

BRB No. 91-1846

GEORGE E. SHROUT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS	)	DATE ISSUED:
CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

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: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

The Director, Office of Workers' Compensation Program (the Director), appeals the Decision and Order Awarding Benefits (90-LHC-720) of Administrative Law Judge Martin J. Dolan, Jr. 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 if they 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 began working for employer in February 1957 as an outside machinist where he was exposed to asbestos when ladders working near him were ripping out asbestos insulation. Claimant stated that in the early 1980s he began to have breathing problems. He was transferred to the outside machine shop in 1984 where he worked until he retired on April 7, 1988. In 1987 claimant was examined by Dr. DeGraff, who reported that claimant suffered from asbestosis and asbestos-related pleural disease as well as chronic obstructive lung disease with a reversible component. In a subsequent report dated June 8, 1990, Dr. DeGraff assessed claimant as having a Class 3 disability, which is a 30 percent moderate impairment of the whole person. Cl. Ex. 3. An October 4, 1990, report by Dr. Godar diagnosed moderate chronic obstructive pulmonary disease associated with cigarette smoking, and minimal bilateral pleural thickening with early plaque formation and calcified hemi-diaphragms, consistent with asbestos exposure, but not of physiologic consequence or impacting on lung function. Dr. Godar assigned claimant an impairment rating of between 20 and 25 percent of the whole person. Emp. Ex. 6. Claimant sought permanent partial disability compensation under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988).

The administrative law judge awarded benefits to claimant under Section 8(c)(23) of the Act for a 26.25 percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988) (*AMA Guides*), based on an average of the disability ratings provided by Drs. Godar and DeGraff. Decision and Order at 6-7, 11. In addition, he found employer entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The Director appeals the award of Section 8(f) relief. Employer did not respond to the Director's appeal.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. In order to be entitled to Section 8(f) relief where claimant is permanently partially disabled, employer must establish that claimant had a manifest pre-existing permanent partial disability, which combined with claimant's subsequent work injury to produce a materially and substantially greater degree of disability than that which would have resulted from the subsequent work injury alone. *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Readel v. Foss Launch & Tug*, 20 BRBS 229 (1988); 33 U.S.C. §908(f)(1).

In awarding employer Section 8(f) relief in the present case, the administrative law judge found that employer met its burden of establishing that claimant had a manifest pre-existing permanent partial disability, based on a 1978 x-ray report noting atelectasis and 1983 x-rays indicating pleural scarring and pleural calcification. He further found that thereafter claimant sustained further exposure to asbestos at the work place resulting in further impairment.

On appeal, the Director contends that the x-rays relied upon by the administrative law judge indicate that claimant had atelectasis and pleural scarring and are insufficient to establish a pre-existing permanent disability under Section 8(f). The Director asserts that there is no evidence as to the permanency or degree of impairment caused by either condition and that neither establishes a

serious lasting physical problem.<sup>1</sup> In addition, the Director asserts that the administrative law judge erred in finding the Section 8(f) contribution requirement satisfied in this case because employer failed to establish what percentage of claimant's overall permanent partial disability is attributable to his pre-existing condition and that this percentage is material and substantial. The Director further asserts that it was error for the administrative law judge to find contribution based on claimant's continued exposure to asbestos absent evidence of actual aggravation.

We affirm the administrative law judge's finding that employer succeeded in establishing a pre-existing permanent partial disability. A pre-existing permanent partial disability may be found where "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge [or to decline to hire] the handicapped employee because of a greatly increased risk of employment related accident and compensation liability." *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992), quoting *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). X-ray evidence of pleural scarring is sufficient to establish the existence of a serious lasting lung condition meeting this standard. See *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40, 44 (1983); *Musgrove v. William E. Campbell Co.*, 14 BRBS 762, 765-766 (1982).

The Board's scope of review is limited by the substantial evidence standard and the Board lacks the authority to engage in a *de novo* review of the evidence, or to substitute its views for those of the administrative law judge. See *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 3 BRBS 398 (5th Cir. 1976); see also *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991), *rev'g in part* 19 BRBS 15 (1986); *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989). While our dissenting colleague relies on Dr. Godar's opinion that claimant's asbestos-related pleural thickening did not impact on his lung function to conclude that claimant's pre-existing lung condition did not constitute a pre-existing permanent partial disability, we note that Dr. DeGraff's opinion provides support for the administrative law judge's contrary determination. In rating claimant's permanent impairment in 1990 at 20 to 25 percent, Dr. Godar was of the opinion that claimant's pleural thickening related to asbestos exposure did not impact on his lung function; he also diagnosed chronic obstructive pulmonary disease. Thus, even when claimant's lung function was impaired, Dr. Godar did not attribute the impairment to asbestos-related disease, but to chronic obstructive pulmonary emphysema associated with severe cigarette smoking.

Dr. DeGraff, on the other hand, diagnosed asbestosis and asbestos-related pleural disease as well as chronic obstructive pulmonary disease, resulting in a 30 percent impairment. Dr. DeGraff reported that although, to his knowledge, claimant was first known to have shown changes of asbestos-related lung disease on a 1981 chest x-ray, in retrospect employer's x-rays had shown

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<sup>1</sup>The Director asserted the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), below. 20 C.F.R. §702.321(b)(3). The administrative law judge denied the Director's motion to dismiss employer's Section 8(f)(3) application and considered it on the merits. The Director, on appeal, does not challenge the administrative law judge's dismissal of his motion and challenges the decision on the merits.

changes for some time before this.<sup>2</sup> Cl. Ex. 2. Dr. DeGraff also deposed that the primary evidence of claimant's asbestos-related disease is the chest x-ray showing bilateral pleural plaques and diffuse interstitial changes. Dr. DeGraff thus felt that claimant has a serious, asbestos-related lung disease and that it was evidenced on x-rays for years prior to his retirement. Cl. Ex. 5 at 15, 17, 21. Despite this specific medical opinion and x-rays relating to claimant's illness, our dissenting colleague has turned to medical journal articles in an attempt to establish that claimant's pre-existing lung condition was not a pre-existing permanent partial disability.<sup>3</sup> We note that the articles were neither part of the record before the administrative law judge nor cited as supporting authority by the Director on appeal, and the parties have not been provided the requisite opportunity to respond. *See generally* *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528.9, 530 (1978); *Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd mem. sub nom. Maddaleni v. Director, OWCP*, No. 90-9583 (10th Cir. 1992); *see also* Administrative Procedure Act, 5 U.S.C. §556(e). In any event, they cannot alter our decision, as substantial evidence supports the finding that claimant had a significant permanent lung disease which was evident many years prior to his retirement.

Contrary to the Director's assertions, medical records need not indicate the precise nature or severity of a pre-existing condition in order to satisfy the pre-existing permanent partial disability requirement of Section 8(f), so long as there is sufficient information to establish the existence of a serious lasting physical problem prior to the subsequent injury. *See, e.g., 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). Our dissenting colleague, however, asserts that evidence of a serious lasting lung "condition" will not suffice to establish a pre-existing permanent partial disability, stating the term "condition" does not even connote an impairment, much less a disability. Claimant's pre-existing permanent condition need not result in a measurable impairment or actual inability to perform his job, however, in order to constitute a pre-existing permanent partial disability under Section 8(f). *See id.; Director, OWCP v. General Dynamics Corp.*, 982 F.2d at 797, 26 BRBS at 149-150 (CRT). Rather, it is sufficient that the injured employee had a pre-existing permanent condition which would have motivated a "cautious employer" to discriminate against the handicapped employee because of a greatly increased risk of compensation liability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990), *rev'g Berkstresser v. Washington Metropolitan Area Transit Authority*, 22 BRBS 280 (1989). We note that the United States Court of Appeals for the Second Circuit, from which the present case arises, has recently explicitly adopted the "cautious employer" standard set forth in *C&P Telephone Co. v. Director, OWCP*, 534 F.2d at 513, 6 BRBS at 415, for determining the existence of a pre-existing permanent

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<sup>2</sup>Claimant apparently filed two claims in this case, the first one on August 28, 1981, apparently based on the 1981 x-ray to which Dr. DeGraff refers. This x-ray does not appear in the record. *See* Tr. at 6.

<sup>3</sup>In discussing this point in his dissent, our colleague focuses totally on whether pleural plaques cause impairment or disability, which in our view is irrelevant in view of Dr. DeGraff's diagnosis of a serious, asbestos-related lung disease.

partial disability under Section 8(f).<sup>4</sup> *Director, OWCP v. General Dynamics Corp.*, 982 F.2d at 797, 26 BRBS at 149-150. In that case, the court in providing remand instructions to the administrative law judge specifically recognized that the fact that an employee's pre-existing back condition had been asymptomatic for twelve years, and did not in any way impair the employee's ability to perform his job functions, would not preclude a finding of a pre-existing permanent partial disability if that condition rendered him significantly more susceptible to serious injury in the future. *General Dynamics Corp.*, 982 F.2d at 797, 26 BRBS at 149-150 (CRT). Inasmuch as Dr. Graff's opinion, in conjunction with the x-ray evidence relied upon by the administrative law judge, provides substantial evidence from which the administrative law judge could rationally conclude that claimant's pre-existing pleural disease was such a condition, the administrative law judge's finding of a pre-existing permanent partial disability is affirmed. *See Topping*, 16 BRBS at 44; *Musgrove*, 14 BRBS at 765.

We are unable, however, to affirm the administrative law judge's finding that employer established the contribution requirement of Section 8(f).<sup>5</sup> In finding that employer was entitled to Section 8(f) relief, the administrative law judge summarily concluded that after claimant's permanent partial disability was manifest to employer, he sustained further exposure to asbestos at the workplace resulting in further impairment. While a work-related aggravation of a prior condition may establish contribution for Section 8(f) purposes, *see, e.g., Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT)(1st Cir. 1983), in this case the administrative law judge mentioned no evidence establishing that an aggravation in fact occurred. In a permanent partial disability case, moreover, employer must establish that the pre-existing permanent partial disability combined with the subsequent injury to result in a materially and substantially greater degree of permanent disability. *See Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993). Although the administrative law judge found that claimant's continued exposure to asbestos at the workplace resulted in further impairment, his failure to analyze or discuss the relevant evidence and to identify the evidentiary basis for his conclusion violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A). *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 382-383 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). We therefore vacate his finding that employer satisfied the contribution requirement of Section 8(f) and remand for him to reconsider this issue under the appropriate legal standard in accordance with the APA.

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<sup>4</sup>We note that the "cautious employer" standard is consistent with *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198 (1948). In *Lawson*, the United States Supreme Court, in discussing whether a condition must be work-related in order to constitute a pre-existing disability under Section 8(f), observed that the definition of disability in Section 8(f)(1), 33 U.S.C. §908(f) (1927), was not made with "watch-like precision" and should not be applied so as to be equated with the definition of disability found in 33 U.S.C. §902(10), the incapacity because of injury to earn the wages which the employee was earning at the time of the injury.

<sup>5</sup>As the Director does not challenge the administrative law judge's manifestation determination, it is affirmed.

Accordingly, the administrative law judge's finding that employer established a manifest pre-existing partial disability under Section 8(f) is affirmed. His finding that employer established that this condition contributed to claimant's ultimate disability is vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY  
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

In this case, in which the administrative law judge granted Section 8(f) relief, the majority affirms the finding that the employer met its burden of establishing that claimant had a manifest pre-existing permanent partial disability, based on a 1978 x-ray report noting atelectasis and 1983 x-rays indicating pleural scarring and pleural calcification. On appeal, the Director contends that the aforementioned x-rays are insufficient to establish a pre-existing permanent disability under Section 8(f), 33 U.S.C. §908(f), in that there is no evidence as to the permanency or degree of impairment caused by either condition and that neither establishes a serious lasting physical problem. I agree with the Director and would reverse the finding of Section 8(f) relief on the basis that there was no pre-existing permanent partial disability. I, therefore, respectfully dissent, finding it unnecessary to remand, as the majority would do, for the administrative law judge to consider whether the claimant's prior condition was aggravated by his continued exposure to asbestos in the workplace. *See Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993).

In this case, the administrative law judge determined that there was a pre-existing partial disability, in part based upon a 1978 x-ray indicating atelectasis.<sup>6</sup> As the Director asserts, there is no

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<sup>6</sup>According to Dorland's Illustrated Medical Dictionary (26th ed., 1981), this is a condition caused by incomplete expansion of a lung or portion of a lung, airlessness of a lung that had once been expanded, or collapse of a lung. There is nothing of record indicating which of these conditions was present on the 1978 x-ray.

medical evidence indicating whether this condition was permanent or caused any degree of impairment or disability. In fact, there was no further reference to this condition in the record. It is noted that the majority did not base its affirmance of a pre-existing permanent partial disability on the existence of this condition, *i.e.*, atelectasis.

The majority affirms the finding of a pre-existing permanent partial disability on the x-ray evidence in 1983 of pleural scarring, stating that this is sufficient to establish a serious lasting lung condition, under *Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40, 44 (1983), and *Musgrove v. William E. Campbell Co.*, 14 BRBS 762, 765-766 (1982), two Board decisions. I note that the majority uses the term "condition." A pre-existing condition does not trigger Section 8(f). A "condition," however, does not even connote "impairment." Moreover, an "impairment" may or may not, but does not necessarily involve a "disability." What is required as one of the three criteria to invoke Section 8(f) is a pre-existing permanent partial disability, which can appear in several forms, one of which is "a serious physical disability." See *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT)(D.C. Cir. 1985). The mere fact of a past injury, let alone a condition, does not, of itself, establish disability. "There must exist, as a result of that injury, some serious, lasting, physical problem." *Id.*

The majority concludes that the mere existence of pleural scarring, *ipso facto*, constitutes a serious lasting lung condition, citing *Topping* and *Musgrove, supra*, two cases involving prior pleural thickening. However, in neither of those cases is there any medical evidence that the pleural thickening caused a disability. They too are in the *ipso facto* category.

The Director asserts that there is no evidence as to the permanence or degree of impairment of the conditions found on the 1978 and 1983 x-rays. I agree. There is no such evidence in the record. In fact, there is some evidence indicating the conditions did not cause any impairment or disability. First, it is helpful to look to reports of medical experts. In an article reported in *Respiration* 39:229-240 (1980), identified as a Case Report from the Thoracic Sierras, Boston University Medical School, by Doctors Epler, Fitzgerald, Gaensler and Carrington, it is reported that "[P]leural plaques and calcification are the most common manifestations of asbestos exposure." *Id.* at 237. This article further reports that "[P]laques are not precancerous lesions nor do they cause functional impairment, since they are situated on the chest wall and diaphragm, do not involve the lungs, and the pleural space remains free. For these reasons plaques and calcification should not be regarded as compensable disease. However, they are important epidemiologic markers." *Id.* at 238.

The view expressed above by Doctors Epler *et al.* to the effect that pleural plaques and calcification are looked upon as epidemiologic markers and manifestations of asbestos exposure, without being a cause of impairment, is confirmed in a Special Issue of the American Medical Association, Vol. 106, No. 11, October 8, 1982, on Asbestos - Associated Diseases, entitled Archives of Pathology and Laboratory Medicine, John E. Craighead, M.D., Chairman. It is stated therein that, "[P]laques of the partial and diaphragmatic pleura often are found in persons exposed to asbestos. In recent years, these lesions have been considered one of the pathologic and radiologic

hallmarks of exposure. They are considered to be markers of exposure." *Id.* at 551. There is, however, no discussion in the Special Report implicating plaques as a cause of impairment or disability.

The majority takes issue with the reference in this dissenting opinion to the above medical articles relating to pleural plaques. They note that the articles are not part of the record and were not cited as authority by the Director. This is true. It was necessary, however, to resort to judicial notice to ascertain the nature of pleural plaques, since the majority is treating their mere presence as a pre-existing permanent partial disability for the purposes of Section 8(f), although there is no medical evidence in this record to substantiate such a conclusion. Furthermore, there is no reference in the opinions in *Topping* and *Musgrove*, *supra*, to any such medical conclusions, even though these cases were cited as authority for the majority's position in this case. Rather than perpetuate a misconception, judicial notice of medical treatises was necessary, a procedure that may take place at any stage of a proceeding, including on appeal. *See* Fed. R. Evid. 201.

In line with the medical authorities referred to above, Dr. Godar, in a report submitted through counsel on October 4, 1990, listed his impressions of claimant's conditions one of which was, "Minimal bilateral pleural thickening with early plaque formation and calcified hemidiaphragms, consistent with asbestos exposure, *not of physiologic consequence or impacting on lung function.*" (emphasis added). Employer's Exhibit 6. In addition, when Dr. DeGraff was asked the significance of the finding of plaques in this case during the course of his deposition, he responded that this finding would be "consistent with the diagnosis of asbestos-related pleural disease." Depo. at 8. Bearing in mind that he was asked what was the *significance* of the plaques, it is noted that he said nothing about impairment or disability.

I respectfully dissent from the majority's position. I would reverse the administrative law judge's award of Section 8(f) relief since there was no proof of a pre-existing, permanent partial disability. There was no proof of a serious, lasting, physical problem.

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JAMES F. BROWN  
Administrative Appeals Judge