BRB No. 91-1276

WILLIAM L. KELLEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

William C. Bell, Newport News, Virginia, for self-insured employer.

Karen B. Kracov (Thomas S. Williamson, 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: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-247) of Administrative Law Judge Daniel L. Leland awarding benefits 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, who had been employed by Newport News Shipbuilding & Dry Dock Company as a rigger since 1951, sought compensation under the Act for occupational lung disease including mesothelioma which was diagnosed on or about December 20, 1988. Employer and claimant stipulated that claimant was suffering from malignant mesothelioma which was caused in part by his exposure to airborne asbestos dust and fibers during, and in the course of, his employment with employer. Employer and claimant also stipulated that claimant is permanently totally disabled, that claimant's permanent total disability commenced on December 20, 1988, and that the total disability, which was caused in part by the occupational lung disease of mesothelioma, was compensable. Finally, employer and claimant stipulated that the applicable average weekly wage for calculating the award of benefits was $870.50, and that claimant was entitled to medical benefits and interest. Accordingly, the sole issue to be adjudicated before the administrative law judge was whether employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

The administrative law judge found that employer established that claimant suffered from adult onset diabetes and hypertension, that these conditions represented pre-existing permanent partial disabilities for Section 8(f) purposes, and that these conditions were manifest to employer. The administrative law judge, however, ultimately denied employer Section 8(f) relief, based on his determination that the opinion of Dr. Harmon, employer's medical director, was insufficient to establish Section 8(f) contribution.

On appeal, employer contends that the administrative law judge's finding that Dr. Harmon's opinion was insufficient to establish Section 8(f) contribution is irrational and not supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of Section 8(f) relief.

Section 8(f) of the Act provides that the Special Fund will assume responsibility for permanent disability payments after 104 weeks in a case of permanent total disability where an employee suffers from a manifest pre-existing permanent partial disability which combines with the work injury to result in the employee's permanent total disability; the permanent total disability must not be due solely to the work injury. 33 U.S.C. §908(f); *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175 (4th Cir. 1993). Employer bears the burden of proving that the disability was in part caused by the pre-existing condition. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Barclift)*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). If the employee's job-related injury is, in and of itself, totally disabling, the limited liability scheme of Section 8(f) will not apply, as his pre-existing condition is not partially responsible for his total disability. *Barclift*, 737 F.2d at 1300, 16 BRBS at 112.

In a letter dated June 29, 1989, Dr. Harmon stated that based upon his review of the available medical records it was his opinion that claimant was permanently totally disabled. Dr. Harmon further opined that claimant's disability was not the result of his malignant mesothelioma alone but rather was contributed to, and made materially worse by, his pre-existing cardiovascular disease,

diabetes mellitus, and chronic obstructive pulmonary disease (COPD) which have been manifest since February 1974. Finally, Dr. Harmon stated that it was also his opinion that claimant's death would indeed be hastened by his pre-existing diabetes, COPD, and hypertensive cardiovascular disease. Ex 13D.

We agree with employer that the administrative law judge's denial of Section 8(f) relief cannot be affirmed because his finding that Dr. Harmon's opinion was insufficient to establish the contribution element of Section 8(f) is contrary to applicable law. The administrative law judge found that Dr. Harmon's opinion was not sufficient to establish Section 8(f) contribution because he failed to establish a "logical nexus" between claimant's malignant mesothelioma and his hypertensive cardiovascular disease, diabetes mellitus, or chronic obstructive pulmonary disease. Employer, however, need not establish that a causal relationship exists between claimant's work-related injury and his pre-existing conditions to establish Section 8(f) contribution. Rather, where the claimant is permanently and totally disabled, employer must show that a relationship exists between the disability and the pre-existing conditions such that claimant's permanent total disability is not due solely to the subsequent work injury but results from the combined effects of that injury and the pre-existing permanent partial disabilities. *See Harcum*, 8 F.3d at 185. Moreover, the administrative law judge rejected Dr. Harmon's opinion that claimant's death would be hastened by his pre-existing conditions based on his own determination that these conditions were controlled with medication and that malignant mesothelioma is always a fatal disease resulting in death within a few years, thereby improperly setting his own expertise against that of Dr. Harmon.

As Dr. Harmon's opinion clearly establishes that claimant's pre-existing diabetes and hypertension were contributing factors in his permanent total disability and that claimant's permanent total disability was not due to his malignant mesothelioma alone, we conclude that this opinion is sufficient to establish Section 8(f) contribution under the applicable legal standard. As Dr. Harmon's opinion that claimant's permanent total disability was due to the combination of his pre-existing conditions and his malignant mesothelioma is uncontradicted, we reverse the administrative law judge's finding that Section 8(f) contribution is not established and hold that employer is entitled to Section 8(f) relief as a matter of law. *See Barclift*, 737 F.2d at 1300, 16 BRBS at 112; *Pino v. International Terminal Operating Company, Inc.*, 26 BRBS 81, 86-87 (1992).

Accordingly, the administrative law judge's decision denying employer Section 8(f) relief is reversed. The administrative law judge's decision is modified to provide that the Special Fund is liable for claimant's benefits after 104 weeks of permanent total disability. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge