

ANNE R. COMPRONE	)	
(Widow of JOHN COMPRONE)	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION	)	DATE ISSUED:
	)	
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 - Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for employer.

Luann Kressley (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: STAGE, 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 - Awarding Benefits (88-LHC-3077) of Administrative Law Judge David W. DiNardi 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).

Decedent was exposed to asbestos while working for employer as an outside machinist, a working leader, and a planner from November 23, 1959 until November 1, 1977, when he was laid off. Thereafter, employer offered to return decedent to his former job as an outside machinist, but he declined because his family was concerned over his declining stamina and breathing problems. Subsequent to this offer, decedent worked part-time from October 6, 1980 until September 1, 1987, in non-maritime employment that did not expose him to asbestos. Decedent's breathing problems worsened, and in October 1987, he was diagnosed as having restrictive lung disease secondary to mesothelioma from which he died on February 20, 1988. His widow, the claimant in the current appeal, sought accrued disability benefits dating back to November 1977 and death benefits under the Act.

The administrative law judge awarded claimant permanent total disability compensation from November 2, 1977 to October 5, 1980, permanent partial disability compensation from October 6, 1980 to August 1, 1987, and permanent total disability benefits thereafter to the date of death. Claimant was also awarded survivor's benefits under Section 9 of the Act, 33 U.S.C. §909. The administrative law judge further determined that employer was entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), finding that decedent's permanent disability was due to the combination of his pre-existing permanent partial disabilities, *i.e.*, pleural scarring, restrictive lung disease, obstructive lung disease due to smoking, cardiac problems, obesity and hypertension, and his November 1, 1977 work injury.<sup>1</sup> The Director appeals the award of Section 8(f) relief. Employer responds, urging that the award of Section 8(f) relief be affirmed.

Section 8(f) shifts liability to pay compensation for permanent partial disability, permanent total disability, and death benefits after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. To obtain the benefit of Section 8(f) relief, employer must show (1) that the employee had a pre-existing permanent partial disability, (2) that this disability was manifest to the employer prior to the subsequent work-related injury, and (3) that the subsequent work injury alone would not have caused claimant's permanent disability or death. *Director, OWCP v. General Dynamics Corp.*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Pino v. International Terminal Operating Co., Inc.*, 26 BRBS 81 (1992). Where a claimant is ultimately permanently partially disabled, employer is entitled to Section 8(f) relief only if it establishes that claimant's manifest pre-existing permanent partial disability combined with the disability due to the work injury to produce a materially and substantially greater degree of disability. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53, 61 (1992).

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<sup>1</sup>In so concluding the administrative law judge apparently equated decedent's last day of employment when he could have received injurious exposure, to a second injury.

On appeal, the Director argues that the administrative law judge erred in concluding that a 1970 x-ray evincing pleural thickening was sufficient to establish a manifest pre-existing permanent partial disability for Section 8(f) purposes. The Director also asserts that neither decedent's obesity nor his smoking habit constitutes a pre-existing permanent partial disability under Section 8(f). Finally, while conceding that decedent's hypertension is a manifest pre-existing permanent partial disability, the Director contends that employer is not entitled to Section 8(f) relief based on this condition, or any other of decedent's pre-existing conditions, as employer failed to introduce any evidence sufficient to establish that these conditions contributed to the employee's permanent disability or death.

In awarding Section 8(f) relief, the administrative law judge found numerous physical ailments, including restrictive and obstructive lung disease, obesity, smoking and hypertension combined with decedent's November 1, 1977, "second injury" to cause his permanent disability. Initially, we note that the administrative law judge did not separately evaluate whether the requirements of Section 8(f) relief were met for the disability claim and the death claim. *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 86 (1989). We will consider first whether the requirements were met with regard to decedent's disability, which commenced in 1977 and continued until his 1988 death. In order to receive Section 8(f) relief, employer must prove that claimant had a manifest, permanent partial disability pre-existing his disabling lung condition and combining with that condition to result in his periods of permanent total disability and permanent partial disability.

Turning first to decedent's various lung conditions, it is readily apparent that they cannot establish a basis for Section 8(f) relief. The Board and courts have long held that an employment-related aggravation of a prior condition may satisfy the requirements of Section 8(f). *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). Thus, where an employee has a pre-existing disabling lung condition which is manifest and is aggravated by further injurious exposure at work, employer may satisfy the prerequisites for Section 8(f) relief. *Id.*; *Director, OWCP v. Todd Shipyards Corp.*, 625 F.2d 317, 12 BRBS 578 (9th Cir. 1980). In this case, however, assuming decedent had a pre-existing permanent partial disability to his lungs which was manifested by a 1970 x-ray showing pleural scarring, and that decedent had further exposure to asbestos thereafter until his last day of work, November 1, 1977, employer's claim for Section 8(f) relief must still fail, as there is no evidence that decedent's continued employment in fact aggravated his lung disease to result in his disability. In a 1989 report, relied on by employer below in support of its claim, Dr. Gaensler indicated that the calcification and pleural thickening in claimant's lungs present in a 1987 x-ray were greater than that noted on the 1970 and 1979 x-rays. This opinion cannot establish entitlement to Section 8(f) relief on an aggravation theory, however, as Dr. Gaensler did not opine that claimant's lung condition was aggravated by continuing exposure at work after the 1970 x-ray; in fact, he attributed both the development of pleural changes and decedent's mesothelioma to asbestos exposure prior to 1967. Employer bears the burden of proving all elements necessary for Section 8(f) relief, which includes establishing that claimant is not permanently disabled by his work injury alone. *See Luccitelli v. General Dynamics Corp.*, 964 F.2d

1303, 26 BRBS 1 (CRT)(2d Cir. 1992). Dr. Gaensler's opinion actually supports the conclusion that claimant's disability was due to the natural progression of his asbestos-related lung diseases. 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. *See Director, OWCP v. Cooper Associates*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979).

Accordingly, as employer has not established that claimant's permanent disability is due to the aggravation of a pre-existing lung condition, employer is not entitled to Section 8(f) relief on that basis. We therefore need not address the Director's argument that the pleural scarring evinced on the 1970 x-ray does not constitute a manifest pre-existing permanent partial disability. With regard to claimant's other pulmonary problems, Section 8(f) relief is also not available as the relevant reports, the 1987 report of Dr. Urbanetti and the 1989 report of Dr. Wade, establish only that claimant had a variety of other pulmonary conditions in addition to the asbestosis and mesothelioma being compensated. These reports are insufficient to establish that claimant was not totally disabled due to his asbestos-related lung conditions alone. Accordingly, the administrative law judge's finding that employer established entitlement to Section 8(f) relief based on decedent's lung conditions is reversed.

We also agree with Director that the administrative law judge erred in awarding employer Section 8(f) relief on the disability claim based on decedent's obesity and prior smoking history. A pre-existing disability must be a medically cognizable physical impairment rather than an unhealthy habit or lifestyle. *Wilson v. Todd Shipyards Corp.*, 23 BRBS 24 (1989). The Board has noted that obesity, by itself, does not constitute a pre-existing disability. *Vogle v. Sealand Terminal, Inc.*, 17 BRBS 126 (1985). While the record in the present case does indicate that employee had been admonished to lose weight, there is no evidence which suggests that decedent's obesity resulted in any medically cognizable physical ailment or disabling symptoms. As his obesity did not constitute a pre-existing permanent partial disability under Section 8(f) on the facts in this case, the administrative law judge's award of Section 8(f) relief based on this condition is reversed. *See Brogden v. News Shipbuilding and Dry Dock Co.*, 16 BRBS 259 (1984)

The administrative law judge similarly erred in awarding employer Section 8(f) relief based on decedent's prior smoking history. The administrative law judge's conclusion that decedent's smoking, together with his exposure to other pollutants at the shipyard, contributed to his breathing problems and his decision not to return to work after November 1, 1977, is without support in the record. The only relevant medical evidence in the record, Dr. Wade's May 3, 1989 opinion, indicates that decedent stopped smoking cigarettes at a much earlier age, and did not exhibit the type of obstructive lung disease usually associated with smoking rather than the pulmonary fibrosis of asbestosis. As Dr. Wade's opinion indicates that decedent's smoking did not result in any cognizable physical impairment, it also does not constitute a pre-existing permanent partial disability sufficient to support an award of Section 8(f) relief. The administrative law judge's award of Section 8(f) relief based on employee's prior smoking history is therefore reversed. *See General Dynamics Corp. v. Sacchetti*, 681 F.2d 37, 14 BRBS 862 (1st Cir. 1982), *aff'g* 14 BRBS 29 (1981).

Finally, we agree with Director that the administrative law judge erred in awarding employer Section 8(f) relief on the disability claim based on decedent's pre-existing hypertension. Although, as Director concedes, decedent's hypertension constitutes a manifest pre-existing permanent partial disability under Section 8(f), there is no medical evidence in the record which implicates hypertension as a contributing factor in his permanent disability. As employer failed to prove one of the essential elements necessary to establish Section 8(f) entitlement with regard to employee's hypertensive condition, the administrative law judge's determination that employer is entitled to Section 8(f) relief on the disability claim based on this condition is reversed. *See Sproull v. Stevedoring Services of America*, 25 BRBS at 100, 110-111 (1991).

Based on the foregoing, employer failed to establish that decedent's permanent total and permanent partial disabilities from 1977 to 1988 were the result of the combination of his work-related lung condition and any manifest, pre-existing permanent partial disability. Accordingly, the administrative law judge's award of Section 8(f) relief on the disability claim is reversed. Employer is liable in full for these benefits.

The administrative law judge did not consider employer's entitlement to Section 8(f) relief on the claim for survivor's benefits for decedent's death, and there is evidence in the record relevant to this issue. Although the evidence is insufficient to establish hypertension as a contributing factor in decedent's disability, his death certificate, stating death was due to respiratory insufficiency which was due to progressive pleural fibrosis and mesothelioma from asbestosis, lists hypertension as a significant contributory factor. As the administrative law judge did not discuss the death certificate or consider whether hypertension played a contributing part in decedent's death, the case is remanded for the administrative law judge's consideration of this issue. On remand, if the administrative law judge determines that hypertension contributed to employee's death, employer is entitled to section 8(f) relief on the death benefits claim, as all pre-requisites for Section 8(f) entitlement will have been satisfied.

Accordingly, the administrative law judge's determination that employer was entitled to Section 8(f) relief on the disability claim is reversed. This case is remanded in order for the administrative law judge to consider whether decedent's hypertension contributed to his death.

SO ORDERED.

BETTY J. STAGE, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge