BRB Nos. 99-0456
and 99-0456A

MARIE STILLEY (Widow of LYMAN STILLEY) Claimant-Respondent v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Petitioner Cross-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Cross-Petitioner	)	DATE ISSUED: Jan. 10, 2000 DECISION and ORDER

Appeals of the Decision Granting Benefits to the Claimant and Section 8(f) Relief to the Employer of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

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

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Joshua T. Gillelan, II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and

NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision Granting Benefits to the Claimant and Section 8(f) Relief to the Employer (97-LHC-1707) of Administrative law Judge Richard K. Malamphy 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant is the widow of Lyman Stilley (hereinafter, decedent), who was employed as an electrician's helper for this employer for approximately ten months in the 1950s during which time he was exposed to asbestos dust and fibers.[1] On November 18, 1994, decedent was diagnosed with mesothelioma and died approximately 18 months later on May 14, 1996. Claimant sought compensation for decedent's total disability for the period preceding his death, as well as death benefits. 33 U.S.C. §§908(a), 909. Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

The parties stipulated that decedent was exposed to asbestos during his employment with employer. The administrative law judge found that employer, as the last maritime employer for which decedent worked, is the responsible employer under the Act, and he awarded claimant compensation for decedent's permanent total disability from November 18, 1994, to May 14, 1996, as well as death benefits. He further found employer entitled to relief under Section 8(f) for both claims.

In its appeal, employer argues that the administrative law judge's finding that it is the responsible employer violates its rights to equal protection and due process, as decedent was exposed to asbestos in subsequent non-covered employment.

[1]Decedent was employed by employer from October 10, 1950, to January 31, 1951; from March 3 to June 7, 1955; and from June 5 to August 29, 1956. Stip. 1, Decision at 3.

Claimant responds, urging affirmance of the administrative law judge's finding. In his cross-appeal, the Director alleges that the administrative law judge erred in granting employer relief under Section 8(f). Employer responds, contending that the grant of relief under Section 8(f) is proper.

Employer contends that, under the facts of this case, it should not be held responsible for the payment of disability compensation and death benefits. The record reflects that subsequent to his work with employer, decedent was employed as an electronic technician with the National Air and Space Administration (NASA) from September 1957 to July 1989, during which period, it is alleged, decedent also was exposed to asbestos.[2] DX 1. Employer argues that decedent's long-term exposure to injurious stimuli while employed by NASA relieves it of responsibility for any benefits to which the claimant or decedent may be entitled.

Under the Act, the responsible employer is the last maritime employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease. *See Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied,* 350 U.S. 913 (1955); *see also General Ship Service v. Director, OWCP*, 938 F,2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). Employer concedes that the administrative law judge's finding that it is the responsible employer is consistent with the case law of the circuit courts of appeals as well as the Board.[4] *See, e.g., Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT)(5th Cir. 1992); *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 15 (CRT)(11th Cir. 1988), *aff'g Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986); *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

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[2]Although the parties stipulated to decedent's exposure to harmful stimuli while employed by NASA, the administrative law judge refused to accept the stipulation as NASA was not a party to this preceding. Decision at 4.

[4]Employer acknowledges that the administrative law judge's finding is consistent under current law but raises the issue here, as it did below, to maintain it for further appeal.

Indeed, the United States Court of Appeals for the Ninth Circuit has addressed a case with the fact pattern presented herein. In *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984), the claimant worked for Todd Shipyards from 1942-1945, where he was exposed to asbestos. He subsequently worked for Boeing, a non-covered employer, for many years, where he also was exposed to asbestos. Todd Shipyards was held fully liable for the claimant's totally disabling lung disease that resulted from asbestos exposure. The Ninth Circuit rejected the contention that liability could be apportioned between a covered and an uncovered employer, under the same rationale that prevents apportionment among covered employers, namely, to ensure full compensation to injured employees and avoidance of "the burden and delay inherent in litigating complex issues of proportionate liability." *Id.*, 717 F.2d at 1286, 16 BRBS at 18(CRT). Thus, as employer herein acknowledges that it is the last covered employer to expose decedent to asbestos, the administrative law judge properly found that it is the responsible employer.[5] We decline to disturb this finding, and it is hereby affirmed.

In his cross-appeal, the Director argues that the administrative law judge erred in finding employer entitled to relief under Section 8(f). Section 8(f) limits employer's liability for compensation to the first 104 weeks of permanent disability or of death benefits; additional compensation is paid from the Special Fund. 33 U.S.C. §944. Where employer claims Section 8(f) relief and the case involves two separate claims, in this case a claim for total disability, 33 U.S.C. §908(a), and a claim for death benefits, 33 U.S.C. §909, employer's entitlement to relief must be separately evaluated with regard to each claim. *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130(CRT)(1st Cir. 1983). If Section 8(f) applies to both claims, employer is liable for only one period of 104 weeks. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *cf. Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT)(4th Cir. 1990) (employer's liability is limited to one period of 104 weeks only if the two claims arise from the same injury).

In order to establish entitlement to relief under Section 8(f), employer has the burden of establishing that decedent had an existing permanent partial disability

[5]As in *Black*, there has been no demonstration by the responsible employer that the claimant's injury resulted exclusively from the subsequent non-covered employment. *See* 717 F.2d at 1286, 16 BRBS at 17(CRT).

manifest prior to the injury for which compensation is sought, and that the resulting permanent total disability and death were not due solely to the subsequent injury.[6] 33 U.S.C. §908(f)(1). In the instant case, employer based its request for Section 8(f) relief on decedent's hypertension which was noted in his medical records prior to the diagnosis of mesothelioma, but after he ceased working for employer. The Director argues that this condition is insufficient to satisfy any of the criteria necessary for Section 8(f) relief.

For the reasons that follow, we hold that employer's evidence is legally insufficient to establish that decedent's death was not due solely to mesothelioma. Therefore, we reverse the award of Section 8(f) relief on this basis, and we need not address the Director's remaining contentions. Employer is entitled to Section 8(f) relief in a death claim if the death is not due solely to the work injury, a standard which can be met if the pre-existing condition hastens the employee's death. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT)(4th Cir. 1998); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). In *Sain*, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, stated that the administrative law judge's requiring the employer to prove that the decedent would not have died at the time he did had he not suffered from the pre-existing condition is consistent with the hastening standard. *Sain,* 162 F.3d at 820, 32 BRBS at 211(CRT).

[6]Although the United States Court of Appeals for the Fourth Circuit, in which this case arises, does not apply the manifest requirement in post-retirement occupational disease cases, *see, e.g., Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991), this is not a post-retirement case; decedent was fully employed in his usual occupation until he resigned following the onset of his mesothelioma. EX 11. Accordingly, the manifest element is applicable to this claim.

Dr. Reid opined that decedent's "weak heart" and "hypertensive cardiovascular disease" materially and substantially contributed to and hastened decedent's death. EX 9, 18, 21. The administrative law judge found that Dr. Reid did not provide a well-reasoned opinion as to the contribution of the hypertension to the death. Decision at 15-16. It is the administrative law judge's duty to determine the weight to be given to the evidence of record, *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and this finding therefore is affirmed as it is rational.[7] The administrative law judge further discussed the opinion of Dr. Quinlan, who disagreed with Dr. Reid that the hypertension contributed to decedent's death, DX 13, but the judge did not determine the weight this opinion should be accorded, nor did he discuss the death certificate, which lists mesothelioma due to asbestos exposure as the sole cause of death. DX 10. The administrative law judge nevertheless found the "contribution" element satisfied by Dr. Maddox's opinion that "it is reasonable to assume that hypertension had some degree of negative effect on Mr. Stilley's pulmonary function, and thus hastened his death to some degree." EX 22. The administrative law judge stated:

> At face value, the undersigned finds the Employer's argument to be thin regarding contribution to the fatal event. However, in view of *Patrick v. Newport News Shipbuilding and Dry Dock Co.*, 15 BRBS 274 (1983), I find Dr. Maddox's statement as to a "negative effect" caused by hypertension to be sufficient for a grant of Section 8(f) relief.

Decision at 16.

[7]We note, moreover, that there is no diagnosis in the record of a "weak heart" or "hypertensive cardiovascular disease." In fact, this is belied by the autopsy report discussing decedent's heart which states that the heart was normal size, without evidence of significant coronary stenosis or any myocardial lesions. DX 6.

In *Patrick v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 274 (1983) (Kalaris, J., dissenting), the decedent, who had a diagnosis of pre-existing interstitial fibrosis, died from mesothelioma. A doctor stated that the decedent's pre-existing interstitial fibrosis had a "negative effect" on his mesothelioma and overall respiratory condition. The Board held that this opinion was sufficient to establish that the interstitial fibrosis combined with the mesothelioma, resulting in death. 15 BRBS at 277. The administrative law judge in the present case relied on Dr. Maddox's statement as to the negative effect of hypertension on the mesothelioma to find the "contribution" standard satisfied. The standard in *Patrick*, however, focused improperly on whether there was a combination of conditions resulting in death. The proper standard is whether employer established the decedent's death is not due solely to the work injury. *Sain,* 162 F.3d at 820, 32 BRBS at 211(CRT). Thus, the administrative law judge's reliance on Dr. Maddox's opinion as to the "negative effect" played by the hypertension on the mesothelioma is insufficient to afford employer relief under Section 8(f).

Moreover, in the instant case, in which decedent died within the expected time frame after the diagnosis of mesothelioma, Dr. Maddox's opinion does not support a finding that decedent's death was hastened by hypertension. *See id.* His entire conclusion is that:

> - [Decedent] had pre-existing hypertension.
> - Hypertension continued to be a problem during his illness.
> - The pain and respiratory compromise caused by the mesothelioma probably worsened the hypertension.
> - It is reasonable to assume that hypertension had some degree of negative effect on [decedent's] pulmonary function, and thus hastened his death to some degree.

EX 22. First, Dr. Maddox does not state that decedent would not have died when he did if not for the hypertension. *Sain,* 162 F.3d at 820, 32 BRBS at 211(CRT). His statement that death was hastened "to some degree" is vague and plainly insufficient to meet the standard discussed in *Sain.* Second, his opinion is capable of more than one interpretation, *i.e.*, did the pre-existing hypertension hasten death, or did decedent's mesothelioma worsen the hypertension? Because Dr. Maddox found that decedent's hypertension was non-contributory to any disability prior to his death, DX 2, and that the fatal cancer may have caused a rise in blood pressure, *id.*, it is unclear whether it was pre-existing hypertension, if any, which had a contributory effect on decedent's death or whether the rise in blood pressure resulting from the mesothelioma itself had the negative effect. Finally, Dr. Maddox's opinion was the same when he believed that decedent died within six months of diagnosis as when

he was given the correct survival time of 18 months, which is directly in the middle of the expected span of 12 to 24 months. *Compare* EX 20 *with* EX 22. The fact that decedent's death occurred within the expected time frame further undermines Dr. Maddox's opinion. Thus, Dr. Maddox's opinion is legally insufficient to establish that decedent's death was not due solely to mesothelioma. As the administrative law judge declined to credit Dr. Reid's opinion, and as the remaining evidence of record, which the administrative law judge did not weigh in his consideration of this issue, states that mesothelmia alone was the cause of death, DX 6, 10, 13, we hold that the employer failed to establish the contribution element necessary for entitlement to Section 8(f) relief. *See Sain*, 162 F.3d at 813, 32 BRBS at 205(CRT). Therefore, the award of Section 8(f) relief must be reversed.[8]

Accordingly, the administrative law judge's finding that employer is responsible under the Act for the benefits awarded is affirmed. His award of relief to employer under Section 8(f) is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[8]Although the administrative law judge did not specifically address the contribution element regarding decedent's disability, because we hold that there is no contribution on the death claim, there can be no Section 8(f) relief on the disability claim as that award is for fewer than 104 weeks, *i.e.*, November 18, 1994, to May 14, 1996. Accordingly, we need not remand the case for consideration of employer's entitlement to Section 8(f) relief on the total disability claim. Moreover, given our holding, it is not necessary to address the Director's arguments regarding the manifest and pre-existing permanent partial disability elements.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge