BRB Nos. 96-0733
and 96-0733A

OTIS LEWIS	)	
	)	
Claimant	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PENNSYLVANIA TIDEWATER	)	
DOCK COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Charles F. Love, Philadelphia, Pennsylvania, for claimant.

Michael D. Schaff (Naulty, Scaricamazza & McDevitt, Ltd.), Philadelphia, Pennsylvania, for self-insured employer.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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 DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and employer cross-appeals, the Decision and Order (94-LHC-2744, 94-LHC-2755) of Administrative Law Judge Paul H. Teitler 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, on April 28, 1993, sustained work-related injuries while working for employer when he fell from a ladder, injuring his left elbow and lower back. As a result of this work incident, employer voluntarily paid claimant temporary total disability compensation. 33 U.S.C. §908(b). Claimant returned to work on November 20, 1993. However, on that date claimant slipped and fell, injuring his right wrist and lower back. Claimant has not returned to work since the date of his November 20, 1993, injury.

In his decision, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer had established rebuttal of that presumption, and that, based on the record as a whole, claimant had established a casual relationship between his employment with employer and his physical problems. Further, the administrative law judge determined that claimant was unable to return to his usual job and that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge awarded claimant permanent total disability compensation. Lastly, the administrative law judge determined that employer was entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), of the Act.

On appeal, the Director challenges the administrative law judge's award of Section 8(f) relief to employer. In its cross-appeal, employer contends that the administrative law judge erred in finding a causal relationship between claimant's work and his physical problems; alternatively, employer challenges the administrative law judge's determination that claimant remains totally disabled. Claimant responds to employer's appeal, urging affirmance of the administrative law judge's decision.

We will first address employer's cross-appeal of the administrative law judge's award of permanent total disability compensation to claimant. BRB No. 96-0733A. Employer contends that the administrative law judge erred in failing to credit the testimony of Dr. Didizian when addressing the issues of causation and the extent of claimant's disability.[1] In the instant case, the

[1]We decline to address employer's contention that it rebutted the Section 20(d), 33 U.S.C. §920(d), presumption based upon its presentation of "evidence sufficient to demonstrate that [claimant's] injuries were staged or self-inflicted," *see* Employer's brief at 4, since employer failed to brief this assertion on appeal. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

administrative law judge properly invoked the Section 20(a) presumption as he found that claimant suffered a harm and that working conditions existed which could have caused that harm. *See generally Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, aggravated, or rendered symptomatic by his employment. *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

After determining that employer had rebutted the presumption, the administrative law judge considered all of the medical evidence of record and credited the opinions of Dr. Sedacca, claimant's treating physician who opined that claimant's November 1993 incident aggravated his condition, and that of Dr. Salvo in concluding that causation had been established. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). In declining to credit the contrary opinion of Dr. Didizian, the administrative law judge noted that that physician examined claimant approximately one year after the work incidents occurred and that Dr. Didizian's opinion that claimant's elbow chip fracture could have occurred on a spontaneous basis was equivocal. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan,* 300 F.2d 741 (5th Cir. 1962). In the instant case, the administrative law judge's credibility determinations are neither inherently incredible nor patently unreasonable. Accordingly, we affirm the administrative law judge's determination that claimant's present physical problems are related to his employment with employer. *See generally Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989).

Employer next challenges the administrative law judge's determination that claimant is permanently totally disabled; specifically, employer avers that any disability sustained by claimant terminated as of Dr. Didizian's March 4, 1994, examination. *See* EX 3. It is well- established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In finding that claimant had established a *prima facie* case of total disability, the administrative law judge credited the testimony of Dr. Sedacca, Ms. Dorf and claimant, over the testimony of Dr. Didizian. Dr. Sedacca, claimant's treating physician, opined that claimant was disabled from performing his prior occupational duties as of November 19, 1993. *See* CX N. Ms. Dorf, a vocational consultant, concluded that claimant is able to work at a sedentary physical demand level. *See* CX E. Claimant, based upon his continued complaints of back and leg pain,

asserted that he is unable to return to his longshore duties. In contrast, the administrative law judge noted that, of all the physicians who submitted medical reports, only Dr. Didizian opined that claimant was capable of returning to gainful employment with no restrictions. It is well-established that the administrative law judge as the trier-of-fact is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. We therefore affirm the administrative law judge's decision to credit the testimony of the claimant, Dr. Sedacca, and Ms. Dorf as that determination is neither inherently incredible nor patently unreasonable. *See generally Cordero*, 580 F.2d at 1331, 8 BRBS at 744. As the administrative law judge's determination that claimant was incapable of resuming his usual employment duties with employer is supported by the record, *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). As the administrative law judge found that employer submitted no evidence of suitable alternate employment, claimant's award of permanent total disability benefits is affirmed.

We now address the Director's appeal of the administrative law judge's award of Section 8(f) relief to employer. BRB No. 96-0733. Specifically, the Director asserts that claimant's underlying back condition did not constitute a manifest, pre-existing permanent partial disability which contributed to claimant's ultimate total disability. Section 8(f) shifts liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently totally disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his permanent total disability is not due solely to the subsequent work injury. *See* 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980). Thus, where an employee is permanently totally disabled, an employer must demonstrate that the total disability was caused by both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *See Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

The record reflects that claimant sustained a work-related injury to his back on April 28, 1993, while working for employer, which resulted in temporary total disability from the date of that injury until November 19, 1993, at which time claimant returned to work for employer; claimant suffered a second work injury on November 20, 1993. Prior to his work-related injury, claimant also suffered an injury to his right knee in 1987 and to his back in 1985.

Initially, the Director contends that the administrative law judge erred in finding that claimant's pre-existing back condition constituted a permanent disability.[2] The Director argues that the mere existence of the underlying condition is not evidence of a pre-existing permanent partial

[2]We note that the Director concedes that claimant's knee impairment constitutes a manifest, pre-existing permanent partial disability.

disability. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983). Where claimant has a history of injury yet suffered no sign of medical problems or work restrictions, the mere existence of these prior injuries does not establish a pre-existing disability for Section 8(f) purposes because the pre-existing condition must produce some serious lasting physical problem. *Mijangos v. Avondale Shipyards Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). However, a pre-existing disability need not be an economic disability, *see Preziosi v. Controlled Industries, Inc.*, 22 BRBS 468 (1989) (Brown, J., dissenting); rather, the pre-existing condition need only have been of sufficient seriousness that a cautious employer would have been motivated to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *See Dugas v. Durwood Dunn Inc.*, 21 BRBS 277 (1988); *Bickham v. New Orleans Stevedoring*, 18 BRBS 41 (1986). A permanent physical condition which makes a person's back more susceptible to further injury may be sufficient to establish a pre-existing permanent partial disability. *See Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990). In addressing claimant's back condition, the administrative law judge found the pre-existing permanent partial disability element satisfied on the basis that this condition existed prior to claimant's work injuries. *See* Decision and Order at 18. The administrative law judge made no finding, however, regarding whether claimant's back condition was of sufficient seriousness that a cautious employer would have been motivated to discharge the him. We therefore vacate the administrative law judge's finding that claimant's back condition constitutes a pre-existing permanent partial disability for purposes of awarding Section 8(f) relief, and we remand the case for the administrative law judge to reconsider the evidence of record regarding this element of Section 8(f). *See Dugas*, 21 BRBS at 277.

Next, the Director argues that the administrative law judge failed to determine whether claimant's underlying back condition was manifest. We agree. The manifest element will be satisfied if either employer had actual knowledge of the pre-existing condition or if there were medical records in existence from which claimant's condition was objectively determinable. *See Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988); *Blake*, 21 BRBS at 49. As the Director asserts, the administrative law judge made no findings regarding whether claimant's back condition was manifest to employer. Thus, on remand, the administrative law judge must consider the evidence of record regarding claimant's back condition as it relates to this issue.

Finally, the Director contends that the administrative law judge erred in finding that employer established the contribution element necessary for entitlement to Section 8(f) relief. Specifically, the Director contends that the administrative law judge erred in crediting the opinions of Drs. Sedacca and Lee when addressing this element. In the instant case, the administrative law judge summarily stated that

> Drs. Lee and Sedacca concluded that Claimant's disability is a result of the Claimant's pre-existing conditions in addition to the Claimant's current injury.

Decision and Order at 19. Based upon this finding, the administrative law judge concluded that the contribution element had been satisfied. Contrary to the administrative law judge's rationale, however, employer, in order to establish the Section 8(f) contribution element in cases involving permanent total disability, must demonstrate that claimant would not have been totally disabled by the work injury alone. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT); *Two "R" Drilling*, 894 F.2d at 748, 23 BRBS at 34 (CRT); *Dominey*, 30 BRBS at 134. As it is uncontroverted that claimant is permanently totally disabled, the administrative law judge's determination regarding this issue must be vacated, as it is not in accordance with the applicable legal standard for establishing contribution. We therefore vacate the administrative law judge's finding that the contribution element is satisfied; on remand, the administrative law judge must determine whether claimant's work injuries alone would have caused his permanent total disability.[3] *See Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996).

[3]We note that on remand the administrative law judge may wish to consider whether employer is entitled to relief under Section 8(f) based upon the relationship between his two traumatic work injuries suffered in 1993. *See Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116 (CRT)(1st Cir. 1992).

Accordingly, the administrative law judge's award of Section 8(f) relief to employer is vacated, and the case is remanded for further proceedings consistent with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge