BRB No. 91-986

GARY ANDERSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
	)	
C.G. WILLIS, INCORPORATED	)	DATE ISSUED:_____
	)	
and	)	
	)	
AETNA CASUALTY & SURETY 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 of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for employer/carrier.

Before: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (80-LHC-1952) of Administrative Law Judge Aaron Silverman denying modification of 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

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984,
33 U.S.C. §921(b)(5)(1988).

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 second time. On March 20, 1978, claimant fell and injured his back while working for employer. In a Decision and Order issued on May 24, 1982, Administrative Law Judge Clarke awarded claimant compensation for permanent total disability, but denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge found that while claimant had a pre-existing permanent partial disability of the back which combined with the work injury to cause a greater degree of disability, the pre-existing disability was not manifest to employer.

Employer appealed the administrative law judge's denial of Section 8(f) relief to the Board, contending that the administrative law judge erred in finding that claimant's pre-existing disability was not manifest. The Board held that the mere existence of a scar on claimant's back without any relevant diagnoses prior to the date of claimant's work injury is insufficient to render a pre-existing back disability manifest to employer. The Board stated that because employer is not a medical expert, simply seeing a scar on claimant's back without a relevant medical diagnosis could not have alerted employer to claimant's condition. In so holding, the Board emphasized that employer introduced no medical records from claimant's prior surgery into evidence. Consequently, the Board affirmed the administrative law judge's denial of Section 8(f) relief. Anderson v. C.G. Willis, Inc., 19 BRBS 169 (1986).

Employer thereafter sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging there was a mistake in a determination of fact regarding the manifest requirement and that subsequent case law would support an award of Section 8(f) relief.

Administrative Law Judge Silverman found that employer, in effect, merely reargued matters previously considered and ruled on by the Board and provided no new evidence, medical or other, to show either a mistake of fact or change of condition. The administrative law judge also stated that any issues regarding a change in law have to be considered by the Board in the first instance. He consequently denied the petition for modification.

On appeal, employer contends that the administrative law judge erred in finding there was no mistake in fact as to whether the manifest requirement is satisfied and therefore erred in denying employer Section 8(f) relief. Employer also argues that a change in the law requires that its petition for Section 8(f)

relief be granted. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification is permitted based on a mistake of fact in the initial decision or a change in claimant's condition. Jenkins v. Kaiser Aluminum & Chemical Sales, Inc., 17 BRBS 183 (1985). Under Section 22 of the Act, the administrative law judge has broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence or merely further reflection on the evidence initially submitted. Dobson v. Todd Pacific Shipyards Corp., 21 BRBS 174 (1988).

With respect to its petition for modification, employer contends that Administrative Law Judge Clarke was mistaken in concluding that a scar on claimant's back did not make his prior back surgery manifest. Employer did not submit new evidence in support of this contention but relies on O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 256 (1971), reh'g denied, 404 U.S. 1053 (1972), in requesting that the factfinder further reflect on the evidence initially submitted. Employer continues to maintain that claimant's pre-existing back condition was manifest because claimant had a scar on his back and that any physician could tell by examining the scar that claimant had undergone serious back surgery. Employer also continues to assert that claimant would have revealed his back condition to employer had he only been asked.

Section 8(f) shifts the liability to pay compensation for permanent total disability after 104 weeks from employer to the Special Fund if employer proves that claimant had a manifest pre-existing permanent partial disability and that the subsequent disability is not due solely to the work injury. See generally Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 22 BRBS 11 (CRT)(5th Cir. 1989); 33 U.S.C. §908(f)(1). A pre-existing disability will meet the manifest requirement if, prior to the subsequent injury, employer either had actual knowledge of the pre-existing condition, or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable. Id; Lockhart v. General Dynamics Corp., 20 BRBS 219 (1988). We reject employer's contention that there was a mistake in the determination that claimant's scar satisfied the manifest requirement. As employer is not a medical expert, simply seeing the scar without a relevant medical diagnosis could not have alerted employer to claimant's condition.[1] We emphasize

[1]Employer incorrectly argues that it has satisfied the manifest requirement because a diagnosis could have been made had claimant been examined. See Lambert's Point Docks, Inc. v. Harris, 718 F.2d 644, 16 BRBS 1 (CRT) (4th Cir. 1983); Hitt v. Newport News Shipbuilding and Dry Dock Co., 16 BRBS 353 (1984).

again that employer introduced no medical records from claimant's prior surgery into evidence. Anderson, 19 BRBS at 170. We therefore affirm the finding of Administrative Law Judge Silverman that, in effect, employer reargues matters previously considered and ruled on by the Board and states no argument based on evidence, medical or other, to show either a mistake of fact or change of condition.[2]

Next, employer contends that a change in the law requires that it be granted Section 8(f) relief. Employer asserts that the Board's decision in Stone v. Newport News Shipbuilding and Dry Dock Co., 20 BRBS 1 (1987), controls the instant case. Employer also relies on the case of Newport News Shipbuilding and Dry Dock Co. v. Harris, 921 F.2d 306, 24 BRBS 190 (CRT) (4th Cir. 1991), as setting forth an exception to the manifest requirement. Alternatively, employer argues that the manifest rule should be abandoned and cites American Ship Building Co. v. Director, OWCP, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989), as support for this proposition.

Initially, we note that modification cannot be obtained based on a change in the law. See generally O'Keeffe, 404 U.S. at 256; Stokes v. George Hyman Construction Co., 19 BRBS 110 (1986); Swain v. Todd Shipyards Corp., 17 BRBS 124 (1985). Moreover, Stone, 20 BRBS at 1, can be distinguished from the instant case based on its unique facts. In Stone, an occupational disease case, there had not been an employment relationship with employer since 1945 and was seeking to show that a condition diagnosed in 1926 was a manifest pre-existing permanent partial disability. Employer thus would have been required to obtain medical records more than 40 years old in order to satisfy the manifest element. The hospital which treated decedent's kidney disorder in a 1926 hospitalization and diagnosed a congenital missing kidney, responded to a subpoena by stating that it destroyed its records after 25 years. Under these circumstances, the Board held that the record could support a finding that the kidney disease was constructively manifest in 1945, and it remanded the case for further findings. The instant case, however, does not involve an employment relationship that ended many years ago and does not present the latency problems associated with occupational diseases. Likewise, the decision in Harris, 921 F.2d at 306, 24 BRBS at 190 (CRT), can be distinguished from the present case in

[2]We note that Administrative Law Judge Clarke stated claimant would not have told the truth about his back condition had he been asked. Employer argues that this credibility determination should be overturned "upon further reflection." As claimant was not asked, it is irrelevant what he would have said, or whether Judge Clarke's credibility determination was rational.

that, unlike Harris, claimant is not a "retiree."[3] Finally, we decline to apply the decision in American Ship Building Co., 865 F.2d at 727, 22 BRBS at 15 (CRT), as the present case does not arise within the jurisdiction of the Sixth Circuit. We therefore reject employer's contention.

Accordingly, the Decision and Order of the administrative law judge denying modification is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

[3]In Harris, the United States Court of Appeals for the Fourth Circuit eliminated the manifest requirement in cases of retirees whose occupational diseases manifest themselves after retirement.