

BRB No. 97-1299

FRANK BOSSE )  
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 Claimant ) DATE ISSUED:  
 )  
 v. )  
 )  
 BATH IRON WORKS CORPORATION )  
 )  
 and )  
 )  
 COMMERCIAL UNION INSURANCE )  
 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 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 (Martin Krislov, Deputy Solicitor of National Operations; Carol A. 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 (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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The only issue presented by this appeal is whether the administrative law judge erred in awarding employer relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Claimant commenced working for employer in 1960, where he was exposed to asbestos during his duties a painter and a stage builder. In 1975, claimant was transferred to employer's Harding facility, a non-covered situs, where he worked as a maintenance carpenter and was no longer exposed to asbestos. Prior to 1990, claimant had been diagnosed as suffering from a myriad of health conditions including chronic psoriasis and dermatitis of the foot, chronic atrial fibrillation, high blood pressure, near blindness in the right eye, carpal tunnel problems, torn cartilage of the knee, chronic indigestion and chronic diabetes. In 1992, while he was still working, 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. Although he went back to work in June 1993, he could not do his job and left permanently after a few days. Thereafter he was diagnosed with stomach cancer, requiring surgical removal of his stomach. During one of the stomach surgeries, his gall bladder also was removed, and 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).

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 13.5 percent of that amount being due to asbestosis, the administrative law judge awarded him compensation

under Section 8(c)(23) for a 13.5 percent impairment.<sup>1</sup> The administrative law judge 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). Finally, after characterizing the Director's June 29, 1996, position letter, in which he asserted that none of the requirements for Section 8(f) relief had been met in this case, as a blanket denial unrelated to the evidence in this case, the administrative law judge summarily awarded employer Section 8(f) relief.

The Director appeals, arguing that the administrative law judge's award of Section 8(f) relief should be reversed on several grounds. Initially, while noting the Board's position to the contrary in *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996), the Director argues that the manifest requirement is not satisfied in this case as a matter of law because the medical records documenting claimant's alleged pre-existing conditions date back to 1978, whereas his last exposure to asbestos occurred in 1975. In addition, the Director argues that the administrative law judge's award of Section 8(f) relief should be reversed as a matter of law because he erred in applying the contribution standard applicable in the case of permanent total disability, and because he factored out all of claimant's non-employment related contributing causes and held employer liable only for the 13.5 percent of claimant's cardiopulmonary impairment attributable to claimant's asbestosis. In the alternative, the Director contends that the award of Section 8(f) relief must be vacated and the case remanded because in entering this award the administrative law judge failed to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(C)(3)(A) (the APA).<sup>2</sup> Employer responds, urging affirmance.

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<sup>1</sup>Dr. 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.

<sup>2</sup>The Director does not dispute that claimant's pre-existing conditions were serious, lasting physical problems sufficient to satisfy the pre-existing permanent

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. 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., Inc. 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 are unable to affirm the administrative law judge's award of Section 8(f) relief. Initially, the Director correctly asserts that although the award in this case was for permanent partial disability compensation under Section 8(c)(23), the administrative law judge erroneously cited the Section 8(f) contribution standard applicable in a case involving an award of permanent total disability compensation. Whereas the employer must show that the employee's disability is not due solely to the most recent injury to establish contribution under Section 8(f) in cases where the employee is totally disabled, an additional burden is placed on the employer in the case of a permanently partially disabled employee: employer must also show that the current permanent partial disability is materially and substantially greater than would have resulted from the subsequent injury alone. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).

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partial disability requirement of Section 8(f) entitlement. See generally *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142 (1997).

In addition, the case must be remanded because the administrative erred in awarding Section 8(f) relief based only on a finding that the Director did not submit evidence disproving the employer's entitlement. In so doing, the administrative law judge did not discuss the relevant evidence or provide any explanation as to the basis for his Section 8(f) findings. See Decision and Order at 7. Contrary to the administrative law judge's analysis, employer bears the burden of proving each of the elements required for Section 8(f) relief. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995). Moreover, decisions under the Act must comply with the APA, which requires that the administrative law judge adequately detail the rationale behind his decision, analyze and discuss the medical evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence, in his decision. 5 U.S.C. §557(c)(3)(A). In light of the administrative law judge's 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, his erroneous application of the burden of proof, and his failure to comply with the requirements of the APA, we vacate his award of Section 8(f) relief and remand the case for him to reconsider this issue in light of all of the relevant evidence in accordance with the applicable legal standards consistent with the requirements of the APA.<sup>3</sup> See *generally Shrou v. General Dynamics Corp.*, 27

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<sup>3</sup>We reject the Director's invitation to hold that record evidence is insufficient as a matter of law to establish the manifest and contribution requirements for Section 8(f) entitlement. The Board has no *de novo* review authority, and the administrative law judge has not, as yet, considered the record evidence in relation to the manifest and contribution requirements for Section 8(f) relief in the first instance. See *generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT)(5th Cir. 1991). We further note that while the Director argues that there is no medical evidence in the record dating prior to 1978 sufficient to render claimant's pre-existing conditions manifest, there is, in fact, one medical report dated

BRBS 160, 165 (1993)(Brown, J., dissenting).

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June 25, 1975 which reflects that claimant was suffering from hypertension. See EX-1.

We note that the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, has recently addressed the manifest requirement in a case involving a voluntary retiree. In *Bath Iron Works Corp. v. Director, OWCP [Reno]*, 136 F.3d 34 (1st Cir. 1998), the court held, consistent with the position of the Board in *Ehrentraut*, that the manifest requirement of Section 8(f) applies in such cases. In contrast, however, to the Board's holding in *Ehrentraut* that a pre-existing disability need only be manifest prior to the compensable injury, the First Circuit held that the pre-existing permanent partial disability must be manifest prior to the claimant's retirement because otherwise the potential for discrimination does not exist. Inasmuch as *Reno* is controlling in this case, on remand the administrative law judge should evaluate the manifest requirement consistent with this decision.<sup>4</sup> Moreover, in determining whether the contribution element of Section 8(f) has been satisfied, he should be aware that 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); *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).

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<sup>4</sup>The United States Court of Appeals for the First Circuit recognized in *Reno* that Section 8(f) was designed for the very specific reason of removing the discriminatory incentive created by holding the last employer liable for the results of an aggravating injury. 136 F.3d at 44. Accordingly, we agree with the Director 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 award, holding employer liable only for the percentage of impairment due to claimant's asbestosis. Pursuant to the aggravation rule, which is applicable in cases involving voluntary retirees receiving compensation under Section 8(c)(23,) 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). On remand, therefore, Section 8(f) relief is available to employer only if the award of compensation is for claimant's total respiratory impairment, consistent with controlling case authority that both claimant's right to compensation and employer's entitlement to Section 8(f) relief are premised on application of the aggravation rule. See *Reno*, 136 F.3d at 40-42.

Accordingly, the administrative law judge's findings with regard to employer's entitlement to Section 8(f) relief are vacated, and the case is remanded for further consideration of this issue consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge