BRB No. 91-2056

SARAH CANADA (Widow of WILLIAM CANADA) 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: DECISION and ORDER

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

M. Janet Palmer, Newport News, Virginia, for employer.

LuAnn Kressley (Thomas S. Williamson, Solicitor of Labor; Carol 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: BROWN and McGRANERY, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Employer appeals the Decision and Order Denying Petition for Relief Under Section 8(f)

(90-LHC-2472) of Administrative Law Judge Daniel A. Sarno, Jr. 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

This case involves employer's appeal of the denial of relief under Section 8(f) of the Act, 33 U.S.C. §908(f), in a widow's claim for death benefits arising from decedent's exposure to asbestos while working for employer as a welder from 1940 through 1977. Claimant, decedent's widow, and employer stipulated that on or about November 13, 1988, decedent was diagnosed as having mesothelioma, a permanent and potentially progressive lung disease which permanently impaired his pulmonary function and caused or contributed to his death on November 13, 1988. They further stipulated that decedent's mesothelioma was caused, in part, by his exposure to airborne asbestos dust and fibers during and in the course of his employment, that decedent retired from active continuing employment more than one year prior to his diagnosis of mesothelioma on November 13, 1988, and that claimant was entitled to death benefits. The Director, who was not a party to the stipulations, filed a response brief.[1]

The only issue presented for adjudication before the administrative law judge was employer's entitlement to Section 8(f) relief. Section 8(f) shifts liability to pay compensation for permanent disability and death benefits from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In general, employer is entitled to relief from the Special Fund if it establishes that the employee suffered from a manifest pre-existing permanent partial disability which combined with a subsequent work-related injury to result in the employee's disability or death. *See, e.g., Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). In occupational disease cases involving voluntary retirees, however, the United States Court of Appeals for the Fourth Circuit has held that the requirement that the prior disability be manifest does not apply. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (1991), *rev'g* 23 BRBS 114 (1989). A medical condition need not be economically disabling in order to constitute a pre-existing permanent partial disability within the meaning of Section 8(f). *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990). The mere fact of a past injury, however, does not itself establish a pre-existing permanent partial disability. Rather, there must exist as a result of that injury some serious lasting physical problem. *Director, OWCP v. Belcher Erectors*, 770 F.2d 1220, 1222, 17 BRBS 146, 149 (CRT) (D.C. Cir. 1985).

In his Decision and Order, the administrative law judge denied employer's request for Section 8(f) relief based on decedent's pre-existing hypertension, arteriosclerotic vascular disease, and myocardial infarction. The administrative law judge concluded that as decedent's hypertension, which was first diagnosed in 1973, and his cardiovascular disease, which was confirmed by Dr. Horgan in 1977, resulted in his being permanently and totally disabled and forced him to retire in

[1]Such stipulations are not binding on the Special Fund absent the participation of the Director. *See Brady v. J. Young & Co*., 17 BRBS 46 (1985), *aff'd on recon.*, 18 BRBS 167 (1985).

1977, employer failed to establish the existence of a pre-existing permanent partial disability. The administrative law judge further determined that to award benefits when decedent suffered from a pre-existing total disability, rather than a pre-existing permanent partial disability, would not only be contrary to the literal reading of the statute, but would thwart the purpose behind Section 8(f) relief. Finally, the administrative law judge noted that as decedent was already permanently totally disabled following his cardiovascular problems in 1977, he would not be in the workforce, and accordingly would not be the type of claimant Section 8(f) was intended to protect. Employer appeals the denial of Section 8(f) relief. The Director responds, urging that the denial of Section 8(f) relief be affirmed.

We agree with employer that the administrative law judge erred in denying Section 8(f) relief in this case based on his determination that decedent's pre-existing cardiovascular disease and hypertension resulted in a pre-existing permanent total disability. Under the relevant case law, this condition is clearly a serious lasting physical problem satisfying the pre-existing permanent partial disability requirement, regardless of whether it caused claimant to leave employment. As employer avers, moreover, in finding that the pre-existing permanent partial disability requirement of Section 8(f) had not been satisfied, the administrative law judge focused only on decedent's status in 1977, at the time of his retirement. There is evidence in the record establishing that decedent had hypertension and cardiovascular disease which was not totally disabling for several years prior to his retirement. An April 10, 1973 report indicates that decedent's blood pressure was 180/100, and the doctor set a follow-up check in 3 weeks. One year later, a medical report notes that decedent had suffered from hypertension for one year, and his blood pressure was then 140/86. A March 3, 1977 report from Dr. Harmon states that decedent had been hospitalized in November 1976 for a myocardial infarction. Medical evidence submitted after decedent's death indicates that hypertension is a risk factor for a heart attack and stroke, and an etiological factor in the development of arteriosclerotic heart disease. Dr. Harmon also noted that persistent elevation of the diastolic pressure above 90 mm equates to a ten percent whole body impairment according to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988).

We further note that the although the administrative law judge found that decedent was totally disabled at the time of his retirement, the relevant medical evidence indicates only that he was totally disabled from his shipyard work for retirement purposes. It does not indicate that he had a permanent total economic disability as defined by the Act. The event that led to decedent's disability retirement was a March 3, 1977 letter from Dr. Horgan to Dr. Ware. In that letter Dr. Horgan revealed that decedent had developed disabling cardiovascular disease, indicated that decedent's treadmill and angiographic outlook was generally good, and suggested that decedent either try returning to work or retire. Dr. Horgan further indicated that given decedent's extreme apprehension about his work capabilities, he would in all probability favor retirement. On March 31, 1977, upon reviewing medical reports submitted by Dr. Ware, Dr. Harmon, the director of employer's medical department, wrote a letter to R. S. Green, benefits administrator for employer, in which he opined that decedent suffered from coronary artery insufficiency which renders him totally

and permanently disabled. [2]

Even if decedent had been permanently totally disabled due to hypertension and heart disease in 1977, as the administrative law judge found, it would not, in any event, preclude a finding of a pre-existing permanent partial disability where, as here, Section 8(f) relief is being sought on a death benefits claim. While employer may not obtain Section 8(f) relief on a disability claim where an employee is permanently totally disabled due solely to a pre-existing condition, *see, e.g., Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT), *reh'g denied*, 859 F.2d 928 (5th Cir. 1988), the fact that an employee may be permanently totally disabled prior to death does not preclude a finding that the pre-existing condition, which rendered him disabled, was a contributing factor in his death. As decedent's pre-existing hypertension and cardiovascular disease constitute serious lasting physical conditions, the administrative law judge's determination that employer failed to satisfy the pre-existing permanent partial disability requirement of Section 8(f) is reversed. *See Belcher Erectors*, 770 F.2d at 1222, 17 BRBS at 149 (CRT).

We further note that the administrative law judge erred in disallowing Section 8(f) relief on the rationale that decedent left the workforce and accordingly was not the type of claimant Section 8(f) was intended to protect. This rationale runs afoul of *Harris*, 934 F.2d at 552, 24 BRBS at 198 (CRT). In *Harris*, the United States Court of Appeals for the Fourth Circuit, in which this case arises, specifically noted that the 1984 Amendments to the Act were intended to provide benefits to employees who developed occupational diseases after retirement. Accordingly, as an award of Section 8(f) would be consistent with applicable circuit case law on the facts presented in this case, we reverse the administrative law judge's finding to the contrary.

As the administrative law judge determined that decedent did not have a pre-existing permanent partial disability, he never addressed whether employer had established contribution under Section 8(f). In light of our reversal of the administrative law judge's finding of no permanent partial disability, the case must be remanded for the administrative law judge to consider whether decedent's pre-existing permanent partial disability combined with his second injury, mesothelioma, to contribute to his death. *See Readel v. Foss Launch & Tug*, 20 BRBS 229 (1988). We note that there is medical evidence in the record relevant to this issue. The death certificate, which states that the cause of death was respiratory arrest due to pleural effusion and emphysema and metastatic carcinoma of the prostate, lists arteriosclerotic heart disease under "other significant condition contributing to death." EX-4(H). Dr. Harmon opined that claimant's disability and death were contributed to and hastened by his pre-existing arteriosclerotic heart disease which was manifest as early as 1973. Dr. Baker stated that decedent's malignant mesothelioma was capable of causing his death without contribution from the arteriosclerotic heart disease. At his deposition, however, Dr. Baker conceded that arteriosclerotic cardiovascular disease could have played a role in the death, but that he was unable, without further information, to absolutely determine whether in fact it did. The denial of Section 8(f) relief is accordingly vacated, and the case is remanded for the administrative

[2]As no hearing was held in this case, and as claimant was only seeking death benefits, employer did not present any evidence as to the availability of other work which decedent could have done.

law judge to determine, based on all relevant evidence in the record, whether decedent's pre-existing hypertension and cardiovascular disease were contributing factors in his death. If, on remand, the administrative law judge finds that decedent's pre-existing hypertension and cardiovascular disease contributed to his death, he should award employer relief under Section 8(f) as all requirements for Section 8(f) relief will have been met, *see Harris*, 934 at 552, 24 BRBS at 198 (CRT).

Accordingly, the administrative law judge's finding that employer failed to establish a pre-existing permanent partial disability for Section 8(f) purposes is reversed, as is his determination that Section 8(f) is inapplicable in post-retirement occupational injury cases. His Decision and Order Denying Petition for Relief Under Section 8(f) is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge