

FRANK D. HART)	
)	
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 Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

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

Carol B. Feinberg (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. De Deo, 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, BROWN, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Awarding Benefits (89-LHC-777) of Administrative Law Judge Martin J. Dolan, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers's Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and the conclusions of law of the administrative law judge

*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).

which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S.C. 359 (1969); 33 U.S.C. §921(b)(3).

Claimant worked as a welder for employer from 1961 until his voluntary retirement on October 31, 1986. Subsequent to his retirement, claimant suffered breathing problems, and experienced difficulty climbing stairs and walking. As a result of these difficulties, claimant sought medical treatment which resulted in a diagnosis of a pulmonary impairment. Thereafter, claimant filed a claim for permanent partial disability benefits under Section 8(c)(23), 33 U.S.C. §908(c)(23), of the Act. At the formal hearing, claimant testified that while working for employer he used asbestos material, and that he worked around other tradesmen who also utilized asbestos materials in performing their employment duties. Claimant further testified that he was exposed to a variety of welding fumes throughout the course of his employment with employer.

In his Decision and Order, the administrative law judge determined that claimant's pulmonary impairment constituted a work-related injury arising out of and in the course of his employment with employer, and thereafter awarded claimant disability benefits for a twenty-five percent permanent partial disability pursuant to 33 U.S.C. §§902(10), 908(c)(23), and 910(d)(2)(B). Next, the administrative law judge found employer is liable for claimant's past and future medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907. Lastly, after determining that claimant's pre-existing hearing loss and knee injury constituted pre-existing permanent partial disabilities, the administrative law judge found employer entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, the Director challenges the administrative law judge's decision to award employer relief from compensation liability pursuant to Section 8(f). Employer responds, urging affirmance.

Section 8(f) shifts the liability for permanent disability or death after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. Relief pursuant to Section 8(f) is available if the employer establishes that the employee: 1) had a pre-existing permanent partial disability; 2) such pre-existing disability, in combination with the subsequent work-related injury, contributes to a greater degree of permanent disability or death; and 3) the pre-existing disability was manifest to the employer. See *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989). In the case of permanent partial disability, the resultant disability must be "materially and substantially" greater than that which would have resulted from the subsequent injury alone. See generally *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

The Director contends that the Board's holding in *Adams v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 78 (1989), mandates a reversal of the administrative law judge's award of Section 8(f) relief to employer. We agree. In *Adams*, the employee suffered from chronic obstructive pulmonary disease, hearing loss, lower back difficulties, anemia and arthritis prior to contracting mesothelioma. The administrative law judge awarded the employee benefits pursuant to

Section 8(c)(23) for his mesothelioma, and employer relief under Section 8(f), based on the employee's multiple pre-existing conditions. Noting that compensation pursuant to Section 8(c)(23) is awarded based solely on the degree of permanent impairment arising from the employee's occupational disease, the Board vacated the administrative law judge's award of Section 8(f) relief, holding that as a matter of law the employee's pre-existing hearing loss, lower back difficulties, anemia and arthritis could not form a basis for Section 8(f) relief as they cannot contribute to claimant's disability due to his pulmonary impairment under Section 8(c)(23). *Adams*, 22 BRBS at 79, 85. The Board thus remanded the case for the administrative law judge to discuss whether the employee's pre-existing chronic obstructive pulmonary disease, the only pre-existing lung condition, satisfied the elements necessary for employer to be entitled to Section 8(f) relief. *Id.*

In the instant case, claimant, prior to the onset of his pulmonary disease, suffered from both a hearing loss and a knee injury sustained in 1963. In his Decision and Order, the administrative law judge concluded that these pre-existing conditions were sufficient to entitle employer to relief pursuant to Section 8(f). Claimant's pre-existing hearing loss and knee condition, however, have no role in determining the degree of impairment compensated under Section 8(c)(23); this award compensates claimant's whole person impairment resulting from his occupational lung disease. Therefore, as a matter of law, the hearing loss and knee condition cannot contribute to a greater degree of disability under Section 8(c)(23). Thus, for the reasons set forth in *Adams*, we hold that claimant's pre-existing hearing loss and knee difficulties cannot serve as a basis for granting Section 8(f) relief on an award made pursuant to Section 8(c)(23). We, therefore, reverse the administrative law judge's award of Section 8(f) relief to employer.

Accordingly, the administrative law judge's award of Section 8(f) relief to employer is reversed. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge