

BRB No. 01-0333

ROBERT O. ROUTTEN )

Claimant )

v. )

NEWPORT NEWS SHIPBUILDING )  
AND DRY DOCK COMPANY )

Self-Insured )  
Employer-Petitioner )

DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )

Respondent )

DATE ISSUED: Dec. 11, 2001

DECISION and ORDER

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

Lexine D. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Julia Mankata (Howard M. Radzely, Acting Solicitor of Labor; Carol A. 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:

Employer appeals the Decision and Order Awarding Benefits and Denying Section 8(f) Relief (2000-LHC-1620) of Administrative Law Judge Daniel A. Sarno, 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 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 pipefitter, pipefitter supervisor, and inspector supervisor was diagnosed in 1998 with asbestosis caused in part by his asbestos exposure at employer's facility. Claimant had retired in 1992 because of his muscular dystrophy. Employer and claimant stipulated that claimant is entitled to permanent partial disability benefits for a 10 percent impairment, and the administrative law judge awarded them accordingly. 33 U.S.C. §908(c)(23); *see* Decision and Order at 7; Emp. Ex. 5c n. 10. The only disputed issue before the administrative law judge was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. The administrative law judge denied employer's claim for Section 8(f) relief, finding that employer did not establish that claimant suffers from a pre-existing permanent partial disability that contributes to claimant's current permanent partial disability.

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

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability in a post-retirement occupational disease case, as here, employer must establish that claimant has a pre-existing permanent partial disability and that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone.<sup>1</sup> *Director*,

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<sup>1</sup>The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the present case arises, has eliminated the manifest requirement of Section 8(f) in post-retirement occupational disease cases such as this one. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4<sup>th</sup> Cir. 1991).

*OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4<sup>th</sup> Cir. 1997).

Employer contends that the administrative law judge erred in finding that claimant's muscular dystrophy and pre-existing lung problems are not pre-existing permanent partial disabilities. Employer also contends that the administrative law judge erred in finding that claimant's muscular dystrophy and pre-existing lung problems do not contribute to his overall pulmonary disability. A pre-existing permanent partial disability is a serious lasting physical condition that would motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accident and compensation liability. *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Where claimant's compensable disability due to an occupational disease is based on the degree of permanent physical impairment pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), only those conditions that can contribute to the compensable impairment may constitute pre-existing permanent partial disabilities. See *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1<sup>st</sup> Cir. 1997); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

With regard to claimant's muscular dystrophy, the administrative law judge rationally found that it is not a pre-existing permanent partial disability that contributes to claimant's impairment. The administrative law judge found no evidence, except Dr. Tornberg's brief statement in a medical record review, that claimant's muscular dystrophy contributed in any way to his pulmonary disability.<sup>2</sup> The administrative law judge rationally found that Dr. Tornberg's opinion is not consistent with the reports he relied upon as none of them attributes any of claimant's pulmonary disability to his muscular dystrophy. In particular, the administrative law judge noted that claimant's treating physician, Dr. Reagan, did not attribute any pulmonary difficulties to the muscular dystrophy. As the administrative law judge's finding that employer did not establish that claimant's muscular dystrophy is a pre-existing permanent partial disability which contributes in any way to his overall compensable pulmonary disability is rational and supported by substantial evidence, we affirm the administrative law judge's finding to that effect. See generally *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Stone*, 29 BRBS 44.

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<sup>2</sup>Dr. Tornberg stated that, with regard to claimant's muscular dystrophy, claimant became progressively weaker prior to 1998 and needed to wear a body brace which would effect his breathing and pulmonary function testing. Emp. Ex. 1c.

With regard to claimant's pre-existing lung problems, the administrative law judge found that Dr. Tornberg's 1979 and 1982 reports do not support a finding that claimant's lung problems constituted a pre-existing permanent partial disability since the reports were

isolated and vague.<sup>3</sup> Decision and Order at 4-5; Emp. Exs. 1d-j, 2a-i, 3, 4a-h. The administrative law judge noted that the more recent reports in 1991-1993 by Dr. Reagan make no mention of any lung problems nor do the reports of Drs. Foreman and Donlan dated in 1998 and 1999. Thus, the administrative law judge rationally concluded that any prior lung problems claimant had were not serious, lasting physical problems. *See generally Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2<sup>d</sup> Cir. 1997). We therefore affirm the administrative law judge's finding that employer did not establish that claimant had a pre-existing permanent partial lung disability. Based on our affirmance of the administrative law judge's findings that employer did not establish the pre-existing permanent partial disability element of Section 8(f) relief, we need not address employer's remaining contentions and we affirm the administrative law judge's denial of Section 8(f) relief to employer.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Denying Section 8(f) Relief is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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<sup>3</sup>Claimant reported a "lung problem" in 1979 and that a "cyst on lung causes a lot of pain in cold weather." Emp. Ex. 1d. In 1982, claimant reported "lung trouble" which resulted in a week's hospitalization in 1975 and stated that he had a bronchoscopy where non-malignant cysts were found on the right lung. Emp. Ex. 1e.