BRB No. 93-0740

ROBERT E. GOODY Claimant-Respondent v. THAMES VALLEY STEEL CORPORATION and HARTFORD INSURANCE GROUP Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits, Decision and Order on Motion for Reconsideration, and Order Denying Respondent's Motion for Clarification of George G. Pierce, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

David A. Kelly (Montstream and May), Glastonbury, Connecticut, for employer/carrier.

Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet 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, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits, Decision and Order on

Motion for Reconsideration, and Order Denying Respondent's Motion for Clarification (90-LHC-2333) of Administrative Law Judge George F. Pierce 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).

Claimant was employed by General Dynamics Corporation - Electric Boat Division (Electric Boat) as a sheet metal worker from 1953 to 1970, during which time he was exposed to asbestos. From 1972 until November 1986, claimant was employed by employer first as a layout man and then as a working foreman, during which time he was exposed to pulmonary irritants including welding smoke, grinding dust, and paint fumes; he was not exposed to asbestos during his employment. Claimant subsequently filed claims under the Act against both employer and Electric Boat, seeking compensation for a pulmonary disability and a loss of hearing. After these claims were filed, claimant filed a third-party lawsuit against several manufacturers and distributors of asbestos products. Thereafter, in November 1990, claimant entered into settlements of his third-party claims after obtaining written approval of them from Electric Boat. EX 3.

In his Decision and Order Awarding Benefits, the administrative law judge found the claims to be timely, determined that employer had failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption linking claimant's chronic obstructive pulmonary disease to his work place exposures, concluded that claimant was temporarily totally disabled by a pulmonary impairment from December 15, 1986, to July 5, 1988, and permanently totally disabled thereafter, and that employer was the responsible employer as it was the last employer to expose claimant to injurious fumes. The administrative law judge next determined that Section 33(g) did not bar claimant's claim for benefits under the Act, since claimant was not "a person entitled to compensation" within the meaning of Section 33(g)(1) at the time he settled his third-party claim, and that claimant complied with Section 33(g)(2) when he notified employer of the settlements at the formal hearing. The administrative law judge further determined that employer is entitled to a credit for monies received under the settlements,[1] but that employer is not entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Lastly, because he found claimant entitled to an award for permanent total disability, the administrative law judge, citing *Tisdale v. Director, OWCP*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983), did not address claimant's claim for a hearing loss under the schedule because such an award may not coincide with an award of permanent total disability. Thereafter, in his Decision and Order on Motion for Reconsideration, the administrative law judge reaffirmed his decision that employer was not entitled to relief under Section 8(f). Finally, in his Order Denying Clarification, the administrative law judge stated that his original decision clearly set forth the basis and reasons for his denial of Section 8(f) relief and declined to further elucidate on the

[1]Claimant received $30,400.70 from his $45,200 settlement, the remainder going for attorney fees. Of this amount, the administrative law judge found that employer was entitled to a credit for $24,320.56, the actual amount recovered by claimant; the remainder was credited to the interest of claimant's wife.

issue.

On appeal, employer contends that, pursuant to the holding of the United States Supreme Court in *Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), claimant was "a person entitled to compensation" under Section 33(g)(1) at the time he entered into his third-party settlements and that, therefore, claimant was required to obtain employer's written approval of those settlements. Thus, employer avers that since it did not give written approval of claimant's third-party settlements, the administrative law judge erred in not finding claimant's claim for benefits barred pursuant to Section 33(g)(1). Employer additionally contends that the administrative law judge erred in denying it relief pursuant to Section 8(f) of the Act. Claimant responds, urging affirmance of the administrative law judge's finding that his claim for benefits is not barred by Section 33(g)(1); specifically, claimant asserts that the Supreme Court's decision in *Cowart* should not be applied retroactively to affect his claim and that, if it is so applied, Section 33(g)(1) remains inapplicable because his third-party recoveries are related solely to his asbestos exposure while working for Electric Boat.

The Director, Office of Workers' Compensation Programs (the Director), has responded to the appeal in this case, supporting claimant's contention with regard to Section 33(g)(1). Specifically, the Director contends that, on the facts of this case, Section 33(g)(1) is not applicable because claimant sustained two distinct injuries, asbestosis while working for Electric Boat and chronic obstructive pulmonary disease while working for employer, and the third-party settlements entered into by claimant relate only to claimant's asbestosis. Thus, the Director asserts that while Section 33(g)(1) applies to any claim by claimant against Electric Boat for his asbestosis, that subsection of the Act is inapplicable to claimant's claim against employer for his chronic obstructive pulmonary disease.

The first issue presented in this case is whether the administrative law judge erred in determining that claimant's claim for benefits is not barred by Section 33(g)(1) of the Act. Section 33(g)(1), as amended in 1984, states:

> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1)(1988).

In the instant case, the administrative law judge, in determining that Section 33 was applicable to the claim, explicitly found that "on or about November 5, 1990, [claimant] settled a third party claim arising out of the injury that forms the basis of this claim." *See* Decision and Order at 16. Next, the administrative law judge, citing *Dorsey v. Cooper Stevedoring Co., Inc.*, 18 BRBS 25 (1986), and *Collier v. Petroleum Helicopters, Inc.*, 17 BRBS 80 (1985), *rev'd on other grounds*, 784 F.2d 644, 18 BRBS 67 (CRT)(5th Cir. 1986), concluded that Section 33(g)(1) did not bar the instant claim because claimant was not being paid compensation by employer either pursuant to an award or voluntarily at the time of his settlement and therefore claimant was not "a person entitled to compensation" within the meaning of Section 33(g)(1). *See* Decision and Order at 15-16. The administrative law judge further found that because claimant notified employer of his settlements at the formal hearing, claimant complied with Section 33(g)(2), 33 U.S.C. §933(g)(2) (1988). *See* Decision and Order at 16. Lastly, the administrative law judge addressed Sections 33(b) and (f), 33 U.S.C. §933(b), (f), and determined that employer was entitled to a credit based on the settlement monies received.[2]

Subsequent to the administrative law judge's decision in this case, the United States Supreme Court issued its decision in *Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), wherein the Court held that under the plain language of Section 33(g)(1), a claimant who has suffered an injury and enters into a settlement with a third party as a result of the injury forfeits his right to compensation benefits under the Act by failing to obtain the employer's written approval of the settlement. In *Cowart*, the claimant suffered a work-related traumatic injury, and the employer paid temporary total disability benefits for ten months. However, the employer refused to pay permanent total disability benefits. In the meantime, the claimant settled a third-party action, arising from the injury but did not secure the employer's written approval of the settlement. The claimant argued that since the employer was not voluntarily paying benefits at the time of the settlement, and a formal award of benefits had not been issued, he was not a "person entitled to compensation" under Section 33(g)(1). Thus, the claimant argued, compliance with Section 33(g)(1) was not required.

[2]We note that the Director argues that the administrative law judge erred in finding employer entitled to a credit for some of the settlement funds; this issue, however, is not raised in the appeal before us and will not be further addressed.

The Board agreed with the claimant's argument. *See Cowart v. Nicklos Drilling Co.*, 23 BRBS 42 (1989). However, the United States Court of Appeals for the Fifth Circuit reversed, holding that Section 33(g) contains no exceptions to the written approval requirement. *See Nicklos Drilling Co. v. Cowart*, 927 F.2d 828, 24 BRBS 93 (CRT) (5th Cir. 1991)(*en banc*). In affirming the Fifth Circuit's decision, the Supreme Court held that the claimant "became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability." *Cowart*, U.S. , 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). Thus, the claimant became a person entitled to compensation at the time he suffered his work-related injury. Despite the employer's conceded knowledge of the settlement, the Court held that the claimant was required to obtain the employer's written approval of the settlement pursuant to Section 33(g)(1).[3]

Based upon the Supreme Court's decision in *Cowart*, it is clear that the administrative law judge's findings regarding Section 33(g)(1) cannot stand. In this regard, employer asserts that the Court's decision in *Cowart* requires that we hold that Section 33(g)(1) bars claimant's claim for benefits, and that we accordingly reverse the administrative law judge's award of benefits. In their respective briefs, claimant and the Director assert that reversal pursuant to *Cowart* is not appropriate since, based upon the facts of this case, Section 33(g) is inapplicable to the claim against employer. Specifically, claimant contends that since his claim against employer was not based upon exposure to asbestos while he was employed by employer, and his third-party recoveries relate solely to his exposure to asbestos, Section 33(g) cannot bar his claim against employer. In a brief supportive of claimant's position on this issue, the Director, citing to *United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979), asserts that because claimant sustained two distinct injuries, *i.e.*, asbestosis, a restrictive impairment resulting from his exposure to asbestos while employed at Electric Boat, and chronic obstructive pulmonary disease (COPD), an obstructive impairment resulting from exposure to noxious fumes at employer's facility, the injury for which claimant sought a settlement from third parties and received approval from Electric Boat, asbestosis, is separate and distinct from the injury, COPD, for which he sought compensation from this employer.[4] Thus, the

[3]The Court noted that a claimant is required to provide notice of a settlement under Section 33(g)(2), but not written approval, in only two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or equal to the employer's total liability." *Cowart*, 112 S.Ct. at 2597, 26 BRBS at 53 (CRT).

[4]In *Melson*, a case which arose under the pre-Amendment Act, claimant was employed by both a longshore employer and a service station. Claimant suffered shortness of breath and chest pains for two weeks prior to his last day of employment with his longshore employer, and thereafter suffered a heart attack while working at the service station. Claimant filed a state claim against the service station, which was settled, and a claim under the Act against the longshore employer. The United States Court of Appeals for the Fifth Circuit, noting that Section 33(g) is limited to the situation in which the third party is potentially liable to both the employee and the covered employer, held that the claimant's settlement of his state claim without his longshore employer's written approval did not bar his claim under the Act pursuant to Section 33(g), since claimant's settlement of his state claim did not prejudice claimant's longshore employer.

Director contends that while Section 33(g) applies to claimant's asbestosis claim against Electric Boat, it has no bearing on the claim against this employer.

Section 33(g) specifically refers to Section 33(a) of the Act which states:

> If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such persons.

33 U.S.C. §933(a). Thus, Section 33 applies where a third party is liable in damages for the same disability or death for which compensation is sought. In such a case, claimant's right to seek damages from the third party may be assigned to his employer under certain circumstances, *see* 33 U.S.C. §933(b), and where claimant files suit, the employer may gain the rights to a credit for amounts recovered under Section 33(f) and to approve any settlement pursuant to Section 33(g). In this case, the question is whether employer, who did not expose claimant to asbestos, nonetheless is entitled to assert rights under Section 33.

In addressing this issue, the definitions of injury and disability are relevant. Disability is defined in the Act as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment... ." 33 U.S.C. §902(10). The Act states that an injury

> means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2). In *Cowart*, the Court, in construing the term "person entitled to compensation," held that the claimant became such a person when he suffered an injury giving him a right to compensation under the Act. Claimant and the Director argue that in the present case, the injury giving rise to the third-party claim is related only to claimant's asbestos exposure and that only this injury and the employment giving rise to it are relevant for purposes of Section 33(g).

Employer, however, asserts that the focus is properly on the fact that it is liable for claimant's entire respiratory disability. Employer on appeal does not contest that it is the employer liable for claimant's permanent total disability. Employer's liability is consistent with two well-settled principles, the aggravation rule and the last employer rule.

It is well-established that an employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates or combines with an underlying condition, the entire resultant disability is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In addition, the responsible employer under the Act in cases involving the

potential liability of multiple employers where claimant suffers an occupational disease is the "employer during the last employment in which the claimant was exposed to the injurious stimuli prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment." *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Employer thus contends that, as it is liable for claimant's entire respiratory disability, its consent was required under Section 33(g).

While we agree with employer that the instant case must be reconsidered in light of the Supreme Court's decision in *Cowart,* we cannot agree that it is appropriate to reverse the administrative law judge's decision. In a similar case involving claims for asbestosis and siderosis, the Board remanded the case for consideration by an administrative law judge. *See O'Berry v. Jacksonsville Shipyards, Inc.*, 22 BRBS 430 (1989), *modifying on recon*. 21 BRBS 355 (1988). As claimant and the Director's arguments have not been considered by the administrative law judge and, if accepted, lead to the conclusion that Section 33(g) does not bar the claim, we conclude that the case must be remanded for the administrative law judge to consider their theory. Accordingly, we vacate the administrative law judge's determination regarding the inapplicability of Section 33(g)(1), and we remand the case for the administrative law judge to reconsider the applicability of that subsection in light of the Supreme Court's decision in *Cowart*. On remand, the administrative law judge must address the evidence regarding claimant's and the Director's contention that Section 33(g)(1) cannot bar the instant claim against employer since claimant's claims involve two separate and distinct injuries.[5] We note that it is uncontested that claimant was exposed to asbestos only at Electric Boat and that Electric Boat gave its consent to the third-party settlements.

Employer additionally challenges the administrative law judge's finding that it failed to establish entitlement to relief pursuant to Section 8(f) of the Act; specifically, employer alleges that the administrative law judge erred in failing to find that claimant's pre-injury pulmonary problems constituted pre-existing permanent partial disabilities which were manifest to employer and which contributed to claimant's subsequent permanent total disability. Section 8(f) of the Act, 33 U.S.C. §908(f), shifts the liability to pay compensation for permanent total disability after 104 weeks from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944. In a case where claimant is permanently totally disabled, Section 8(f) relief is available to employer if employer establishes the following: 1) the claimant has a pre-existing permanent partial disability which 2) combines with a subsequent work-related injury to result in permanent total disability, and 3) the pre-existing disability was manifest to employer. *See* 33 U.S.C. §908(f); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), *rev'g Luccitelli v. General Dynamics Corp.*, 25 BRBS 30 (1991); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989). Section 8(f) does not apply if claimant is permanently totally disabled as a result of the subsequent work

[5]We note that in his decision, the administrative law judge stated that this claim is for "pulmonary injury and impairment," *see* Decision and Order at 2-3, and that "claimant, on or about November 5, 1990, settled a third party claim arising out of the injury that forms the basis of the claim." Decision and Order at 16. The Director argues that this statement is not supported by the record.

injury alone. *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1 (CRT).

In the instant case, the administrative law judge, after reciting the criteria necessary to establish entitlement to relief under Section 8(f), stated, *in toto*:

> [B]ased on the totality of evidence, I find that Employer has not satisfied the requirements of Section 8(f) of the Act. The medical documentation introduced by Employer in its application for benefits under Section 8(f) does not indicate that Employer was aware that Claimant suffered from any pre-existing permanent partial disability. There is no evidence which indicates that Claimant suffered any degree of pulmonary impairment before this claim. Section 8(f) relief, therefore, is not available to the Employer in this instance.

See Decision and Order at 15. Decisions rendered under the Act are subject to the Administrative Procedure Act which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all material issues of fact, law or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In the instant case, the administrative law judge's failure to explicitly set forth the evidence upon which employer relies makes it impossible to apply the Board's standard of review. Accordingly, we vacate the administrative law judge's denial of relief under Section 8(f); on remand, the administrative law judge must consider and discuss all of the medical evidence relevant to employer's contentions on this issue.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits, Decision and Order on Motion for Reconsideration, and Order Denying Respondent's Motion for Clarification are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

My colleagues vacate the administrative law judge's determinations regarding the applicability of both Section 33 and Section 8(f) of the Act to the instant case. I must respectfully dissent because I agree with the Director's position regarding the inapplicability of Section 33(g)(1) to the instant case and I also agree with the administrative law judge's determination regarding the unavailability of Section 8(f) relief to employer.

Claimant, as a result of a work-history filled with exposure to noxious elements, including asbestos, suffers distinct pulmonary disabilities, a restrictive impairment resulting from asbestos exposure and chronic obstructive pulmonary disease (COPD), an obstructive lung disease attributable to various lung irritants. As a result of his multiple disabilities, claimant filed claims against Electric Boat and employer, both of whom are subject to the Act. Thereafter, claimant entered into third-party settlements with various asbestos manufacturers, after obtaining the approval of Electric Boat. Claimant was exposed to asbestos only at Electric Boat. Employer has contended that it did not expose claimant to asbestos at any time during claimant's tenure with it. *See* Transcript at 34.

As the Director and claimant argue, claimant has sustained two separate injuries, *i.e.*, asbestosis arising from asbestos exposure at Electric Boat, and COPD. Furthermore, as the Director

sets forth in his brief, Section 33(g) of the Act, 33 U.S.C. §933(g), applies in cases where an employee is injured by a third person during the course of his employment and is limited to the situation in which the third party is potentially responsible to both the claimant and the employer. *See United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979). In the instant case, the third parties, *i.e.*, the asbestos manufacturers with whom claimant entered into settlements, have no potential responsibility to this employer because they never sold asbestos to it, nor does employer contend that it exposed claimant to asbestos. Since claimant's exposure to asbestos occurred only during his employment with Electric Boat, only Electric Boat would have a cause of action against the third party asbestos manufacturers, *see* 33 U.S.C. §933(b); thus claimant, in accordance with the applicable provisions of the Act, correctly sought and obtained Electric Boat's written approval prior to entering into third-party settlements with various asbestos companies.

My colleagues, however, assert that the administrative law judge's findings regarding Section 33(g)(1) cannot stand in light of the Supreme Court's decision in *Cowart v. Nicklos Drilling Co.,* U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992). Specifically, the majority contends that the administrative law judge's determination that claimant was not "a person entitled to compensation" within the meaning of Section 33(g)(1) at the time he settled a third-party claim in November 1990 must be vacated, and the case remanded for reconsideration of the applicability of that subsection in light of *Cowart*. Such reconsideration is unnecessary in my view because the Court's interpretation in *Cowart* does not change the result in the instant case. As set forth above, even if claimant were "a person entitled to compensation" at the time of the settlement, because claimant obtained written approval from the relevant party, *i.e.*, Electric Boat, he satisfied the requirements of Section 33(g)(1). Accordingly, the requirements of Section 33(g)(1) were fulfilled in this case, since the employer who may itself proceed against the third parties, *i.e.*, Electric Boat, consented to the settlement. I would hold that Section 33(g)(1) cannot bar claimant's claim against employer.

Furthermore, the fact that employer is liable for all disability sustained by claimant, even that which could be caused by his exposure with Electric Boat, is not relevant to this issue. It is well-established that if the circumstances of a claimant's employment cause an injury that aggravates, accelerates or combines with an underlying condition, the entire resultant disability is compensable. *See generally Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989). Accordingly, employer is responsible under the Act for compensating claimant for the entirety of his disability even though that disability may have been occasioned only in part by his employment with this employer, pursuant to the well-established aggravation rule. *See, e.g., Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert.denied*, 350 U.S. 913 (1955). Any harm sustained in prior employment, covered under the Act or not, is simply irrelevant to employer's liability for claimant's entire lung condition.

In summary, as employer did not expose claimant to asbestos, it was not an employer to whom claimant's rights to file suits against the third-party asbestos manufacturers could be assigned under Section 33(b). Those rights ran to Electric Boat, the employer who did expose claimant to asbestos. I would therefore hold that Section 33(g)(1) does not apply to require that claimant obtain

from employer consent to his settlement of his suits related to his asbestosis injury, in order to pursue this claim for COPD against this employer. Accordingly, I would affirm the administrative law judge's conclusion that Section 33(g)(1) does not bar claimant's recovery from this employer.

Additionally, I would affirm the administrative law judge's determination that employer is not entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f). Although the administrative law judge's findings are concise, his statement that there is no evidence which indicates that claimant suffered any degree of pulmonary impairment prior to his claim against this employer is supported by the record. There is no evidence that claimant experienced any pulmonary problems prior to the mid-1980's, and any prior conditions are reflected only in claimant's patient history. In the statement of Dr. Cherniack, dated December 15, 1986, the date of the first symptoms for chronic bronchitis is listed as approximately 1983. Additionally, claimant testified that he never missed any work as a result of bronchitis while working. Tr. at 78. Although employer states that claimant had "medical treatment for pulmonary problems going back to 1974," Brief at 12, there is no evidence to support that statement in the record. In view of employer's failure to cite any evidence which would support an award of Section 8(f) relief, I would affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, I would affirm the administrative law judge's decision in its entirety.

REGINA C. McGRANERY
Administrative Appeals Judge