BRB No. 93-1578

MARVIN BETTS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MANSON CONSTRUCTION AND ENGINEERING COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Joan L.G. Morgan (Williams, Kastner & Gibbs), Seattle, Washington, for employer.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer[1] appeals the Decision and Order (92-LHC-1258) of Administrative Law Judge Paul A. Mapes 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.* (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).

[1]Employer's carrier, Pacific Marine Insurance Company, was liquidated and did not appear before the administrative law judge. Decision and Order at 2, n. 1.

Claimant was injured on March 25, 1987, when the crane he was operating tipped over and fell 75 feet into a waterway. Rescue workers extricated claimant from the cab of the crane after claimant had spent approximately one hour in the crane in the water. Claimant was hospitalized for five days and discharged with diagnoses of a nasal fracture, multiple facial lacerations, and an abdominal wall contusion. The parties stipulated that claimant suffered from a totally and permanently disabling injury in the course of his employment and reached maximum medical improvement on January 13, 1989. Decision and Order at 2; Tr. at 5. In seeking relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), employer sought to establish that claimant's learning disability was a manifest pre-existing permanent partial disability which contributed to his permanent total disability. The administrative law judge denied Section 8(f) relief, finding that none of the required elements was met. On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief.

Section 8(f) shifts liability to pay compensation for permanent total disability from employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks if employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent total disability is not solely due to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Todd Pacific Shipyards Corp. v. Director, OWCP [Mayes]*, 913 F.2d 1426, 24 BRBS 25 (CRT)(9th Cir. 1990). 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 prior to the subsequent injury from which the condition was objectively determinable. *Bunge Corp. v. Director, OWCP [Miller]*, 951 F.2d 1109, 25 BRBS 82 (CRT)(9th Cir. 1991); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *Esposito v. Bay Container Repair Co.*, BRBS , BRB No. 93-0658 (Mar. 25, 1996).

Employer contests the administrative law judge's findings on all three of the elements required for Section 8(f) relief. Employer contends that the administrative law judge erred in denying Section 8(f) relief by finding that claimant's alleged pre-existing learning disability was not manifest to employer at the time of injury. Employer asserts that both claimant's school records and the testimony of Mr. McGarry, its Vice-President of Operations who had observed claimant while working, establish that claimant's learning disability was manifest to employer. We disagree with employer. In concluding that claimant's learning disability was not manifest to employer prior to the injury, the administrative law judge discussed Mr. McGarry's testimony that claimant was "very slow," that his speech was "sometimes just a little bit broken," that he "really didn't have a problem with [him] at all" and that he would not have characterized claimant as "mentally retarded." Decision and Order at 12. After discussing this testimony, the administrative law judge rationally

concluded that, at most, it showed that employer may have suspected that claimant was of below-average intelligence but did not constitute knowledge of a learning disability.[2] *Lacey v. Raley's Emergency Road Service*, 23 BRBS 432 (1990), *aff'd mem.*, 946 F.2d 1565 (D.C. Cir. 1991); Decision and Order at 12; Tr. at 18, 19, 23. Moreover, the administrative law judge also discussed claimant's school records, which indicated that claimant had failed a grade, was conditionally promoted to two grades, and participated in a special education class.[3] Decision and Order at 13. The administrative law judge acted within his discretion in finding that the school records do not suggest the reason for claimant's poor performance; they do no more than indicate poor performance by claimant in certain academic areas.[4] *Bunge Corp.*, 951 F.2d at 1109, 25 BRBS at 82 (CRT); Decision and Order at 13; Employer's Exhibit A at 135-149. The administrative law judge accurately noted that any suggestion that claimant's poor performance was caused by a learning disability is contained only in the psychological reports of Drs. Fordyce and Townes which are insufficient to establish that claimant's disability was manifest, as they were prepared subsequent to claimant's work injury.[5] *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); Decision and Order at 13; Employer's Exhibits A at 127-134, C. As the administrative law judge's finding that the evidence of record is insufficient to satisfy the manifest element for Section 8(f) relief is rational and supported by substantial evidence, we affirm the denial of Section 8(f) relief.[6]

Accordingly, the administrative law judge's Decision and Order denying Section 8(f) relief is affirmed. In all other respects, the administrative law judge's decision is affirmed.

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[2]Although the *Mayes* case is similar to the instant case, the court in *Mayes* did not decide the manifest issue. The court held in *Mayes* that claimant's mental limitations were an existing permanent partial disability and remanded the case to the Board to determine whether substantial evidence supported the administrative law judge's conclusion that Mayes' pre-existing permanent partial disability was manifest to employer. *Mayes*, 913 F.2d at 1433, 24 BRBS at 35-36 (CRT).

[3]Contrary to employer's assertion, claimant's learning disability is not documented in the standardized tests given to claimant in the 1940s. Employer's Exhibit A at 135-149.

[4]Contrary to employer's assertion, the administrative law judge did not err in citing to *Bunge Corp.* for the proposition that the disability noted in records must be so obvious that a formal diagnosis is not necessary. In *Bunge Corp.*, the court stated that a diagnosis is not necessarily required to meet the manifest prong and held that a disability should be considered manifest if the factual information in the available records reflects sufficient unambiguous, objective, and obvious indication of a disability. *Bunge Corp.*, 951 F.2d at 1111, 25 BRBS at 84-85 (CRT).

[5]Although employer relies on *Langley v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 580 (1981) to support its proposition that it is permissible for health care providers to review records pre-dating the second injury and make a post-injury diagnosis based on facts available pre-injury, we note that the Fourth Circuit reversed *Langley* in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982).

[6]Based on our affirmance of the administrative law judge's finding that claimant's alleged pre-existing learning disability was not manifest to employer prior to the injury, we need not address the administrative law judge's findings regarding the two remaining requirements of Section 8(f) relief.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge