

MARVERINE S. GODWIN)	
(Widow of JESSE M. GODWIN))	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
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 Granting Petition for Relief Under Section 8(f) in Part and Order of Remand in Part of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Laura Stomski (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Petition for Relief Under Section 8(f) in Part and Order of Remand in Part (91-LHC-676) of Administrative Law Judge Richard K. Malamphy 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

*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).

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).

Decedent was exposed to asbestos while working as a pipefitter for employer in 1943 and from 1946 to 1947. Claimant, the decedent's widow, and the employer stipulated that on September 14, 1988, decedent was diagnosed with mesothelioma, a permanent and potentially progressive lung disease, which impaired his pulmonary function and which caused or contributed to his reported death on May 25, 1991. The parties further stipulated that decedent's mesothelioma was an occupational disease which arose out of and in the course of his employment, and that as decedent had retired more than one year prior to his diagnosis of mesothelioma on September 14, 1988, he was entitled to disability benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), for a 50 percent permanent physical impairment. *See also* 33 U.S.C. §§902(10), 910(d)(2)(B) (1988). Accordingly, the sole issue remaining for adjudication before the administrative law judge was whether employer was entitled to relief from continuing compensation liability under Section 8(f), 33 U.S.C. §908(f), on decedent's claim for disability benefits.

In his Decision and Order, the administrative law judge awarded employer Section 8(f) relief based on the May 14, 1990, opinion letter of Dr. Bobbitt.¹ Citing *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989), the Director contends that Dr. Bobbitt's opinion is insufficient to support the award of Section 8(f) relief because it does not indicate that decedent suffered from any pre-existing condition which materially and substantially contributed to his compensable impairment due to mesothelioma. Employer has not responded to the Director's appeal.²

In order to be entitled to Section 8(f) relief where the claimant is permanently partially disabled, the employer must generally establish: 1) that the claimant suffered from a pre-existing permanent partial disability; 2) that the pre-existing permanent partial disability was manifest to the employer; and 3) that the pre-existing condition combined with the employment injury to render the employee materially and substantially more disabled than he would have been from the employment injury alone. 33 U.S.C. §908(f); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*

¹On November 20, 1991, the widow filed a claim for death benefits. On January 7, 1992, she moved to consolidate her claim with decedent's disability claim. The administrative law judge denied the motion on the ground that there was no documentation in the record evidencing decedent's death, and remanded the widow's claim for further evidentiary development. The remand does not affect our jurisdiction over this appeal, which relates to the disability claim, as employer's entitlement to Section 8(f) relief must be separately considered with regard to the death and disability claims. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 110 (1993).

²The Director does not challenge the administrative law judge's findings with regard to the remaining elements of Section 8(f), 33 U.S.C. §908(f), relief.

[*Barclift*], 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984). See *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991).³ Moreover, where the claimant is a retiree and benefits are awarded pursuant to Section 8(c)(23), the pre-existing permanent partial disability must combine with the claimant's occupational disease to result in a materially and substantially greater degree of occupational disease-related impairment, *i.e.*, the pre-existing condition must contribute to the physical impairment which forms the basis of the compensable occupational disease. *Adams*, 22 BRBS at 85 (1989).

In *Adams*, which dealt with an award of Section 8(f) relief where benefits were awarded pursuant to Section 8(c)(23), the Board held as matter of law that while the decedent's pre-existing chronic obstructive pulmonary disease could have contributed to his compensable disability due to mesothelioma for Section 8(f) purposes, his pre-existing hearing loss, back condition, anemia and arthritis could not have played any role in the occupational lung impairment being compensated. Accordingly, because the administrative law judge failed to identify which of claimant's pre-existing conditions formed the basis for his award of Section 8(f) relief, the Board remanded the case for the administrative law judge to consider whether employer was entitled to Section 8(f) relief based on the decedent's pre-existing chronic obstructive pulmonary disease. *Adams*, 22 BRBS at 85.

In the instant case, there is evidence that prior to contracting mesothelioma decedent suffered from hypertension, chronic arthralgia, laminectomy and chronic sinus drainage. In awarding employer Section 8(f) relief, the administrative law judge summarily concluded that employer had established all three elements necessary for Section 8(f) relief based on the May 14, 1990, letter of Dr. Bobbitt. In that letter, Dr. Bobbitt opined that decedent's disability is not caused by his mesothelioma alone, but rather his disability is materially contributed to, and made materially and substantially worse by, his pre-existing hypertension, chronic arthralgia in the hands, laminectomy, and chronic sinus drainage. Dr. Bobbit also explained that the hypertension would limit the chemotherapy to treat the mesothelioma, eliminating or reducing chemotherapy which would adversely affect the cardiovascular system, and that the chronic arthralgia and laminectomy would have a cumulative effect on the physical limitations due to the mesothelioma. Doctor Bobbit also indicated that the chronic sinus drainage problem would adversely affect decedent's breathing. Emp. Ex. 9(c).

Because the administrative law judge did not specify which of the decedent's pre-existing conditions provided the basis for his award of Section 8(f) relief in the present case, consistent with *Adams*, we must vacate the award and remand for the administrative law judge to reconsider employer's eligibility for Section 8(f) relief based on those pre-existing conditions which could have contributed to the decedent's compensable occupational lung impairment. *Adams*, 22 BRBS at 85. In this case, the parties stipulated that decedent has a 50 percent permanent physical impairment. As this impairment is that compensated under Section 8(c)(23), only those conditions which materially

³In *Harris*, the Fourth Circuit, within whose jurisdiction the instant case arises, held that the manifest requirement does not apply in post-retirement occupational disease cases. This requirement is not at issue in the present case.

and substantially contributed to this rating may be considered. On remand, the administrative law judge must also resolve this issue consistent with the most recent decision of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, which issued subsequent to the administrative law judge's decision and addressed the Section 8(f) contribution requirement. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993). In *Harcum*, the Fourth Circuit stated that to establish the contribution element for purposes of Section 8(f) relief, it is insufficient to show that the pre-existing disability rendered the subsequent disability greater.⁴ The court indicated that where the employee is permanently partially disabled, the employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. The court further indicated that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone, *i.e.*, the employer must present evidence of the type and extent of disability that the employee would suffer "if not previously disabled when injured by the same work-related injury." *Id.*, 8 F.3d at 185, 27 BRBS at 131 (CRT). The court explained that by establishing the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. Accordingly, on remand once the administrative law judge identifies those pre-existing conditions which could have contributed to decedent's compensable occupational impairment, he should reconsider whether the Section 8(f) contribution requirement has been satisfied in relation to that condition consistent with the Fourth's Circuit's most recent pronouncement on this subject in *Harcum*.

⁴In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), a physician opined that claimant had a five percent whole body impairment attributable to his pre-existing condition and an eighteen percent whole body impairment following his work-related injury. The physician further stated that the pre-existing condition combined with the present disability to create a "greater impairment" than would otherwise have occurred. The Board affirmed the administrative law judge's determination that employer had established that claimant had a greater degree of disability than that which would have resulted from the work-related injury. The United States Court of Appeals for the Fourth Circuit, reversed, however, and remanded the case for further consideration.

Accordingly, the administrative law judge's Decision and Order Granting Petition for Relief Under Section 8(f) is vacated and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge