

BRB No. 99-0199

FRANK BOSSE, DECEASED)
)
 Claimant)
)
 v.)
)
 BATH IRON WORKS CORPORATION)
)
 and)
)
 COMMERCIAL UNION INSURANCE) DATE ISSUED: Nov. 2, 1999
 COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order on Remand of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Richard F. Van Antwerp and Thomas R. Kelly (Robinson, Kriger & McCallum, P.A.), Portland, Maine, for employer/carrier.

LuAnn Kressley (Henry L. Solano, Solicitor of Labor; Carol 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (96-LHC-175) of Administrative Law Judge Jeffrey Tureck 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time.¹ To briefly recapitulate the facts, claimant was exposed to asbestos in the course of his work as a painter and stage builder for employer; claimant's asbestos exposure ended in 1975 when employer transferred him to another facility where he worked as a maintenance carpenter. Prior to 1990, claimant had been diagnosed with numerous medical conditions including hypertension, chronic atrial fibrillation, diabetes, chronic indigestion, near blindness in the right eye, carpal tunnel problems, torn cartilage of the knee, and dermatological conditions. In 1992, while still working for employer, claimant was diagnosed with obstructive lung disease (emphysema) due to smoking and asymptomatic asbestos-related pleural lung disease. In 1993, he was hospitalized due to congestive heart failure and, in addition, underwent treatment for gastrointestinal pain and bleeding. After an unsuccessful attempt to return to work for employer in June 1993, claimant retired from the workforce. Claimant was subsequently diagnosed with stomach cancer, and underwent the surgical removal of his stomach and gall bladder; additionally, he experienced kidney failure and an incisional hernia. Finally, based on a CT scan and pulmonary function tests performed on July 20, 1994, claimant was definitively diagnosed by Dr. Killian as suffering from asbestosis. On September 8, 1994, claimant filed a claim under the Act, arguing that he was an involuntary retiree entitled to permanent total disability compensation due to the combination of his pre-existing conditions and asbestosis. Claimant argued alternatively that if he were found to be a voluntary retiree, he was entitled to compensation for a 46 percent permanent partial disability under Section 8(c)(23), 33 U.S.C. §908(c)(23)(1994).

¹Subsequent to the issuance of the Board's previous decision in this case, a Notice of Death was filed, advising that claimant had died on July 8, 1997. See Decision and Order on Remand at 1 n.1; CXS 16, 17. Consistent with the nomenclature used by the administrative law judge in his Decision and Order on Remand, the deceased employee is referred to herein as the claimant.

In his initial Decision and Order, the administrative law judge found that claimant was a voluntary retiree. Crediting Dr. Killian's opinion that of claimant's overall cardiopulmonary impairment of 54 percent, 27 percent was respiratory in origin, with half of that 27 percent, or 13.5 percent, being due to asbestosis, the administrative law judge awarded claimant compensation under Section 8(c)(23) for a 13.5 percent impairment.² Having rejected the Director's contention that employer was not entitled to Section 8(f) relief because of its failure to comply with the requirements of Section 8(f)(3), 33 U.S.C. §908(f)(3)(1994), the administrative law judge summarily awarded employer Section 8(f) relief.

The Director thereafter appealed the administrative law judge's Decision and Order to the Board. On June 16, 1998, the Board issued a Decision and Order vacating the administrative law judge's award of Section 8(f) relief and remanding the case to the administrative law judge for further consideration. *Bosse v. Bath Iron Works Corp.*, BRB No. 97-1299 (June 16, 1998)(unpublished). The Board held that the administrative law judge's award of Section 8(f) relief could not be affirmed in light of the administrative law judge's failure to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), his erroneous application of the burden of proof, and his failure to analyze the issue of Section 8(f) contribution in accordance with the legal standard applicable in the case of a permanently partially disabled employee. Moreover, the Board held that, on remand, the administrative law judge must evaluate the manifest requirement of Section 8(f) in accordance with the decision of the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, in *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34, 32 BRBS 19 (CRT) (1st Cir. 1998). Lastly, the Board noted its agreement with the position taken by both the Director and employer that it was irrational for the administrative law judge to have awarded employer Section 8(f) relief where he eliminated the effects of claimant's pre-existing conditions from the compensation award and held employer liable for the payment of benefits only for the percentage of claimant's impairment that was due to his asbestosis. Accordingly, the Board held, consistent with the aggravation rule, that Section 8(f) relief is available to employer only if the compensation award is for claimant's total

²Dr. Killian testified that claimant's emphysema, obesity, congestive cardiac failure, atrial fibrillation, diabetes, hypertension, and chronic renal insufficiency, as well as his status as post-surgical cholecystectomy were all contributing factors to his respiratory impairment. EX-8 at 8-11.

respiratory impairment.

On remand, in a Decision and Order issued September 24, 1998, the administrative law judge again found employer entitled to Section 8(f) relief. Specifically, the administrative law judge found that the asbestos-related restrictive disease diagnosed in 1992 constitutes a pre-existing permanent partial disability which was manifest to employer prior to claimant's retirement. The administrative law judge further found that the Section 8(f) contribution requirement was satisfied inasmuch as claimant's asbestosis, diagnosed in 1994, was materially and substantially more severe than it would have been absent the pre-existing asbestos-related restrictive disease manifest in 1992.

In the present appeal, the Director first avers, and employer agrees, that the administrative law judge erred in awarding employer Section 8(f) relief without having corrected his previous award of compensation to reflect claimant's total respiratory impairment consistent with the aggravation rule, as directed by the Board in its Decision and Order. The Director next contends, and again employer agrees, that the administrative law judge erred in basing the Section 8(f) award on the 1992 diagnosis of asbestos-related restrictive disease, which cannot meet the contribution requirement. Lastly, the Director argues that the Section 8(f) manifest requirement cannot be satisfied because employer failed to establish that the alleged pre-existing disabilities were manifest to employer prior to 1975, the date of claimant's last exposure to injurious stimuli. In response to this last argument, employer urges that the Board reject the Director's request for a ruling that the pre-existing permanent partial disability must be manifest prior to the date of last asbestos exposure.

Initially, we agree with the position taken by the Director and employer that the administrative law judge erred in failing to comply fully with the Board's remand order. Section 802.405(a) of the regulations, 20 C.F.R. §802.405(a), governing the operations of the Benefits Review Board, provides that "[w]here a case is remanded, such additional proceedings shall be initiated and such other action *shall* be taken as is directed by the Board." (emphasis added). In the Board's first Decision and Order, the Board specifically held that Section 8(f) relief is available to employer only if compensation is awarded for claimant's total respiratory impairment inasmuch as both claimant's right to compensation and employer's entitlement to Section 8(f) relief are premised on application of the aggravation rule. We agree with the Director and employer that in again awarding employer Section 8(f) relief on remand without having adjusted the amount of claimant's compensation award to cover claimant's total respiratory impairment, the administrative law judge failed to follow the Board's remand directive. *See Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157, 159 (1990). It is therefore necessary to vacate the administrative law judge's Decision and Order on Remand and remand the case for further consideration. On remand, the administrative law judge must evaluate the extent of claimant's compensable impairment under Section 8(c)(23), 33 U.S.C. §908(c)(23), consistent with the aggravation rule that if the

work-related injury aggravates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, claimant is entitled to be compensated for the entire resultant condition. See *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990).³

³Employer, citing the Board's decision in *Johnson v. Ingalls Shipbuilding Div.*, 22 BRBS 160 (1989), urges that the Board modify the compensation award from the 13.5 percent impairment awarded by the administrative law judge to an award for a 27 percent impairment. While under certain circumstances, such as those in *Johnson*, it may be appropriate for the Board to modify an administrative law judge's award of compensation to conform with the aggravation rule, we conclude that those circumstances are not present in the instant case. We note, in this regard, that while employer avers that claimant is entitled to compensation for a 27 percent respiratory impairment, it is possible, based on the medical evidence of record, that the administrative law judge could find that claimant is entitled to compensation for an even greater percentage of impairment. As previously noted, *infra*, at 3 n.2, Dr. Killian stated that several medical conditions, including claimant's cardiac problems, contributed to his respiratory impairment. Dr. Killian indicated that claimant's overall cardiopulmonary impairment was 54 percent. If, on remand, the administrative law judge were to find that claimant's asbestosis aggravated, accelerated, contributed to, or combined with his previous cardiac condition, claimant could be found entitled to compensation for the entire resultant 54 percent cardiopulmonary impairment. See

Next, we consider the Director's arguments regarding the administrative law judge's findings with respect to the requirements for Section 8(f) relief. As set forth in our previous Decision and Order, an employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury but "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

We agree with the argument made by both the Director and employer that the administrative law judge erred in basing Section 8(f) relief on claimant's 1992 diagnosis of asbestos-related restrictive disease. For purposes of the contribution element of Section 8(f), employer must establish that the pre-existing injury combined with the subsequent injury, or that the pre-existing disability was aggravated by claimant's subsequent employment, resulting in a materially and substantially greater permanent disability. *See Skelton v. Bath Iron Works Corp.*, 27 BRBS 28, 30 (1993). In the case at bar, it is undisputed that claimant's asbestos exposure ended in 1975. Thus, as the Director and employer agree, the asbestosis diagnosed in 1994 represents a natural progression of the asbestos-related restrictive disease diagnosed in 1992, and not an aggravation or second injury. *Id.*, 27 BRBS at 30-31; *see also Jacksonville Shipyards, Inc. v. Director, OWCP [Stokes]*, 851 F.2d 1314, 21 BRBS 150 (CRT)(11th Cir. 1988). Accordingly, the contribution element cannot be satisfied with respect to claimant's pre-existing asbestos-related condition.

SAIF, 908 F.2d at 1434, 23 BRBS at 113 (CRT); *see also Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44, 48 n.1 (1995).

We agree with employer that the case must be remanded for the administrative law judge to consider whether claimant's other medical conditions, apart from the asbestos-related pleural disease, could serve as the basis for Section 8(f) relief. Employer correctly points out that its claim for Section 8(f) has always been premised on claimant's pre-existing hypertension, emphysema and other medical conditions that combined with his asbestosis to impair his breathing.⁴ On remand, then, the administrative law judge must consider whether claimant's hypertension, emphysema or other relevant pre-existing medical conditions contributed to claimant's respiratory disability under Section 8(c)(23) such that claimant's current permanent partial disability is materially and substantially greater than would have resulted from his subsequent asbestosis alone. See *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997). As previously noted by the Board, only those pre-existing disabilities which played a part in claimant's compensable respiratory impairment under Section 8(c)(23) can properly serve as the basis for Section 8(f) relief. *Johnson*, 129 F.3d at 53, 31 BRBS at 160-161 (CRT); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44, 47 (1995); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 111 (1993); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989).

⁴The Board noted, in its previous decision in this case, that the Director does not dispute that claimant's pre-existing conditions were serious, lasting physical problems sufficient to satisfy the pre-existing permanent partial disability requirement of Section 8(f) entitlement. See generally *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

Lastly, the Director contends that the administrative law judge's award of Section 8(f) relief must be reversed, as a matter of law, on the basis of employer's failure to establish that claimant's pre-existing permanent partial disability was manifest to employer prior to 1975, when claimant was last exposed to asbestos. Employer urges that the Director's argument be rejected, stating that the Board previously noted that the record contains a 1975 medical report indicating that claimant suffered from hypertension. *See* EX-1. We agree with employer that the presence of the 1975 medical report, which has not yet been considered by the administrative law judge in relation to the requirements for Section 8(f) relief, makes unnecessary a ruling on the issue of whether manifestation of the employee's pre-existing permanent partial disability must occur prior to the date of last injurious exposure.⁵ As discussed in our previous decision in this case, the holding of the First Circuit in *Reno*, 136 F.3d at 34, 32 BRBS at 19 (CRT), that the pre-existing permanent partial disability must be manifest prior to the employee's retirement, is controlling in this case. On remand, then, the administrative law judge must evaluate the record evidence relevant to the manifest requirement in accordance with the First Circuit's opinion in *Reno*.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁵Employer correctly notes that the Director's position that manifestation must occur prior to the date of last injurious exposure was rejected by the Board in *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996), *rev'd on other grounds sub nom. Director, OWCP v. Sun Ship, Inc.*, 150 F.3d 288, 32 BRBS 132 (CRT)(3d Cir. 1998).