

BRB Nos. 88-3467
and 88-3467A

OLETA W. STONE)	
(Widow of COY STONE))	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	DATE ISSUED:
UNITED STATES DEPARTMENT)	
OF STATES)	
)	
Petitioner)	
Cross-Respondent)	DECISION AND ORDER

Appeals of the Decision and Order on Remand of V.M. McElroy, Administrative Law Judge, United States Department of Labor, and the Decision and Order on Reconsideration of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

LuAnn B. 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: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals, and employer cross-appeals, the Decision and Order on Remand of Administrative Law Judge V.M. McElroy and the Decision and Order on Reconsideration (79-LHC-1506) of Administrative Law Judge G. Marvin Bober 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 if they 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).

This case has a long procedural history, and is on appeal to the Board for the second time. Decedent worked for employer as a pipefitter from March 2, 1942 to August 30, 1945, where he was exposed to asbestos. He thereafter worked in non-maritime jobs until he retired in 1972. Decedent died on January 13, 1981. In the original Decision and Order, issued February 20, 1980, Administrative Law Judge Vernon C. Field denied benefits, finding that decedent was permanently totally disabled as of January 1, 1976, due to non work-related conditions, and that his exposure to asbestos from 1942 to 1945 while working for employer did not contribute to his disability. This decision was appealed to the Board, but was held in abeyance pending resolution of claimant's motion for modification. In the Decision and Order on Modification, Administrative Law Judge V.M. McElroy found, based on medical evidence that had not previously been available, that decedent was permanently totally disabled after September 10, 1979, due to a combination of work-related asbestosis, coronary artery disease and kidney disease. The administrative law judge also found that asbestosis contributed to decedent's death on January 13, 1981. The administrative law judge therefore awarded decedent permanent total disability benefits from September 19, 1979, through January 13, 1981, and death benefits to claimant thereafter. The administrative law judge calculated decedent's average weekly wage based on the date of his last exposure to asbestos in July 1945. The administrative law judge awarded employer relief from continuing liability for compensation for disability and death, pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), holding employer liable for benefits for only one period of 104 weeks. The administrative law judge found that decedent's coronary artery disease and kidney problems caused his disability to be materially and substantially greater than that which would have resulted from his asbestosis alone.

On appeal, the Director challenged the administrative law judge's findings as to the onset date of disability, average weekly wage, and the award of Section 8(f) relief. Specifically, regarding Section 8(f), the Director contended that the administrative law judge failed to address whether decedent's pre-existing coronary artery disease and kidney problems were manifest during decedent's period of employment with employer. In *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987), the Board remanded the case for consideration of average weekly wage and the extent of decedent's disability, pursuant to the 1984 Amendments, which were enacted after the administrative law judge's decision was issued. The Board also held that the administrative law judge erroneously determined the onset of disability based on Dr. Saltzman's September 1979 diagnosis, noting that disability may precede the awareness of the occupational disease.

With regard to Section 8(f), the Board held that the record could support a finding that decedent's kidney disorder was constructively manifest in 1945 as current medical records indicated that in 1926 decedent was hospitalized for a kidney problem at which time a congenital missing kidney was diagnosed. On remand, the Board instructed the administrative law judge to determine whether the circumstantial evidence as to the existence of the relevant documents at the time of employment were sufficient to meet the manifest requirement, noting that the employment relationship in this case had ended over 40 years ago. The Board also stated, however, that there is no evidence that decedent's coronary artery disease was manifest before 1945. *Stone*, 20 BRBS at 6.

In the Decision and Order on Remand, issued on February 8, 1988, Administrative Law Judge McElroy summarily determined that decedent was permanently partially disabled and entitled to 66 2/3 percent of the national average weekly wage at the time of his injury payable from March 10, 1974 through January 13, 1981. The administrative law judge reaffirmed his award of Section 8(f) relief, finding that circumstantial evidence, consisting of the reference in the 1950 Duke Hospital records to decedent's hospitalization in 1926 for kidney problems, met the manifest requirement.

The Director, claimant and employer moved for reconsideration of this decision. In their motions, the Director and employer contended that the administrative law judge erred in failing to determine a percentage rating for decedent's disability pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). The Director also contended that the administrative law judge's finding that decedent's kidney condition was constructively manifest to employer is insufficient as a matter of law to support an award of Section 8(f) relief. Claimant contended that the administrative law judge erred in finding decedent permanently partially disabled as the prior decisions and the parties' stipulations established that decedent was permanently totally disabled.

In the Decision and Order on Reconsideration, issued on August 24, 1988, Administrative Law Judge G. Marvin Bober found that pursuant to the 1984 Amendments, a retiree may be awarded benefits only for permanent partial disability under Section 8(c)(23), and thus denied claimant's motion for reconsideration. The administrative law judge discussed Dr. Saltzman's opinion that decedent had a Class 4, or 50 to 100 percent, respiratory impairment, and found decedent was 100 percent permanently partially disabled. Further, the administrative law judge determined that April 4, 1978, was the date of onset of the disability.

Discussing Section 8(f), the administrative law judge declined to address whether decedent had a pre-existing disability which combined with the subsequent work injury to produce a greater degree of disability, as the Board had not reversed the administrative law judge's prior findings that these requirements had been met. The administrative law judge stated that the Board had not disturbed the finding that decedent's kidney disorder was a pre-existing permanent partial disability; rather, it had remanded the case solely to reconsider whether decedent's kidney condition was manifest, and found that the record could support a finding that the kidney disease was constructively manifest in 1945. The administrative law judge thus reaffirmed the award of Section

8(f) relief.

In her current appeal, the Director contends that the administrative law judge erred in awarding employer Section 8(f) relief because the manifest and contribution elements are not satisfied. BRB No. 88-3467. The Director contends that the circumstantial evidence of decedent's kidney disease is insufficient to meet the manifest requirement. The Director also contends that the evidence does not establish contribution because in his September 1979 opinion, Dr. Saltzman stated that obstructive lung disease, coronary heart disease and asbestosis led to decedent's disability, but does not state that decedent's pre-existing kidney condition contributed to his disability. Regardless, however, whether evidence of record exists to support contribution by decedent's kidney disease, the Director contends that legally, employer cannot establish that decedent's kidney disease contributed to his disability. Citing *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989), the Director states that decedent's pre-existing kidney condition cannot constitute a contributory pre-existing disability as the Board held in *Adams* that an unrelated condition cannot contribute to an employee's disability under Section 8(c)(23).

In its response brief, employer contends that the Director may not raise the issue of whether the contribution requirement was met because the Board's remand order was limited to addressing the manifest requirement. Further, employer contends that the Director failed to raise the issue of contribution in its first appeal, or before the administrative law judge on remand, and therefore has waived the issue. In the alternative, employer contends substantial evidence supports the administrative law judge's finding that the decedent's kidney condition was manifest and contributed to his disability as, in his report dated June 25, 1982, upon noting that decedent had a history of kidney disease, Dr. Bomberg opined that decedent's renal disease contributed to his demise.

In its appeal, employer contends that the manifest requirement is no longer applicable in the case of a post-retirement occupational disease, and alternatively, that decedent's heart disease should be the basis for Section 8(f) relief. BRB No. 88-3467A. The Director has not responded to this appeal.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability and/or death after 104 weeks from an employer to the Special Fund. Generally, Section 8(f) is applicable if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury; 2) the disability was manifest to employer prior to the employment injury; and 3) the current disability or death is not due solely to the most recent injury. See *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), argued on other grounds, No. 93-1783 (U.S. Jan. 9, 1995); *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 25 BRBS 85 (CRT) (9th Cir. 1991). In the time since the decisions in this case were issued, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the present case arises, eliminated the manifest requirement of Section 8(f) in post-retirement occupational disease cases. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991). In *Harris*, the court held that to establish entitlement to Section 8(f) relief in a post-retirement occupational disease case, employer need only

show that there is an existing permanent partial disability that combined with the work injury and contributed to the resulting permanent disability. *Harris*, 934 F.2d at 553, 24 BRBS at 200 (CRT); *see also Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Inasmuch as the manifest requirement of Section 8(f) need not be met in this case, we need not address the parties' contentions with regard to the manifest element.

Regarding the contribution element, we initially reject employer's contention that the Director may not raise the issue of contribution because she did not raise it at any time prior to this proceeding. There is no procedural rule barring consideration of the issue under these circumstances where the law has changed since the prior decisions were issued. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). Inasmuch as the Board's decision in *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989), first enunciated a rule of law with regard to the contribution element after the administrative law judges' decisions were issued, it is appropriate to address the Director's contentions in this case.

Under the 1984 Amendments, a Section 8(c)(23) award provides compensation for permanent partial disability due to occupational disease that becomes manifest after voluntary retirement. *Adams*, 22 BRBS at 85; *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234, 237 (1988). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. *See* 33 U.S.C. §§902(10), 908(c)(23)(1988). In *Adams*, the Board held that where the decedent's disability under Section 8(c)(23) was due to mesothelioma, the pre-existing disabilities due to hearing loss, lower back difficulties, anemia and arthritis could not, as a matter of law, contribute to the occupational lung disease being compensated. The Board held that only the decedent's pre-existing chronic obstructive pulmonary disease could materially and substantially contribute to the degree of occupational disease-related disability. In this case, decedent's award was for a 100 percent respiratory impairment due in part to work-related asbestosis. Thus, as the Director contends, decedent's kidney problems could not, as a matter of law, have contributed to his respiratory disability. *Adams*, 22 BRBS at 85. We therefore hold that Section 8(f) relief cannot be awarded based on decedent's pre-existing kidney disorder, and we reverse the award of Section 8(f) relief on this basis.

It is possible, however, that decedent's coronary artery disease may constitute a pre-existing disability which contributed to his compensable permanent partial disability. In its first decision in this case, the Board stated that there is no record evidence that decedent's coronary artery disease was manifest before 1945. *Stone*, 20 BRBS at 5-6. Because, pursuant to *Harris*, 934 F.2d at 553, 24 BRBS at 200 (CRT), the manifest requirement no longer applies, it is necessary to remand the case for the administrative law judge to determine if decedent's pre-existing coronary artery disease "materially and substantially" contributed to his disability. The Fourth Circuit has held that when an employee is permanently partially disabled, Section 8(f) provides that employer must make the additional showing that the employee's ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. *Harcum*, 8 F.3d at 185, 27 BRBS at 130 (CRT); 33 U.S.C. §908(f)(1). The court stated that a showing of this kind requires quantification of the level of impairment that would ensue from the

work-related injury alone. The court further stated that employer must present evidence of the type and extent of disability that the employee would suffer if not previously disabled when injured by the same work-related injury. *Id.* While evidence of record exists showing that decedent's heart condition was a serious problem, *see, e.g.*, Emp. Exs. 7, 9, 23, whether this condition contributed to decedent's respiratory disability requires fact-finding by the administrative law judge. On remand, the administrative law judge should determine if the heart disease materially and substantially contributed to decedent's respiratory impairment.¹ The administrative law judge may, if he deems it appropriate, reopen the record for the receipt of additional evidence. *See Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 44 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. June 15, 1993); 20 C.F.R. §702.338.

Moreover, if, on remand, the administrative law judge finds that the contribution element of Section 8(f) is not satisfied on decedent's disability claim, he should consider it anew on the death claim. As employer notes, evidence of record could establish that decedent's kidney disorder and/or heart disease contributed to decedent's death, and the contribution standards are different for the applicability of Section 8(f) on Section 8(c)(23) and death claims.² *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131 (CRT)(4th Cir. 1990); *Adams*, 22 BRBS at 78.

¹We note that a 100 percent respiratory disability does not *per se* rule out contribution from heart disease, which can affect the respiratory system. *See Guides to the Evaluation of Permanent Impairment* at 115 *et seq.* (3d ed. rev. 1990).

²In her first appeal to the Board the Director contended that the administrative law judge failed to separately evaluate employer's entitlement to Section 8(f) relief on the disability and death claims. The Board did not address this issue. In cases such as this, employer must raise and show entitlement to Section 8(f) relief for each claim. If Section 8(f) applies to both claims, employer is liable for only one period of 104 weeks if the disability and death arose from the same injury. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 110 (1993).

Accordingly, we reverse the administrative law judge's finding that employer is entitled to Section 8(f) relief on the disability claim based on decedent's pre-existing kidney condition. The case is remanded for further consideration in a manner consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge