

ESMA E. WILLETT)	
(Widow of CHARLES E. WILLETT))	
)	
Claimant)	
)	
v.)	
)	DATE ISSUED:_____
NEWPORT NEWS SHIPBUILDING &)	
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Antje E. Huck, Newport News, Virginia, for employer.

Karen B. Kracov (Judith E. Kramer, Acting 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-337) of Administrative Law Judge Daniel L. Leland 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 administrative law judge's findings of fact and conclusions of law if they are

supported by substantial evidence, are rational, and are in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The parties waived a formal hearing and submitted a joint stipulation of facts, to which the Director, Office of Workers' Compensation Programs (the Director), was not a party. Decision and Order at 2. Claimant (decedent's widow) and employer stipulated that decedent was exposed to asbestos during his employment with employer. In May 1985, decedent was diagnosed with lung cancer. On May 5, 1986, decedent was diagnosed with asbestosis and died of lung cancer. Employer paid, and continues to pay, death benefits to claimant. Decision and Order at 2-3; 33 U.S.C. §909.

As a consequence of the agreement between claimant and employer, the sole issue in dispute is employer's eligibility for relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f) (1988). Employer filed its application for Section 8(f) relief with the district director¹ on October 21, 1988. Pursuant to Section 702.321(c) of the regulations, 20 C.F.R. §702.321(c), the district director forwarded a copy of employer's application when he referred the case to the Office of Administrative Law Judges on November 9, 1989. After determining decedent did not have a pre-existing permanent partial disability that was manifest to employer, and based on the Board's decision in *Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), the administrative law judge denied Section 8(f) relief. Decision and Order at 6-7. Employer appeals the denial of Section 8(f) relief, and the Director responds, urging affirmance.

On appeal, employer contends it established that decedent had a pre-existing permanent partial disability which contributed to decedent's death. Employer also asserts that it need not establish the manifest element normally required for entitlement to Section 8(f) relief as this case must be decided in light of *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), *rev'g* 23 BRBS 114 (1989) (hereinafter *Harris*). The Director agrees with employer's assertion regarding the effect of the *Harris* decision on this case; however, he contends the evidence supports the administrative law judge's finding that decedent did not have a pre-existing permanent partial disability.

We first address employer's argument regarding its need to satisfy the manifest requirement of Section 8(f). 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 relief if it establishes: 1) its employee had a pre-existing permanent partial disability; 2) the pre-existing disability contributed to the permanent disability or death; and 3) the pre-existing disability was manifest to employer. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In *Harris*, 934 F.2d 548, 24 BRBS 190 (CRT), the United States Court of Appeals for the Fourth Circuit reversed

¹Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

the Board's decision and held that in order to establish entitlement to Section 8(f) relief in a case involving a post-retirement occupational disease an employer need only show that the employee had a pre-existing permanent partial disability that contributed to the resulting permanent disability or death. In such a case, the court concluded the manifest requirement will not be applied. *Harris*, 934 F.2d at 553, 24 BRBS at 200 (CRT). The court also stated that the pre-existing disability need only pre-date the manifestation of the occupational disease. *Id.* This case, which arises in the Fourth Circuit, falls into that category of cases covered by the *Harris* holding because decedent's work-related disease became manifest after his retirement. Consequently, employer may be granted relief in this case if it establishes that decedent had a pre-existing permanent partial disability which contributed to his death, and that the subsequent injury was not the sole cause of decedent's death. *Id.* Therefore, we reverse the administrative law judge's finding on the manifest issue.

Employer next contends that decedent's pulmonary difficulties, which he suffered after his retirement in 1978, constitute a pre-existing permanent partial disability. A pre-existing permanent partial disability has been defined as a serious, lasting physical condition. *C&P Telephone*, 564 F.2d at 503, 6 BRBS at 399. The administrative law judge determined that decedent did not have a pre-existing disability because he found that the evidence did not establish the existence of any medical condition prior to the diagnosis of the work-related injury. Decision and Order at 7. Further, contrary to Dr. Harmon's opinion, he found that the 1973 and 1974 x-ray reports do not contain a diagnosis of arteriosclerotic heart disease or pulmonary fibrosis. *Id.*

The record indicates decedent's 1973 x-ray was interpreted as showing pulmonary fibrosis, and that the 1974 x-ray was interpreted as showing pleural thickening and dilatation of the aorta.² Emp. Ex. 9 at 5-6. In 1985, Dr. Umstott, decedent's doctor, diagnosed lung cancer, chronic obstructive pulmonary disease (COPD) caused by smoking, and hypertension, and he noted decedent's history of COPD and hypertension. He also found a malignant tumor on decedent's right lung and enlarged lymph nodes on the superior pulmonary vein and the atrial wall. Emp. Ex. 9 at 9. In 1988, Dr. Maddox reviewed a biopsy specimen, noting carcinoma, adenocarcinoma, asbestosis, pleural, subpleural, alveolar, and peribronchial fibrosis, and clusters of coated asbestos fibers. Emp. Ex. 9 at 11. Dr. Harmon reviewed the medical records and concluded decedent had pre-existing pulmonary fibrosis and arteriosclerotic cardiovascular disease (ASCVD), a permanent, progressive, degenerative disease which interferes with the normal cardiopulmonary function. Emp. Ex. 9 at 3-4. Moreover, he stated that if decedent's exposure to asbestos caused the tumor on decedent's lung, then decedent's lung cancer "was contributed to and hastened by his Pulmonary Fibrosis and ASCVD. . . ." *Id.*

Contrary to the administrative law judge's findings, the record contains evidence of ailments

²Contrary to the administrative law judge's finding that decedent's x-ray reports do not contain a diagnosis of pulmonary fibrosis, the record contains evidence which translates the code on the 1973 x-ray report into the diagnosis of pulmonary fibrosis. See Emp. Ex. 9 at 5; Section 8(f) application filed with the district director.

prior to the diagnosis of the lung cancer which may constitute serious lasting physical problems.³ *See generally Armand v. American Marine Corp.*, 21 BRBS 305 (1988). Further, we note that the administrative law judge did not consider all of the medical evidence of record in that he did not consider the evidence attached to employer's original application for Section 8(f) relief. Such evidence is made a part of the record upon the district director's referral of the case to the administrative law judge. 20 C.F.R. §702.321(c). The administrative law judge also did not consider the opinion of Dr. Maddox. *See generally Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41 (1986). Therefore, we vacate the administrative law judge's denial of Section 8(f) relief, and we remand the case for him to consider the medical evidence in its entirety to determine whether decedent had a pre-existing permanent partial disability. *Id.* at 43.

Because the administrative law judge denied employer Section 8(f) relief based on his findings concerning the pre-existing disability and manifest elements, he did not consider the contribution element. On remand, however, if the administrative law judge determines that decedent had a pre-existing permanent partial disability, then he must consider whether the pre-existing disability contributed to decedent's death, thereby entitling employer to Section 8(f) relief. *Harris*, 934 F.2d at 548, 24 BRBS at 190 (CRT); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988).

³The Board has previously affirmed a finding that the appearance of pleural thickening on an x-ray established the presence of a serious lung condition, constituting a pre-existing disability within the meaning of Section 8(f). *See Topping v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 40 (1983).

Accordingly, the Decision and Order of the administrative law judge denying Section 8(f) relief is vacated, and the case is remanded for further consideration in accordance with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge