

CHARLES C. BUTLER)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION AND ORDER

Appeal of the Decision and Order Denying Section 8(f) Relief of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

M. Janet Palmer (Wilder & Gregory), Richmond, Virginia, for employer.

Laura Stomski (Thomas S. Williamson, Jr., 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-318) of Administrative Law Judge Daniel A. Sarno, Jr. denying employer relief pursuant to 33 U.S.C. §908(f) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from 1940 through 1945, in 1954 and from 1961 until his

retirement in March 1985. He was first diagnosed as suffering from asbestosis in 1983. On February 28, 1985, claimant filed a claim for permanent partial disability benefits for his occupational lung disease. An informal conference was held on August 19, 1986, and both claimant and employer were represented by counsel. The district director¹ found that claimant has asbestosis resulting in a 25 percent impairment. Employer did not request relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), at this time. The case was forwarded to the Office of Administrative Law Judges on September 17, 1986.

Prior to the hearing, the parties reached an agreement and asked the administrative law judge to remand the case to the district director for entry of a compensation order. Specifically, the parties agreed that claimant was entitled to permanent partial disability benefits for a whole man impairment of 30 percent, commencing May 13, 1985. The order was entered by the district director on January 21, 1987.

On June 7, 1990, claimant petitioned the district director for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, because his disability had increased. On July 16, 1990, for the first time, employer requested relief from continuing compensation liability pursuant to Section 8(f), alleging that claimant's pre-existing conditions of chronic obstructive pulmonary disease and hypertension/arteriosclerotic heart disease contributed to claimant's disability. The district director denied employer's application because it was not timely filed. Claimant and employer entered into a stipulation that claimant is entitled to permanent partial disability compensation based on a whole man impairment of 45 percent. The case was referred to the administrative law judge for consideration of the Section 8(f) issue.

The administrative law judge found that employer's application for Section 8(f) relief was untimely, and thus denied the request pursuant to Section 8(f)(3). 33 U.S.C. §908(f)(3) (1988). Employer contends on appeal that the administrative law judge erred by finding its request untimely inasmuch as employer timely filed an application for relief based upon claimant's request for Section 22 modification claiming an increase in permanent partial disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order as it is in accordance with law.

Specifically, employer contends that claimant's request for modification for increased disability is a "new" disability and while his pre-existing conditions did not contribute to his original 30 percent impairment, they did adversely affect his disability by 1986. Employer maintains it did not have any evidence regarding the contributory effect of the pre-existing conditions at the time of the original proceedings. The Director responds that the modification proceedings were based on an increase in claimant's impairment rating, not on a new disability, and that failure to obtain the necessary evidence regarding the applicability of Section 8(f) was in employer's control.

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

Section 8(f)(3) of the Act provides:

[a]ny request. . . for apportionment of liability to the special fund. . . for the payment of compensation benefits, and a statement of grounds therefore (sic), shall be presented to the deputy commissioner prior to the consideration of the claim by the deputy commissioner. Failure to present such request prior to such consideration shall be an absolute defense to the special fund's liability for the payment of any benefits in connection with such claim, unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order.

33 U.S.C. §908(f)(3)(1988). The regulations that implement Section 8(f)(3) provide that "[a] request for section 8(f) relief should be made as soon as the permanency of the claimant's condition becomes known or is an issue in dispute." 20 C.F.R. §702.321(b). Failure to request Section 8(f) relief while the claim is before the district director may be excused only if the employer could not foresee that it had a Section 8(f) claim before consideration of the case by the district director. *Cajun Tubing Testors, Inc. v. Hargrave*, 951 F.2d 71, 25 BRBS 109 (CRT)(5th Cir. 1992), *aff'g* 24 BRBS 248 (1991); *Bath Iron Works Corp. v. Director, OWCP*, 950 F.2d 56, 25 BRBS 55 (CRT)(1st Cir. 1991), *aff'g* *Bailey v. Bath Iron Works Corp.*, 24 BRBS 229 (1991); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1546, 24 BRBS 213 (CRT)(9th Cir. 1991). Section 22, 33 U.S.C. §922, modification proceedings cannot be used, except in rare circumstances, to avoid the rule that Section 8(f) is waived unless raised before the first hearing. Generally, employer cannot raise Section 8(f) as an issue in a Section 22 modification proceeding if the issue was not raised and litigated in the original hearing. *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982); *Burke v. San Leandro Boat Works*, 18 BRBS 44 (1986).

We reject employer's contention that the administrative law judge erred in finding that employer could have reasonably anticipated the liability of the Special Fund prior to the issuance of the original compensation order. In support of its application for Section 8(f) relief, employer relies on a summary of the medical evidence by Dr. Harmon dated July 16, 1990. Dr. Harmon notes that claimant's impairment/disability rating is based on shortness of breath and reduced pulmonary function studies due to a combination of his asbestosis, chronic obstructive pulmonary disease, and hypertension/arteriosclerotic heart disease. Dir. Ex. 17. Dr. Harmon stated that claimant's chronic obstructive pulmonary disease was diagnosed as early as November 29, 1983, and that claimant noted to Dr. Moore in early 1985 that he had had hypertension for some time. Dr. Harmon concludes that claimant's disability is materially contributed to and made materially and substantially worse by his pre-existing conditions. *Id.*

Contrary to employer's contention, the record indicates that the results of claimant's pulmonary function studies, as early as November 1983, were due to a combination of an obstructive disease, as well as a restrictive defect, asbestosis. Dir. Ex. 6. Moreover, claimant's hypertension also was diagnosed in 1983.² *Id.* Thus, even though there was no specific evidence regarding the

²Claimant underwent coronary artery by-pass surgery in May 1985. The first notation of this

contributory effects of claimant's pre-existing conditions, employer could have reasonably anticipated the liability of the Special Fund prior to the issuance of the initial compensation order based on the existence of claimant's obstructive lung disease and hypertension. In order to preserve its rights with regard to Section 8(f), employer should have filed a claim for Section 8(f) relief in the initial proceeding. If employer then was unable to obtain the necessary documentation to support its application, it could have sought an extension from the district director. *See* 20 C.F.R. §702.321; *compare Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991); *Currie v. Cooper Stevedoring Co., Inc.*, 23 BRBS 420 (1990). Moreover, Dr. Harmon's medical report does not indicate that claimant's pre-existing conditions contribute only to the increase in claimant's disability and not to the original 30 percent impairment.

We also reject employer's contention that the administrative law judge erred in finding the request for Section 8(f) relief time-barred inasmuch as employer filed a timely request for Section 8(f) relief based on claimant's "new" disability. Claimant's request for modification pursuant to Section 22 in the present case was based on an increase in his impairment, *i.e.*, a change in condition. Where a claim for Section 8(f) relief is not pursued in the initial proceedings, it may be raised in a proceeding under Section 22 only if there are special circumstances which in the interests of justice outweigh the need for finality in judicial decision making. *Verderane v. Jacksonville Shipyards, Inc.*, 729 F.2d 775, 17 BRBS 154 (CRT)(11th Cir. 1985); *Burke*, 18 BRBS at 46. The medical evidence indicates that claimant exhibited both moderate obstructive pulmonary disease and a mild restrictive defect in pulmonary function studies conducted before and after the consideration of the original claim by the district director. Employer has not raised any special circumstances that warrant departure from the general rule. *See Director, OWCP v. Edward Minte Co.*, 803 F.2d 731, 19 BRBS 27 (CRT)(D.C. Cir. 1986), *aff'g Dixon v. Edward Minte Co.*, 16 BRBS 314 (1984). Inasmuch as the administrative law judge's finding that the application for relief pursuant to Section 8(f) was untimely is based on substantial evidence in the record and accords with law, we affirm the administrative law judge's denial of relief pursuant to Section 8(f).

Accordingly, the Decision and Order Denying Section 8(f) Relief of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

surgery is in an October 14, 1986, report authored by Dr. Donlan. Dir. Ex. 17. Dr. Harmon stated that claimant's arteriosclerotic heart disease/hypertension contributes to claimant's disability. Dr. Donlon's report is dated after the case was referred to the administrative law judge for the first time, but before the district director's compensation order was issued on January 21, 1987.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge