

BRB No. 93-1230

VINCENT A. SEYMOUR)	
)	
Claimant-Respondent)	
)	
v.)	
)	
AVONDALE/GULFPORT MARINE)	DATE ISSUED: _____)
)	
and)	
)	
NATIONAL UNION FIRE)	
INSURANCE 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 Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mager A. Varnado Jr., Gulfport, Mississippi, for claimant.

Alben N. Hopkins (Hopkins, Dodson, Wyatt & Crawley), Gulfport, Mississippi, for employer/carrier.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, 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:

Employer appeals the Decision and Order Awarding Benefits (92-LHC-2387) of Administrative Law Judge C. Richard Avery 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 the 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).

Claimant, a transit packer for employer, suffered a work-related injury to his right shoulder on September 9, 1990, which was initially diagnosed as a trapezius strain. EX-4, CX-7. Claimant continued working after his injury until October 30, 1990, at which time he was placed on temporary total disability and underwent a course of physical therapy. Claimant returned to work on December 3, 1990, and on December 19, 1990, he was laid off due to a reduction in force. Tr. at 28. Claimant continued to seek treatment and was referred to Dr. Danielson, who examined claimant on multiple occasions commencing January 29, 1991. Dr. Danielson ultimately found claimant permanently and totally disabled due to syringomyelia, a slowly progressive neurological syndrome characterized by cavitation in the central segments of the spinal cord, which Dr. Danielson believed had been aggravated by claimant's work injury. CX-6. Claimant sought total disability compensation under the Act.

After denying employer's request to hold the record open post-hearing to provide it the opportunity to submit evidence regarding maximum medical improvement and suitable alternate employment, the administrative law judge awarded claimant temporary total disability benefits from October 30, 1990, until December 3, 1990, and permanent total disability compensation commencing January 29, 1991. The administrative law judge further determined that employer was responsible for reimbursement of medical expenses for the medical treatment provided by Dr. Danielson and that employer was not entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), as there were no medical records in existence prior to the work injury sufficient to render claimant's pre-existing syringomyelia manifest.

Employer appeals, asserting that the administrative law judge erred in weighing the evidence regarding causation, and in finding that claimant established a *prima facie* case of total disability. Employer further asserts that the administrative law judge abused his discretion by asking leading questions of witnesses and by denying its motion to keep the record open post-hearing. Finally, employer appeals the denial of Section 8(f) relief.

After considering the Decision and Order in light of the record evidence and the arguments which employer has raised, we affirm the administrative law judge's finding that claimant's syringomyelia is causally related to the subject work injury because it is rational, supported by substantial evidence and in accordance with applicable law. *O'Keeffe*, 380 U.S. at 359. Employer asserts that the administrative law judge erred as a matter of fact and law by crediting the opinion of Dr. Danielson, claimant's treating physician, who attributed claimant's syringomyelia to his work-

related injury,¹ over the contrary opinions of Drs. Buckley, Hull and Burwell, who opined that the condition was congenital and unrelated to claimant's work-related injury. Such credibility determinations, however, are solely within the purview of the administrative law judge, and the administrative law judge's decision to accord determinative weight to Dr. Danielson's opinion based on his credentials and status as claimant's treating physician is neither inherently incredible nor patently unreasonable. See *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Although employer raises numerous arguments regarding the administrative law judge's consideration of the testimony of Drs. Burwell, Hull, and Buckley, having given consideration to these arguments, we conclude that the administrative law judge fully considered all of the relevant evidence and that employer has failed to establish any reversible error. The administrative law judge's causation finding is affirmed.

We also reject employer's contention that, in determining that claimant established a *prima facie* case of total disability, the administrative law judge erred in viewing Dr. Buckley's opinion as corroborative of Dr. Danielson's opinion. Contrary to employer's assertions, the administrative law judge did not mischaracterize Dr. Buckley's testimony. Although Dr. Buckley's primary opinion was that claimant could resume his normal activities except for his obvious fear and anxiety regarding the presence of the syringomyelic lesion, he also indicated that he could not tell claimant that if he went back to performing heavy work that he would not have problems with the syringomyelic cavity. EX-8. The administrative law judge's inference that Dr. Buckley's opinion corroborated Dr. Danielson's to some extent thus is not unreasonable. Any error the administrative law judge may have committed with regard to Dr. Buckley's medical report is harmless, in any event, as the administrative law judge based his finding that claimant established his *prima facie* case primarily upon the opinion of Dr. Danielson, which constitutes substantial evidence in support of his decision. We accordingly affirm the administrative law judge's finding regarding total disability.

We also reject employer's contention that the administrative law judge erred in denying its motion to keep the evidentiary record open post-hearing to allow the submission of evidence regarding the availability of suitable alternate employment and the date of maximum medical improvement. The basic premise of employer's argument, *i.e.*, that it was not prepared to go forward on the issues relating to permanency because claimant did not assert that he was permanently disabled until the date of the hearing, is contradicted by the record which reflects that permanency was listed as an issue to be resolved in employer's pre-hearing statement and by the parties' joint stipulations listing the date of maximum medical improvement, the nature and extent of claimant's disability including temporary total and permanent partial disability, and employer's entitlement to Section 8(f) relief as contested issues prior to the hearing. Joint Ex 1. Employer's assertion that the administrative law judge abused his discretion in refusing to keep the record open notwithstanding

¹Dr. Danielson found that claimant's syringomyelia was caused by the work-related injury incurred on September 9, 1990, and, if the condition was congenital, it was "small," and severely aggravated by the work-related trauma. CX-12.

its stipulation because it had taken the position prior to the hearing that claimant suffered no disability upon reaching permanency is rejected, as the administrative law judge's refusal to entertain employer's post-hearing request to develop an issue which employer should have reasonably anticipated prior to the hearing was not an abuse of his discretionary authority. *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 157 (1993); *Sam v. Loffland Bros. Co.*, 19 BRBS 228 (1987). Although employer argues that it did not present evidence regarding suitable alternate employment because it had taken the position that claimant was no longer disabled upon reaching maximum medical improvement, in failing to prepare for the contingency that its primary position might be rejected, employer acted at its peril. Finally, we note that inasmuch as employer conceded that the issue of temporary total disability was previously raised, the administrative law judge would not abuse his discretion in considering permanent total disability in any event because the burdens of proof are essentially the same for these two issues. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Bonner v. Ryan-Walsh Stevedoring Company, Inc.*, 15 BRBS 321 (1983).

We also reject employer's contentions that the administrative law judge abused his discretion by improperly asking leading questions of witnesses at the hearing. The administrative law judge has the right to question witnesses, and our review of the record reflects that in the present case the administrative law judge did no more than fulfill his duty to fully inquire into matters at issue. 20 C.F.R. §§702.338, 702.340; *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). Moreover, we reject employer's assertions that the administrative law judge committed reversible error by failing to consider inconsistencies in claimant's testimony regarding his educational background; employer has failed to demonstrate the relevance of this testimony to any of the disputed issues in the case. In addition, the administrative law judge did not base any of his ultimate conclusions on claimant's testimony exclusively.

We next address employer's challenge to the administrative law judge's denial of Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent total disability compensation from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes: 1) the injured employee has a pre-existing permanent partial disability; 2) this pre-existing permanent partial disability was manifest to employer prior to the work injury; and 3) claimant's permanent total disability is not due solely to the subsequent work-related injury. 33 U.S.C. §908(f)(1); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992).

In the present case, employer sought Section 8(f) relief based on Dr. Danielson's 1991 reports stating that claimant's syringomyelia was a congenital condition which predated and was aggravated by his work-related injury. While employer conceded in its petition for Section 8(f) relief that there were no medical records in existence prior to the work injury sufficient to render claimant's syringomyelia constructively manifest, employer argued that it should not be made to suffer due to the non-diagnosis of this pre-existing condition which would have been discovered if proper testing had been done. The administrative law judge, however, disagreed and found that as

claimant's syringomyelia was not manifest to employer prior to claimant's September 9, 1990, work injury, it was not entitled to Section 8(f) relief.

On appeal, employer urges the Board to adopt the holding of the United States Court of Appeals for the Sixth Circuit in *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989), that the statutory language of Section 8(f) should be read literally and the judicially imposed manifest element eliminated as a pre-requisite for Section 8(f) relief. Employer also notes that, in *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit held that the manifest requirement was not applicable to post-retirement occupational disease cases, and urges the Board to apply the *Harris* holding to the instant case involving a traumatic injury.

Employer's argument must be rejected based on the applicable law. The United States Court of Appeals for the Fifth Circuit, under whose appellate jurisdiction this claim arises, has adopted the manifest requirement as a pre-requisite to Section 8(f) entitlement. See *Eymard & Sons Shipyard v. Smith*, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989). In so holding, the court explicitly stated that a disease is not manifest merely because it might have been discovered if proper testing had been done, citing *White v. Bath Iron Works Corp.*, 812 F.2d 33, 36, 19 BRBS 70, 75 (CRT) (1st Cir. 1987), and *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 648, 16 BRBS 1, 9 (CRT) (7th Cir. 1983). Moreover, in *American Shipbuilding*, while the court rejected a standard requiring employer's knowledge of a pre-existing condition, it found justification for requiring employer to present objective evidence in existence prior to the second injury establishing that the pre-existing condition manifested itself to someone prior to that injury. The court found x-rays taken prior to the second injury satisfied this standard, notwithstanding that they were not interpreted until after the second injury. The decision in *American Ship Building* thus does not support a wholesale abandonment of an objective manifest requirement. Finally, in *Harris*, the court stated that it was not questioning the wisdom of the manifestation requirement previously adopted by that court but was limiting its focus to whether the manifestation requirement should be extended to the area of post-retirement occupational disease. *Harris*, 934 F.2d at 551, 24 BRBS at 196 (CRT). Accordingly, we reject employer's argument that the manifestation element of Section 8(f) entitlement should be eliminated and affirm the administrative law judge's denial of Section 8(f) relief based on employer's failure to establish this element in this case.²

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

SO ORDERED.

²We do not address employer's alternative argument that the manifestation requirement was satisfied on the facts presented because there were records in existence documenting the September 1990 work injury and this injury was subsequently aggravated when claimant returned to work between December 3 and December 19, 1990, resulting in the syringomyelia. Employer has raised this theory of the case for the first time on appeal, and it thus cannot be addressed. See, e.g., *Shaw v. Todd Pacific Shipyards, Corp.*, 23 BRBS 96 (1989).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge