BRB Nos. 92-505
and 93-1266

NELSON SANDGREN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	DATE ISSUED:
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION AND ORDER

Appeals of the Second Decision and Order Awarding Benefits of George G. Pierce, Administrative Law Judge, United States Department of Labor, and of the Decision and Order Denying Director's Petition for Modification and Director's Motion to Reopen the Record to Receive Additional Evidence of Anthony J. Iacobo, Administrative Law Judge, United States Department of Labor.

Mark A. Reinhalter (J. Davitt McAteer, Acting 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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Second Decision and Order Awarding Benefits (90-LHC-1855) of Administrative Law Judge George G. Pierce and the Decision and Order Denying Director's Petition for Modification and Director's Motion to Reopen the Record to Receive Additional Evidence of Administrative Law Judge Anthony J. Iacobo 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer as an engineer from 1951 through June 30, 1981, during which time he was exposed to asbestos. In a Decision and Order Awarding Benefits, Administrative Law Judge George G. Pierce found that claimant suffered from work-related asbestosis, and awarded claimant permanent total disability benefits from July 1, 1981 and continuing. The administrative law judge employer denied Section 8(f) relief from continuing compensation liability pursuant to Section 8(f)(3), finding that there was no evidence employer submitted a timely Section 8(f) application to the district director.[1] 33 U.S.C. §908(f)(1988). The administrative law judge found that the assistant district director, in his sworn affidavit, stated that employer did not submit a Section 8(f) application in the time allowed. The administrative law judge found that nothing in the record refutes this statement except employer's counsel's vague reference to a Section 8(f) application during his opening statement.

Employer subsequently filed motions to reconsider the decision and to re-open the record in order to submit additional exhibits consisting of the Section 8(f) application and affidavits by employer's attorney, John W. Greiner, and secretary-typist, Beth MacDonald, asserting the Section 8(f) application was timely mailed to the district director.[2] On July 24, 1991, the administrative law judge issued an order partially granting employer's motions and withdrawing and canceling his original decision. The administrative law judge granted the Director 30 days within which to file rebuttal evidence or comments on the newly admitted exhibits relative to the Section 8(f) application. The Director, however, did not respond.

In his second Decision and Order, the administrative law judge reaffirmed the original decision except that he found employer is entitled to Section 8(f) relief. The administrative law judge found employer's Section 8(f) application was timely filed with the district director, and he

[1]The administrative law judge noted that the Director had moved to dismiss employer's Section 8(f) claim for employer's failure to submit a timely Section 8(f) application.

[2]The assistant district director indicated that the Section 8(f) application should be submitted by April 6, 1990. The affidavits of Mr. Greiner and Ms. MacDonald aver that the Section 8(f) application was mailed on April 2, 1990.

awarded employer Section 8(f) relief on the merits. The Director appealed this decision to the Board, and the Board assigned the appeal BRB No. 92-505.

The Director subsequently petitioned for modification of the administrative law judge's second decision, alleging a mistake in a determination of fact, and moved to reopen the record for the receipt of additional evidence consisting of the district director's affidavit dated March 27, 1992, stating that employer's Section 8(f) application was mailed on April 10, 1990 and received by his office on April 13, 1990, as shown by attached copies of the meter stamp and receipt dates. In an Order dated September 2, 1992, the Board dismissed the Director's appeal, BRB No. 92-505, without prejudice, and remanded the case for the administrative law judge to address the Director's request for modification.

In the Order Denying Director's Petition for Modification and Director's Motion to Reopen the Record to Receive Additional Evidence, Administrative Law Judge Anthony J. Iacobo, who replaced the retired Judge Pierce, denied the motion for modification. The administrative law judge found that the Director failed to respond to employer's new evidence when given the opportunity to do so by Judge Pierce. The administrative law judge found that the "interests of justice will not be served by allowing the Director to re-litigate the issue...." Decision and Order Denying Modification at 2. The Director appealed the administrative law judge's decision denying modification to the Board and requested reinstatement of his first appeal. In an Order dated May 20, 1993, the Board reinstated the Director's appeal, BRB No. 92-505, assigned the Director's appeal of the administrative law judge's decision on modification BRB No. 93-1266, and consolidated the two appeals.

On appeal, the Director contends that the administrative law judge erred in denying his petition for modification. The Director contends that the administrative law judge erred in determining that his failure to affirmatively respond to the July 24, 1991, Order is dispositive for denying a later petition for modification. The Director contends that, contrary to the administrative law judge's finding, the interests of justice would be served by addressing the timeliness of employer's Section 8(f) claim. In the alternative, the Director challenges the administrative law judge's award of Section 8(f) relief on the merits. Employer has not responded to these appeals.

We first address the Director's contention that the administrative law judge erred in denying his petition for modification. Section 8(f)(3) of the Act provides that employer's request for Section 8(f) relief, and a statement of the grounds for such relief, which is filed after September 28, 1984, must be presented to the district director prior to consideration of the claim by the district director, and that failure to do so will bar the payment of benefits by the Special Fund, unless the employer could not have reasonably anticipated that Special Fund liability would be at issue. 33 U.S.C. §908(f)(3)(1988); *Lassiter v. Nacirema Operation Co.*, 27 BRBS 168 (1993). The implementing regulations provide that the employer must file with the district director a fully documented application in support of its request for Section 8(f) relief. 20 C.F.R. §702.321(a). The failure to submit a fully documented application by the date established by the district director shall be an absolute defense to the liability of the Special Fund. 20 C.F.R. §702.321(b)(3). The date for determining timeliness of the application is the date it is actually received by the district director.

Lassiter, 27 BRBS at 172.

Section 22 provides that upon his own initiative, or upon the request of any party, on the ground of a change in condition or because of a mistake in determination of fact, the factfinder may, at any time prior to one year after the denial of a claim or the last payment of benefits, reconsider the terms of any award or denial of benefits. 33 U.S.C. §922. A mistake in a determination of fact, however, does not automatically reopen the case under Section 22; rather, the basic criterion is whether reopening the case where such a mistake has occurred will render justice under the Act. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976).

We hold that the administrative law judge rationally denied the Director's request for modification. As noted by the administrative law judge, the Director participated in the case from the beginning, and failed to avail himself of the opportunity to present additional evidence provided in Judge Pierce's July 24, 1991 Order. Under these circumstances, the administrative law judge acted within his discretion in determining that it would not be in the interests of justice to permit the Director another opportunity to litigate the issue. *See generally General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982). We therefore affirm the administrative law judge's denial of the Director's request for modification.

We next address the Director's challenge to the Section 8(f) award on its merits. 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 totally disabled, employer must show that 1) claimant had a pre-existing permanent partial disability; 2) the disability was manifest to employer prior to the subsequent injury; and 3) the subsequent injury alone did not cause claimant's permanent total disability. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 793, 26 BRBS 139, 142 (CRT)(2d Cir. 1993); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305-1306, 26 BRBS 1, 3 (CRT)(2d Cir. 1992).

The administrative law judge based his award of Section 8(f) relief on Dr. Heller's August 13, 1979 interpretation of a 1973 x-ray showing progressive calcifications in claimant's diaphragm, on Dr. Pella's opinion that claimant had a restrictive ventilatory defect shown in a 1986 pulmonary function study, and on the fact that claimant's pulmonary problems increasingly affected his ability to work prior to July 1981. The administrative law judge found that this medical evidence shows a pre-existing permanent partial disability which was manifest to employer, and established that the alleged disability is materially and substantially greater than it would have been since claimant's condition progressively deteriorated after 1973.

On appeal, the Director challenges the administrative law judge's findings on each element of Section 8(f). We need not address the Director's specific contentions, however, as we agree with the Director that the uncontroverted evidence of record reveals that claimant's disability is due to the natural progression of a lung condition due to asbestos exposure. Section 8(f) relief is not available where the compensable disability results from the natural progression of a condition, as there is only

one injury in such a case. *See Director, OWCP v. Cooper Associates*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979).

In this case, the administrative law judge relied on x-ray readings diagnosing diaphragmatic calcification due to asbestos exposure as the pre-existing disability. The opinions of the physicians who examined claimant subsequently stated that this was an early sign of asbestos exposure which progressed into claimant's subsequently diagnosed mild asbestosis. *See* Emp. Exs. 6, 7, 8; Cl. Exs. 1, 7, 15. As the Director correctly contends, there is no evidence of record establishing that claimant's condition, initially diagnosed in 1973, was actually aggravated by further injurious exposure. *See, e.g., Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT)(1st Cir. 1983), *aff'g Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982). The medical evidence merely shows that claimant's pulmonary condition worsened. Employer therefore has not met its burden of proving that claimant is not totally disabled by his work injury alone. *See Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT). We therefore reverse the administrative law judge's finding that employer is entitled to Section 8(f) relief.

Accordingly, the administrative law judge's award of Section 8(f) relief in the Second Decision and Order Awarding Benefits is reversed. In all other respects, this decision is affirmed. The administrative law judge's Decision and Order Denying Director's Petition for Modification and Director's Motion to Reopen the Record to Receive Additional Evidence is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge