

MARY ELSTON)
(Widow of DENMER L. ELSTON))

Claimant)

v.)

NEWPORT NEWS SHIPBUILDING AND)
DRY DOCK COMPANY)

DATE ISSUED: 02/27/2007

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, Mason, Walker & Hedrick, P.C.), Newport
News, Virginia, for self-insured employer.

Kathleen H. Kim (Jonathan L. Snare, Acting Solicitor of Labor; Allen H.
Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),
Washington, D.C., for the Director, Office of Workers' Compensation
Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-02090) 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 supported by substantial evidence, are rational, and are 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's husband (the decedent) worked for employer as a handyman/machine installer from 1951 through 1953. The parties stipulated that he was exposed to asbestos during this employment. The decedent was diagnosed with chronic obstructive pulmonary disease (COPD) by Drs. Leiger, Umstott, Calhoun, Foreman and Mattern. EX 1-9. On November 17, 1998, decedent was diagnosed with asbestosis by Dr. Foreman. Decedent was subsequently diagnosed with lung cancer on March 18, 1999, from which he died on February 22, 2000. Thereafter, claimant filed a claim for permanent partial disability benefits pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), from November 17, 1998 through February 22, 2000, and for death benefits thereafter, pursuant to Section 9, 33 U.S.C. §909.

Subsequent to the case's transfer to the Office of Administrative Law Judges, claimant and employer signed stipulations agreeing that decedent's lung disease and death were caused, in part, by his exposure to asbestos during his employment with employer, and to claimant's entitlement to permanent partial disability benefits for a 50 percent pulmonary impairment and death benefits. Accordingly, the sole issue remaining before the administrative law judge consisted of employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge found that employer established that decedent suffered from a pre-existing, permanent partial disability, specifically COPD, but that employer failed to demonstrate that decedent's disability and death were not due solely to his asbestos-related condition. Therefore, he denied the claim for Section 8(f) relief.

On appeal, employer contends that the administrative law judge abused his discretion in issuing his Decision and Order two days before the deadline he set for submission of post-hearing briefs. Employer also contends that the administrative law judge erred in finding the evidence insufficient to establish the contribution element for Section 8(f) relief on the death benefits claim.¹ The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's decision.

¹ Employer concedes that it presented insufficient evidence to establish contribution on the permanent partial disability award. Emp. Br. at 3.

Section 8(f) limits employer's liability for death benefits to 104 weeks of compensation if employer establishes that the decedent had a manifest, pre-existing permanent partial disability, and that the death was not due solely to the subsequent work injury.² See 33 U.S.C. §§908(f)(1), 944; *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001). The contribution element may be met with evidence that the pre-existing disability hastened 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).

The administrative law judge found that employer did not establish that decedent's death due to lung cancer was contributed to or hastened by his COPD. Employer first contends the autopsy report establishes that decedent's death was not due solely to lung cancer. The death certificate listed only "small cell cancer lung" as the cause of death. EX 6. The autopsy report listed the following anatomical findings: (1) small cell neuroendocrine carcinoma of the right lung; (2) grade 1B asbestosis; (3) bronchopneumonia of bilateral lower lung lobes; and (4) mild centriacinar emphysema. EX 4-1. The pathologist, Dr. Greeley, stated that decedent died from cancer, complicated by bronchopneumonia. EX 4-2. We reject employer's contention that the diagnosis of "bronchopneumonia" signifies the contribution of COPD to decedent's death, as there is no evidence of record correlating the two conditions. Moreover, the anatomical finding of emphysema also does not establish the contribution element, as the pathologist did not relate this condition to decedent's death. Dr. Greeley makes no statement regarding the extent, if any, to which decedent's COPD may have hastened his death, nor does she state that decedent did not die from lung cancer alone. *Stilley*, 33 BRBS at 227-228. Consequently, as the autopsy report is insufficient, as a matter of law, to establish contribution the fact that the administrative law judge merely noted the contents of the report is not error.

Employer next contends that the administrative law judge erred in finding the medical reports of Drs. Churg, Freeman and Apostoles are not sufficient to establish that decedent's death was not due solely to lung cancer. The administrative law judge found each insufficient to meet employer's burden as a matter of law. Decision and Order at 14-15. We reject employer's contentions of error and we affirm the administrative law

² In a case such as this involving a voluntary retiree, the United States Court of Appeals for the Fourth Circuit has held that the manifest element is not applicable. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

judge's finding as it is rational, supported by substantial evidence, and in accordance with law.

As the administrative law judge correctly stated, Dr. Freeman did not offer any opinion as to the cause of decedent's death. EX 2-1. The administrative law judge properly found that Dr. Freeman's opinion that COPD due to smoking "surely contributed to [decedent's] lung dysfunction" does not establish that decedent's death was not due solely to lung cancer. *See Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2^d Cir. 1992). Similarly, Dr. Churg, who reviewed the pathology materials, noted the presence of emphysema, but opined only that asbestos exposure and cigarette smoking "played a role in the genesis of [decedent's] tumor." EX 5-1. The administrative law judge properly found that this opinion also does not establish that decedent's death was not due solely to lung cancer and was contributed to by his COPD. *Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT).

The administrative law judge found that only Dr. Apostoles's opinion is potentially sufficient to meet employer's burden, in that he stated that decedent's death was "hastened by his chronic obstructive pulmonary disease and history of tobacco abuse." EX 1-4. The administrative law judge found this opinion insufficient to meet employer's burden, however, because Dr. Apostoles did not refer to any medical evidence demonstrating how COPD hastened decedent's death.³ The administrative law judge found that the only medical documents on which Dr. Apostoles relied pre-dated decedent's death by at least 11 months.

We reject employer's summary contention that the administrative law judge was required to rely on this opinion to establish the contribution element. In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140, 32 BRBS 48, 52(CRT) (4th Cir. 1998), the Fourth Circuit stated that the administrative law judge should "examine the logic" of physicians' conclusions and "evaluate the evidence upon which their conclusions are based." *See also Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). Thus, as the administrative law judge rationally found that Dr. Apostoles did not adequately explain the basis for his opinion that COPD hastened decedent's death, we

³ In discussing Dr. Apostoles's opinion regarding the request for Section 8(f) relief on the disability claim, the administrative law judge stated that there is no evidence that Dr. Apostoles, an orthopedic surgeon, possesses the oncology or pulmonary credentials necessary to offer a valid opinion concerning the contribution of COPD to decedent's pulmonary impairment. Decision and Order at 14.

affirm his conclusion that the contribution element was not satisfied in this case.⁴ *Id.*; *Stilley*, 33 BRBS at 227-228. Therefore, we affirm the denial of Section 8(f) relief on the death benefits claim. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT).

We reject employer's argument that the administrative law judge committed reversible error in disregarding the briefing schedule he set in his Order dated March 14, 2006. In this Order, the administrative law judge stated that employer and the Director should file their briefs addressing the Section 8(f) issue within 30 days of March 14, or April 13, 2006. The administrative law judge decision is dated April 11 and was filed by the district director on April 17, suggesting that he wrote his decision prior to the expiration of the 30-day period.⁵ Nonetheless, on the facts of this case, the error is harmless and remand is not required as any argument employer would have made in its post-hearing brief could not cure the deficiencies in the evidence it submitted.

⁴ With respect to Dr. Apostoles's opinion, the administrative law judge also relied on the decision in *Turner v. Director, OWCP*, 927 F.2d 778, 779 (4th Cir. 1991), a black lung case, for the proposition that the report of a non-examining physician, such as Dr. Apostoles, "relying exclusively on reports of other physicians who do not themselves address the etiology or extent of a decedent's death, is insufficient, as a matter of law, to satisfy the employer's burden of proof on this issue." Decision and Order at 15. As the administrative law judge gave alternate, legally sufficient reasons for rejecting Dr. Apostoles's opinion, we need not address the propriety of his reliance on this case.

⁵ The administrative law judge's decision does not refer to the March 14, 2006, Order, but only to two earlier deadlines set for the submission of briefs. Decision and Order at 2.

Accordingly, the administrative law judge's Decision and Order awarding benefits and denying Section 8(f) relief is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge