

DWIGHT COOK)
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 Claimant)
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 v.)
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 BATH IRON WORKS CORPORATION) DATE ISSUED: 04/25/2006
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 and)
)
 ONE BEACON 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 and the Order Denying Reconsideration of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Richard F. van Antwerp (Robinson, Kriger & McCallum, P.A.), Portland, Maine, for employer/carrier.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Reconsideration (2004-LHC-01218) of Administrative Law Judge Jeffrey Tureck 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).

The only issue presented by this appeal is whether the administrative law judge erred in failing to award employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Claimant commenced working for employer in September 1973, when he was exposed to asbestos during his duties as a crane operator and rigger. Employer-sponsored x-rays taken in 1994 and 1995 indicated hyperaeration consistent with chronic obstructive pulmonary disease (COPD). Pulmonary function studies taken of claimant at this time, however, resulted in normal values, and the interpretations of subsequent x-rays taken in 1996 and 1999 made no reference to the presence of COPD. In 2001, claimant was diagnosed with asbestosis. He continued to work until February 1, 2004, at which time claimant retired on the advice of his treating physician. Claimant filed a claim for benefits under the Act, arguing that he was an involuntary retiree entitled to permanent total disability compensation.

In his Decision and Order, the administrative law judge found that claimant was an involuntary retiree, and he awarded permanent total disability compensation from February 4, 2004, and continuing. 33 U.S.C. §908(a). The administrative law judge denied employer's request for Section 8(f), 33 U.S.C. §908(f), relief because, assuming *arguendo* that claimant's COPD constituted a pre-existing permanent partial disability, employer failed to satisfy the manifest requirement necessary for such relief to be granted.¹ Specifically, the administrative law judge found that, as claimant's possible COPD caused no impairment in claimant's lung function, a cautious employer would not be motivated to terminate claimant. In denying employer's subsequent request for reconsideration, the administrative law judge reiterated his determination that employer did not meet the manifest element necessary for the granting of Section 8(f) relief, stating that claimant's COPD was not diagnosed between 1995 and his diagnosis of asbestosis in 2001, that the medical records available during that period of time did not indicate the existence of an impairment due to that condition, and that a cautious employer under these circumstances would not be concerned about an increased risk of compensation liability.

¹ In 1992 and 1998, claimant underwent surgery to replace the aortic valve in his heart. In March 2001, claimant underwent a heart transplant; he returned to work in May of that year. In seeking relief pursuant to Section 8(f) of the Act, employer did not argue that claimant's heart condition and consequent treatment satisfied its burden of proof.

On appeal, employer challenges the administrative law judge's denial of its request for Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's decision.

Section 8(f) shifts the 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. To obtain the benefit of Section 8(f) relief in a case where claimant is permanently totally disabled, employer must show (1) that the employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent injury, and (3) that the subsequent injury alone would not have caused claimant's permanent total disability. *See generally Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2^d Cir. 1992). Employer bears the burden of proving each of the elements necessary for Section 8(f) relief to be granted. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997). It is well-established that 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 from which the condition was objectively determinable. *Callnan v. Morale, Welfare & Recreation, Dept. of the Navy*, 32 BRBS 246 (1998); *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997); *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). The medical records pre-existing the subsequent injury need not indicate the severity or precise nature of the pre-existing condition in order for the condition to be manifest; rather, medical records will satisfy this requirement as long as they contain sufficient and unambiguous information regarding the existence of a serious lasting physical problem which would motivate a cautious employer to consider terminating the employee because of the risk of compensation liability.² *See Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992), *aff'g Lockhart v. General Dynamics Corp.*, 20 BRBS 219 (1988); *see also Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32

² Employer concedes that the United States Court of Appeals for the First Circuit, within whose jurisdiction the instant case arises, uses a "cautious employer" test to determine whether or not it has satisfied the manifest requirement of Section 8(f). *See Director, OWCP v. General Dynamics Corp. [Lockhart]*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992). In *Lockhart*, the court recognized that the crucial issue when addressing the manifest requirement is the potential for discrimination against the disabled. 980 F.2d at 81, 26 BRBS at 133(CRT); *see Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19(CRT) (1st Cir. 1998). The court proceeded to state that the proper touchstone for the manifest requirement is whether the pre-existing condition puts the employer on notice of greatly increased liability and thus creates a risk of discrimination. *Lockhart*, 980 F.2d at 82, 26 BRBS at 135(CRT)(internal citations omitted).

BRBS 19(CRT) (1st Cir. 1998); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Wiggins*, 31 BRBS 142.

In an effort to establish the manifest requirement, employer submitted interpretations of claimant's x-rays dated August 15, 1994 and April 18, 1995; each of these interpretations stated that claimant's x-ray revealed hyperaeration consistent with COPD with no acute process noted. *See* EX 9 at 72, 77. An Asbestos Physical Encounter Form dated May 3, 1995, indicated that claimant, while stating that his health status was "supurb," reported experiencing slight shortness of breath with exertion; this form additionally noted that claimant had slight COPD since his aortic surgery. *Id.* at 70. In discussing at length the medical evidence of record, the administrative law judge found that the pulmonary function test results which accompanied claimant's 1994 and 1995 x-rays showed normal values. *Id.* at 73, 75. Additionally, the administrative law judge stated that his review of the record revealed no diagnosis of an obstructive pulmonary impairment prior to 2001, that employer's medical records regarding claimant during the period 1996 through 2001 make no mention of COPD, and that additional x-rays taken of claimant on May 16, 1996 and April 29, 1999, reported clear lung fields, thus contradicting the earlier x-ray interpretations.³ *Id.* at 41, 65. Pursuant to these findings, the administrative law judge concluded that the medical evidence in existence prior to the diagnosis of claimant's asbestosis in 2001 failed to show that claimant had an impairment in lung function or a pre-existing pulmonary condition which had any medical significance; accordingly, the administrative law judge found that a cautious employer would not be motivated to terminate claimant in fear of an increased risk of liability from a future, work-related injury and that, therefore, employer failed to establish the manifest requirement necessary for Section 8(f) relief. Decision and Order at 6-7. On reconsideration, after once again setting forth the First Circuit's holdings that the core purpose of Section 8(f) is to prevent discrimination against disabled employees, the administrative law judge reiterated his previous findings that COPD was not diagnosed in claimant's medical examinations between 1995 and 2001, and that, based upon this medical record, there is no reason why a cautious employer should be concerned about an increased risk of liability. Order on Reconsideration at 2.

Contrary to employer's assertions on appeal, substantial evidence supports the administrative law judge's finding that employer failed to establish that a serious, lasting, pulmonary condition sufficient to motivate a cautious employer to discharge claimant for fear of an increased risk of liability was manifest. While claimant's 1994 and 1995 x-rays indicated hyperaeration consistent with COPD, no acute process was noted at that

³ While employer notes that claimant complained of shortness of breath during this period of time, the records cited by employer reveal that claimant's lungs were clear and document no limitations or restrictions placed on claimant as a result of these complaints. *See* EX 9 at 29, 52, 58, 68, 71; *see also* EX 9 at 26-28.

time, pulmonary function studies performed at the same time resulted in normal results, x-rays performed in 1996 and 1999 were not interpreted as showing the presence of COPD, and claimant's subsequent medical examinations did not diagnose COPD. Moreover, the voluminous medical records compiled by employer between 1996 and 2001 neither diagnosed COPD nor indicated that claimant's pulmonary condition, if any, was serious and lasting. Consequently, we affirm the administrative law judge's finding that employer has not shown the existence of a manifest pre-existing disability. *See generally Callnan*, 32 BRBS 246. The administrative law judge's denial of Section 8(f) relief is therefore affirmed.

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge