BRB No. 00-1172

GEORGE W. EURE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Aug. 22, 2001
	)	
	)	
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 Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Kristin M. Dadey (Howard M. Radzely, 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 (99-LHC-0344) of Administrative Law Judge Richard E. Huddleston 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 administrative law judge's findings of fact and conclusions of law 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 worked at employer's shipyard from 1941 to 1946, and in 1949, where he was

exposed to asbestos. He was diagnosed as suffering from asbestosis on August 13, 1996. Prior to the hearing in this case, the district director issued a compensation order, based on the parties' stipulations, awarding claimant permanent partial disability benefits for a 15 percent pulmonary impairment. 33 U.S.C. §908(c)(23). The sole issue before the administrative law judge was the applicability of Section 8(f) of the Act, 33 U.S.C. §908(f). In his decision, the administrative law judge found that employer failed to demonstrate that claimant had a pre-existing permanent partial disability due either to claimant's tuberculosis with thoracoplasty or underlying heart disease with congestive heart failure and chronic atrial fibrillation. The administrative law judge therefore denied Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that the administrative law judge mischaracterized the evidence in finding that claimant's chronic exertional dyspnea from his thoracoplasty does not constitute a pre-existing permanent partial disability. Employer further contends that its entitlement to Section 8(f) relief is established by the Director's admission of facts. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury;[1] and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

We first address employer's contention that the Director's admissions of fact entitle employer to Section 8(f) relief. On June 4, 1999, counsel for employer served on the Director a request for admissions. Counsel for employer stated at the hearing that the Director did not answer until July 13, 1999, after the 30-day deadline imposed by 29 C.F.R. §18.20(b).[2] The administrative

[1]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifest requirement in cases such as the one at bar where the worker suffers from a post-retirement occupational disease. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 248, 24 BRBS 190(CRT) (4th Cir. 1990).

[2]29 C.F.R. §18.20 states, in pertinent part:

> (a) A party may serve upon any other party a written request . . . for the admission of the truth of any specified relevant matter of fact.

(b) Each matter of which an admission is requested is admitted unless, within thirty (30) days after service of the request or such shorter or longer time as the administrative law judge may allow, the party to whom the request is directed serves on the requesting party: (1) A written statement denying specifically the relevant matters of which an admission is requested; (2) A written statement setting forth in detail the reasons why he or she can neither truthfully admit nor deny them; or (3) Written objections on the ground that some or all of the matters involved are privileged or irrelevant or that the request is otherwise improper in whole or in part.

* * *

(e) Any matter admitted under this section is conclusively established unless the administrative law judge on motion permits withdrawal or amendment of the admission.

law judge noted that the Director did not appear at the hearing, did not deny employer's assertion, did not file any answers to the request for admissions with his office, which were not offered into evidence, and did not attempt to show good cause as to why he filed any answers in a late fashion. Thus, the administrative law judge found that the Director admitted the truth of any factual assertions contained in the request for admissions. Decision and Order at 2. Relevant to the instant case, these include:

> 1. Mr. Eure had pre-existing tuberculosis/thoracoplasty and heart disease long before he was diagnosed to have asbestosis on August 13, 1996.2. Mr. Eure had tuberculosis and thoracoplasty as early as the 1950's.
>
> 3. In 1994, Mr. Eure had chronic dyspnea-shortness of breath on exertion.
>
> 4. Dr. Shaw attributed Mr. Eure's restrictive changes to the thoracoplasty.7. Mr. Eure's pre-existing conditions of tuberculosis/thoracoplasty and heart disease were permanent and serious. A cautious employer would not hire a worker for heavy manual labor, such as at the Shipyard, if he (sic) either condition.
> 10. Mr. Eure's lung impairment can be attributable to his thoracoplasty.11. Mr. Eure's (sic) noted shortness of breath (dyspnea) ever since his thoracoplasty in the 1950's due to his tuberculosis.

The administrative law judge found that the Director admitted that claimant had the pre-existing conditions of tuberculosis and a thoracoplasty resulting therefrom,[3] but that the admissions do not establish that claimant had any degree of disability within the meaning of Section 8(f) from these conditions prior to the diagnosis of asbestosis.

[3]A thoracoplasty is the surgical removal of ribs, to allow the chest wall to move inward so that a diseasd lung may be collapsed. *Dorland's Illustrated Medical Dictionary*, 25th ed. 1974 at 1604.

We reject employer's contention that the administrative law judge erred in not finding its entitlement to Section 8(f) relief established on the basis of the Director's admissions. The administrative law judge implicitly recognized that the admissions in question do not apply for purposes of establishing the legal requirement of a pre-existing permanent partial disability within the meaning of Section 8(f): the existence of a serious, lasting physical condition that would motivate a cautious employer to discharge the employee because of an increased risk of compensation liability. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Contrary to employer's contention, the regulation at 29 C.F.R. §18.20 applies to matters of fact, *see* 29 C.F.R. §18.20(a), and thus the "matter . . . conclusively established," pursuant to 29 C.F.R. §18.20(e), is indeed only a matter of fact, and not a matter of law. *See Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77, 80 n.3 (1988). Whether claimant's chronic dyspnea constitutes a serious lasting physical condition within the meaning of Section 8(f) requires the administrative law judge to draw a legal conclusion based upon the fact of the condition's existence, and in view of the evidence of record. Therefore, we hold that the administrative law judge properly looked to the evidence of record submitted by employer to determine if Section 8(f) entitlement is established.[4]

We next address employer's contention that the administrative law judge erred in finding the evidence of record insufficient to establish that claimant's thoracoplasty does not constitute a pre-existing permanent partial disability. The administrative law judge found that the existence of a pre-existing condition, thoracoplasty resulting from tuberculosis, was established. The administrative law judge discussed Dr. Edwards's 1994 opinion wherein the physician stated that claimant reported chronic, mild exertional dyspnea since the thoracoplasty was performed in the 1950s.[5] Dr. Edwards further stated, however, that claimant is quite active without any significant limitations. Emp. Ex. 2. Based on this opinion, the administrative law judge found that claimant's thoracoplasty does not constitute a disabling condition.

We affirm the administrative law judge's finding that employer did not establish

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[4]Moreover, admission 7 includes information concerning both claimant's heart condition and the thoracoplasty together as a basis for establishing a pre-existing permanent partial disability. On appeal, employer contends it never claimed Section 8(f) relief on the basis of claimant's heart condition. Thus, this admission cannot serve as a basis for Section 8(f) relief.

[5]The administrative law judge refers to Dr. Edwards as "Dr. Evans." Decision and Order at 4-6.

the pre-existing permanent partial disability element of Section 8(f). Dr. Edwards's opinion supports the administrative law judge's conclusion that claimant's thoracoplasty did not result in any disabling impairment. The mere existence of a pre-existing condition does not establish the disabling nature of such condition. *See generally CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir.1991); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). The administrative law judge rationally determined, in view of Dr. Edwards's statement that claimant was without significant limitations, that the mild dyspnea claimant experiences is not disabling. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

Moreover, although the administrative law judge did not specifically discuss Dr. Shaw's August 13, 1996, opinion in the context of the pre-existing permanent partial disability element, the administrative law judge correctly stated that there is no other evidence of record establishing that the thoracoplasty resulted in any impairment. *See* Decision and Order at 6. Dr. Shaw's report referenced pulmonary function studies conducted on July 17, 1996.[6] Emp. Ex. 4. Dr. Shaw stated that claimant has probable asbestosis, based on his x-ray and diffusion abnormality, but that claimant's restrictive changes can be attributable to his thoracoplasty, not to asbestosis. *Id.* Dr. Shaw did not elaborate as to whether the restrictive changes are those demonstrated on x-ray nor did he attribute any impairment to claimant's thoracoplasty. This opinion, therefore, is insufficient to establish that claimant's thoracoplasty constitutes a pre-existing permanent partial disability.[7] *See generally Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997). As employer has not established the pre-existing permanent partial disability element necessary for Section 8(f) entitlement, we need not address employer's contention

[6]The report states that the pulmonary function results show "mild obstruction with an FEF of 36%. No bronchodilator response. Lung volumes show TLC 69%. Diffusion capacity is 47%." Emp. Ex. 4. Dr. Edwards states that claimant has mild chronic obstructive pulmonary disease. *Id.*

[7]The administrative law judge stated that, generally, Dr. Reid's opinion is not entitled to any weight as he merely repeats what other physicians stated, without any independent diagnosis. Decision and Order at 4. This finding is rational. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998).

that the evidence of record is sufficient to establish the contribution element. Thus, we affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge