLURE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FRED F. NOONAN COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION FUND, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of R.S. Heyer, Administrative Law Judge, United States Department of Labor.

William J. Landsiedel, Cerritos, California, for employer/carrier.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (87-LHC-2209) of Administrative Law Judge R.S. Heyer awarding benefits 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On August 25, 1986, claimant injured his neck and right upper extremity while assisting in moving a gangway off of a ship. Claimant was treated by Dr. Leesment, an orthopedic surgeon,

until June 15, 1988, the date on which Dr. Leesment considered that claimant reached a permanent and stationary condition regarding his orthopedic injuries. During the course of treatment, Dr. Leesment recommended that claimant seek psychiatric care, and claimant began treatment with Dr. Jen Kin, a psychiatrist, on April 13, 1987. Claimant has not returned to work and sought permanent total disability benefits under the Act.

The administrative law judge found that claimant is permanently and totally disabled due to his orthopedic and psychiatric conditions resulting from the August 1986 injury and that claimant reached maximum medical improvement on August 15, 1988. The administrative law judge also found that employer is not entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in finding that claimant cannot return to any work due to his psychiatric condition and thus that he is totally disabled. In addition, employer contends that the administrative law judge erred in denying Section 8(f) relief. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief in this appeal.

Initially, employer contends that the administrative law judge erred in finding claimant totally disabled. The administrative law judge found that the orthopedic medical evidence indicates that claimant is unable to return to his former employment, but is able to perform a majority of the sedentary light-duty jobs located by the vocational management firm. Decision and Order at 8. However, the administrative law judge also found that claimant has sustained a psychiatric disability which prevents him from reentering the work force. Decision and Order at 7. To establish a *prima facie* case of total disability, the employee must show that he cannot return to his regular or usual employment due to his work-related injury. *See Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

In the present case, the administrative law judge credited the opinions of Drs. Leesment and Booth who agreed that claimant cannot return to his previous employment as a winch driver or hatch tender due to his orthopedic limitations, but stated that he could perform the sedentary light-duty jobs identified by Kathryn Melamed, a vocational rehabilitation expert.[1] Emp. Ex. 11; Cl. Ex. 10. The administrative law judge found that Dr. Newman's opinion that claimant had not incurred any residual disability as a result of the August 25, 1986 injury was not as persuasive as the concurrence of opinions of Drs. Leesment and Booth since Dr. Newman examined claimant only once. *See* Emp. Ex. 12.

The administrative law judge also found that the evidence establishes that claimant has sustained a psychiatric impairment as a result of the August 1986 injury. Dr. Jen Kin, claimant's treating psychiatrist, diagnosed claimant as suffering from major depression with suicidal

[1]The positions identified in the labor market survey include marine checker, cashier, telemarketer, health club membership solicitor, conciliator, and driver. *See* Emp. Ex. 17.

tendencies. Dr. Jen Kin opined that the psychiatric disability resulting from the August 1986 injury continued to prevent claimant from returning to his former employment and from re-entering the work force at all. Cl. Ex. 11. Claimant also was examined three times by Dr. Daigle, a board-certified psychiatrist, who diagnosed single-episode major depression. Although Dr. Daigle stated that claimant could not return to his former employment because of his physical limitations, he opined that claimant could, from a psychiatric viewpoint, perform the jobs of marine checker, signalman, conciliator, driver, cashier, retail salesperson, telephone clerk, and health club membership solicitor. Emp. Exs. 13, 16. Dr. Daigle testified, however, that at the time of the March 1988 examination, claimant was not at a level at which he could undertake such employment, but he thought claimant would be in a better emotional and psychological state after this present claim resolved. *See* Emp. Ex. 22 at 22.

Once claimant shows an inability to return to his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). The administrative law judge gave greater weight to claimant's treating psychiatrist, Dr. Jen Kin, and also noted Dr. Daigle's comments at the hearing and claimant's testimony regarding his condition,[2] and found that claimant has a psychiatric disability which prevents him from reentering the work force. The Board has held that if the administrative law judge finds, based on medical opinions, that claimant cannot perform any employment, employer has not established the existence of suitable alternate employment. *See Lostaunau v. Campbell Industries Inc.*, 13 BRBS 227 (1981), *rev'd on other grounds sub nom. Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Moreover, the administrative law judge found that the vocational expert only communicated to prospective employers claimant's orthopedic, not psychiatric, limitations. Therefore, the administrative law judge rationally found that the sedentary positions identified in the labor market survey do not represent suitable alternate employment for claimant at this time. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). The administrative law judge is entitled to weigh the evidence and draw inferences from it, and employer has raised no reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations. *See Todd Pacific Shipyards Corp. v. Director, OWCP*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990); *Cordero v. Triple A Machine Shop*, 580 F.2d 1131, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Therefore, we affirm the administrative law judge's finding that claimant has established a *prima facie* case of total disability and that suitable alternate employment is not established, and, consequently, the award of permanent total disability benefits.[3]

[2]Claimant testified that he was severely depressed and continued to suffer from crying spells, inability to concentrate, withdrawal, and suicidal ideation. *See* H. Tr. at 51-52.

[3]Contrary to employer's assertions, claimant need not establish that he diligently sought employment until employer first identifies suitable alternate employment, *see Piunti v. I.T.O. Corporation of Baltimore*, 23 BRBS 367 (1990), and a claimant who is forced to retire due to his injuries is not precluded from obtaining compensation for total disability. *See generally Rajotte v.*

Employer also contends that the administrative law judge erred in denying it relief from continuing compensation liability under Section 8(f). Employer seeks to rely on the medical reports of a previous lumbosacral sprain which occurred on February 21, 1977 and injuries claimant sustained in a prior automobile accident, which primarily injured claimant's knees, to establish Section 8(f) relief.

Section 8(f) relief is available in this case if employer establishes that claimant had a manifest pre-existing permanent partial disability that combined with the subsequent work-related injury to result in claimant's permanent total disability. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). A pre-existing permanent partial disability has been defined as a serious, lasting physical condition. *See Lockheed Shipbuilding v. Director, OWCP, (Sekin)*, 951 F.2d 1143, 25 BRBS 85 (CRT)(9th Cir. 1991); *Currie v. Cooper Stevedoring Company, Inc.*, 23 BRBS 420; *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). The administrative law judge found that claimant suffered several previous injuries and that he suffers from a degenerative cervical spine. Of these injuries and conditions, the administrative law judge found that the knee injuries sustained in the 1985 automobile accident and the degenerative cervical spine qualify as pre-existing disabilities for purposes of Section 8(f). Decision and Order at 8. The administrative law judge found that the 1977 back injury resulted in no objective, and only slight subjective, factors of disability. *See* Emp. Ex. 18. Moreover, after a period of disability, claimant returned to work with no restrictions. As the mere fact that an employee previously sustained an injury does not, standing alone, establish that he had a pre-existing permanent partial disability, and there are no other medical opinions of record which indicate a chronic low back problem, we affirm the administrative law judge's finding that claimant's 1977 lumbar back strain does not qualify as a pre-existing disability under Section 8(f). *See Sekin*, 951 F.2d at 1146, 25 BRBS at 88; *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982). Further, as claimant was only treated for injuries to his knees following the automobile accident in 1985, we reject employer's contention that claimant suffered a serious and lasting injury to his neck in that accident which would qualify as pre-existing condition under Section 8(f). *Id.*

General Dynamics Corp., 18 BRBS 85 (1986).

In order to establish the contribution element under Section 8(f), employer also must establish that claimant's total permanent disability is not due solely to the subsequent injury. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185, 23 BRBS 1 (9th Cir. 1989). The administrative law judge in the present case found that the medical evidence does not establish that claimant's knee injury contributed to claimant's permanent total disability.[4] The administrative law judge found that although Drs. Leesment and Booth state that claimant's previous knee disability might have contributed to his present disability, neither physician offered any further explanation of the contributing effect or expressed a definitive opinion on this question.[5] Decision and Order at 9. The administrative law judge, as finder-of-fact, is entitled to consider all credible inferences and can consider any part of an expert's testimony or he may reject it completely. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). As there are no medical opinions of record that state unequivocally that claimant's prior knee injuries contributed to his current disability, we affirm the administrative law judge's finding that evidence of claimant's knee injuries in the 1985 automobile accident is insufficient to establish relief under Section 8(f). *See Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991).

Lastly, the manifest requirement may be satisfied either through employer's actual knowledge of the pre-existing condition or through medical records in existence prior to the second injury revealing an unambiguous, objective and obvious indication of a serious, lasting condition. *See Bunge Corp. v. Director, OWCP*, 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991). The administrative law judge found that although claimant's knee injury was manifest from the medical reports following the automobile accident, the evidence fails to demonstrate that claimant's degenerative cervical spine condition was manifest to employer. Decision and Order at 9. Dr. Booth testified that within the realm of medical certainty, the condition existed before the 1986 injury and that diagnostic testing would have revealed the condition; however, no medical records dated before the 1986 injury were submitted to substantiate Dr. Booth's opinion and claimant testified that he had never been told by any doctor that he had a degenerative condition. A post-injury diagnosis of a pre-existing degenerative disease is not sufficient to satisfy the manifest element. *See generally Vlasic v. American President Lines*, 20 BRBS 188 (1988). Therefore, as the record contains no diagnosis of a degenerative cervical spine condition prior to the 1986 injury, the administrative law judge properly denied relief under Section 8(f) based on claimant's pre-existing degenerative spine condition. *See Bunge Corp.*, 951 F.2d at 111-112, 25 BRBS at 85 (CRT).

In sum, we affirm the administrative law judge's denial of Section 8(f) relief, as he rationally found that the 1977 low back injury does not constitute a pre-existing permanent partial disability and that there is insufficient evidence to establish that the pre-existing knee disability contributed to claimant's permanent total disability. Lastly, the administrative law judge properly found that the degenerative cervical condition was not manifest to employer.

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[4]The administrative law judge did find that claimant's degenerative cervical spine condition combined with the 1986 neck injury resulting in claimant's total disability.

[5]Following the 1985 automobile accident, Dr. Leesment did recommend that claimant avoid squatting, kneeling, and he restricted climbing. Although these restrictions overlap the medical restrictions following the 1986 work-related injury, Dr. Leesment does not state that claimant's prior knee injury contributed to his permanent total disability.

Accordingly, the Decision and Order of the administrative law judge awarding claimant permanent total disability benefits and denying employer relief from continuing compensation liability under Section 8(f) is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge