BRB Nos. 88-4061
and 88-4061A

ALEX C. YOUNG	)	
	)	
Claimant	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
T. SMITH & SON (TEXAS), INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
MIDLAND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Robert D. Rapp (Mandell & Wright, P.C.), Houston, Texas, for claimant.

Phillip B. Dye, Jr. and Daniel B. Shilliday (Vinson & Elkins, L.L.P.), Houston, Texas, for employer/carrier.

LuAnn Kressley (Thomas S. Williamson, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and employer cross-appeals the Decision and Order (87-LHC-1897) of Administrative Law Judge Quentin P. McColgin 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 if they 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 June 20, 1982, while in the course of his employment as a longshoreman with employer, claimant sustained an injury to his right hip. Claimant sought medical treatment the following day and had not returned to work for employer as of the date of the formal hearing. Employer voluntarily paid claimant temporary total disability compensation commencing June 21, 1982. 33 U.S.C. §908(b). Claimant thereafter sought compensation for permanent total disability pursuant to 33 U.S.C. §908(a).

In his Decision and Order, the administrative law judge found that claimant aggravated and made symptomatic a pre-existing arthritic hip condition, that claimant is incapable performing his usual employment duties as either a longshoreman or a recreation aide,[1] and that employer failed to establish the availability of suitable alternate employment. After further finding that claimant reached maximum medical improvement on March 19, 1984, the administrative law judge awarded claimant temporary partial disability compensation from June 20, 1982 through May 6, 1983, temporary total disability compensation from May 7, 1983 through March 19, 1984, and permanent total disability compensation thereafter. 33 U.S.C. §908(a), (b), (e). The administrative law judge further found employer entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), on the basis of claimant's pre-existing arthritic hip condition.

On appeal, the Director challenges the administrative law judge's finding that employer is entitled to Section 8(f) relief. In its cross-appeal, employer challenges the administrative law judge's findings regarding the occurrence of a compensable injury, as well as the nature and extent of claimant's alleged disability.[2] Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

We first consider employer's contention on cross-appeal that claimant did not suffer a compensable injury under the Act. It is well-established that, in order to establish that he has

[1]Prior to his injury, claimant worked a second job as a recreation aide with the Houston Parks and Recreation Department. The administrative law judge found that, following his longshore injury, claimant retained this position only through his employer's beneficence until he was terminated on May 5, 1983.

[2]In its response brief, employer, noting that it does not waive its argument on cross-appeal that the administrative law judge erred in finding claimant to be permanently totally disabled, maintains, in the alternative, that the administrative law judge properly accorded employer Section 8(f) relief.

suffered an injury under the Act, a claimant need only establish some physical harm, *i.e.*, that something has gone wrong with the human frame. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc*); *see also Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989). Credible complaints of subjective symptoms and pain are sufficient to establish the element of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In the instant case, the administrative law judge credited and relied upon claimant's testimony regarding his recurrent hip pain, noting that there is no inconsistency in those complaints and that both Dr. Bains, an examining psychiatrist, and Dr. Barnes, claimant's treating orthopedist, believed claimant's complaints of pain. *See* Emp. Ex 7; Emp. Ex. 12 at 29-30. The administrative law judge further addressed the opinions of Drs. Butler and Christensen regarding the existence of claimant's pain, expressly noting Dr. Butler's refusal to say that nothing is wrong with claimant without conducting further diagnostic tests and Dr. Christensen's testimony that he did not disagree with the opinion of Dr. Bains that claimant's pain is real. *See* Emp. Ex. 14 at 38-39; Emp. Ex. 18 at 54. In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and to draw his own inferences from the evidence. *See generally Avondale Shipyards v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Based upon the record before us, we cannot say that the administrative law judge's decision to credit claimant's testimony regarding his ongoing hip pain is inherently incredible or patently unreasonable; accordingly, we reject employer's contention that claimant has failed to establish a compensable injury under the Act.[3]

[3]Because claimant established a harm, *i.e.*, pain, and the parties stipulated to the occurrence of a work-related accident that could have caused the pain, claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his injury was work-related. *See, e.g., Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Contrary to employer's view of claimant's burden in establishing a *prima facie* case under Section 20(a), claimant is not required to produce medical evidence establishing that the working conditions in fact caused the harm, but, rather, need establish only the existence of an accident or working conditions that could have caused the harm. *See Hampton*, 24 BRBS at 144.

Employer next challenges the administrative law judge's determination that claimant is incapable of resuming his usual employment duties with employer. Specifically, employer contends that the administrative law judge erred in relying upon the functional limitations placed upon claimant by Dr. Barnes since, employer contends, that physician's opinion is based solely on claimant's complaints of pain. It is well-established that claimant has the burden of establishing the nature and extent of his disability. *See Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). To establish a *prima facie* case of total disability, an employee must establish that he is unable to return to his usual employment. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988). In the instant case, the administrative law judge, after setting forth the testimony Drs. Barnes, Butler and Christensen, credited and relied upon claimant's complaints of pain and Dr. Barnes' functional limitations in concluding that claimant is incapable of performing his usual occupational duties with employer. Dr. Barnes testified that claimant is incapable of performing longshore work, is limited to lifting 10 pounds occasionally, is restricted from bending, stooping, and kneeling, must alternatively sit and stand for short intervals of time, and requires a crutch or cane for walking. *See* Emp. Exs. 10, 12, 13. In contrast, both Drs. Butler and Christensen declined to offer unequivocal opinions regarding claimant's present physical restrictions. *See* Emp. Ex 14 at 34-35, 38-41, 89; Emp. Ex. 18 at 53-54.

Contrary to employer's contention, an administrative law judge is not required to find determinative the opinions of employer's medical experts simply because the experts are more highly trained. *See Kennel*, 914 F.2d at 91, 24 BRBS at 48 (CRT). Rather, the administrative law judge, as fact-finder, must independently analyze and discuss the medical evidence before him. *See generally Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). In the instant case, the administrative law judge thus rationally declined to rely upon the opinions of Drs. Butler and Christensen, noting that both physicians offered equivocal opinions, and that each physician examined claimant on only one occasion. *See, e.g., Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182, 194 n.13 (D.C. Cir. 1981). In contrast, the credited opinion of Dr. Barnes, as well as claimant's credited complaints of pain, constitute substantial evidence to support the administrative law judge's finding that claimant cannot perform his usual employment duties with employer. *See Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). We therefore affirm the administrative law judge's determination that claimant cannot return to his usual work, and is thus permanently totally disabled.

We further reject employer's cursory argument that there is no evidence to support the administrative law judge's finding that claimant cannot perform the alternative employment opportunities identified by employer's vocational expert.[4] The administrative law judge thoroughly discussed the testimony of employer's vocational expert, Willie Quintanilla, and the testimony of claimant's expert, Richard J. Ruppert, as to the suitability for claimant of three jobs identified by Mr.

[4]We note that employer's assignment of error to the administrative law judge's finding that employer failed to establish the existence of suitable alternate employment is inadequately briefed. *See, e.g., Shoemaker v. Schiavone and Sons, Inc*, 20 BRBS 214 (1988).

Quintanilla, and concluded that the specific requirements of each job are beyond claimant's capabilities. In challenging the administrative law judge's findings regarding this issue, employer identifies no specific errors in the administrative law judge's analysis other than the administrative law judge's reliance on Dr. Barnes' functional restrictions, which we have affirmed. *See* discussion, *infra*. We therefore affirm the administrative law judge's finding that employer failed to establish the existence of suitable alternate employment which claimant is capable of performing, *see Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991), and his consequent award of permanent total disability compensation.

The Director, in his appeal, contends that the administrative law judge erroneously granted employer relief from continuing liability for the payment of claimant's benefits pursuant to Section 8(f) of the Act. Section 8(f) relief is available to employer in a case where the employee is permanently totally disabled if the following three requirements are met: 1) the employee had a pre-existing permanent partial disability, 2) which combined with the subsequent work injury to result in permanent total disability, and 3) the pre-existing disability was manifest to employer. *See, e.g., Adams v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 78 (1989).

In awarding employer relief pursuant to Section 8(f), the administrative law judge credited Dr. Barnes' opinion that claimant's 1982 work accident resulted in a chronic hip sprain which in turn made symptomatic claimant's pre-existing arthritic hip condition. The administrative law judge determined that claimant's pre-existing arthritis made him more susceptible to his present condition and, accordingly, found the pre-existing permanent partial disability and contribution elements of Section 8(f) satisfied. The administrative law judge further found that claimant's pre-existing arthritis was manifest to employer by virtue of the medical reports of Drs. Giessel and Oley, who treated claimant following an automobile accident in 1979, and an x-ray taken by Dr. Baker in 1980.

Our review of the record reveals that claimant was involved in an automobile accident in 1979 following which claimant reported, *inter alia*, a "catch" in his right hip to Drs. Giessel and Oley; neither physician, however, diagnosed claimant's condition as an arthritic hip nor did either physician treat claimant for a hip injury. *See* Emp. Exs. 1, 8. Claimant additionally was examined by Dr. Baker on January 25, 1980; Dr. Baker's subsequent report contains no reference to either a "catch" in claimant's right hip or any other hip problem, while an x-ray taken at this time was not read as exhibiting a hip defect. *See* Emp. Ex. 9. While claimant's deposition and hearing testimony was vague as to whether he experienced a "catch" in his hip subsequent to the 1979 automobile accident, claimant unequivocally testified that between the time of that accident and his work injury, he had no pain, limitation of motion, weakness or any trouble with his right hip. *See* Emp. Ex. 11 at 36; Tr. at 77-81. Rather, the initial diagnosis of a hip abnormality occurred post-injury when Dr. Christensen, during his deposition testimony, interpreted Dr. Baker's 1980 x-ray as revealing a cyst on claimant's right hip. *See* Emp. Ex. 18 at 18.

A pre-existing disability will meet the manifest requirement of Section 8(f) 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. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988). The medical records need not indicate the severity or precise nature of the pre-existing condition in order for the manifest requirement to be satisfied, as long as there is sufficient, unambiguous and obvious information regarding the existence of a serious lasting physical problem. *See Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT)(5th Cir. 1989); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1986); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984). A *post hoc* diagnosis of a pre-existing condition, even a diagnosis based only on medical records in existence prior to the date of injury, is insufficient to meet the manifest requirement of Section 8(f). *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991).

We hold, as a matter of law, that the *post hoc* interpretation by Dr. Christensen of the 1980 x-ray as showing a hip cyst is insufficient to satisfy the manifest requirement of Section 8(f). As the record contains no *contemporaneous* interpretation of the 1980 x-rays revealing a cyst or any other hip abnormality, we must reverse the administrative law judge's determination that the mere existence of the 1980 x-ray prior to the time of claimant's work injury is sufficient to meet the manifest requirement. *See Smith*, 862 F.2d at 1224, 22 BRBS at 14 (CRT); *Caudill*, 25 BRBS at 99; *Armstrong*, 22 BRBS at 278-279. Additionally, we hold that the administrative law judge's finding that the medical reports of Drs. Giessel and Oley demonstrate a pre-existing permanent partial disability which was manifest to employer is unsupported by the record. The reports of these physicians demonstrate only that claimant complained of a "catch" in his hip that was neither diagnosed nor treated by either physician. The mere reference to a physical complaint by claimant does not provide a sufficiently unambiguous, objective and obvious indication of a condition which would put employer on notice of the risk of increased compensation liability; thus, it is legally insufficient to satisfy the manifest requirement. *See Director, OWCP v. Berkstresser*, 921 F.2d 306, 309-311, 24 BRBS 69, 71-73 (CRT)(D.C. Cir. 1990); *Smith*, 862 F.2d at 1224, 22 BRBS at 14 (CRT); *Caudill*, 25 BRBS at 99-100; *Currie v. Cooper Stevedoring Company, Inc.*, 23 BRBS 420, 426 (1990); *Armstrong*, 22 BRBS at 278. As employer has failed to satisfy the manifest requirement necessary for establishing relief under Section 8(f) of the Act, we reverse the administrative law judge's determination that employer is entitled to Section 8(f) relief.

Accordingly, the administrative law judge's determination that employer is entitled to relief pursuant to Section 8(f) is reversed. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge