

BRB No. 98-0963

ELIZABETH A. VANCE)
(Widow of JACK E. VANCE))
)
Claimant)
)
v.)
)
NEWPORT NEWS SHIPBUILDING) DATE ISSUED: April 5, 1999
AND DRY DOCK COMPANY)
)
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 -Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

LuAnn Kressley (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (96-LHC-2575) of Administrative Law Judge David W. Di Nardi 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).

Decedent began working for employer as a shipbuilder in 1960 and continued in that capacity until his voluntary retirement on November 30, 1993. During the course of his employment claimant was exposed to and inhaled asbestos dust and fibers. Beginning around February 1989, claimant received regular pulmonary evaluations to detect the presence of asbestos lung disease, and although several doctors observed asbestos-induced pleural plaques or pleural fibrosis by x-ray, only Dr. Murphy found it sufficient to warrant a diagnosis of asbestosis on March 21, 1994. In addition, decedent was diagnosed with lung cancer by Dr. Murphy at that time, and eventually succumbed to the disease on January 9, 1995. Dr. Freeman, who signed the death certificate, certified carcinoma of the lung as the immediate cause of death. No other medical condition was indicated on the death certificate. An autopsy, performed on January 10, 1995, by Drs. Oppenheimer and Strum, resulted in the opinion that decedent died "from widely metastatic adenocarcinoma arising from the right upper lobe of the lung. Marked tumor burden, and respiratory compromise were the immediate causes of death." Claimant's Exhibit 4. Neither asbestosis nor chronic obstructive pulmonary disease was mentioned in the autopsy report.

In his decision, the administrative law judge determined that decedent was entitled to compensation under Section 8(c)(23), 33 U.S.C. §908(c)(23), for a 100 percent permanent partial impairment from March 21, 1994, through January 9, 1995,¹ and that claimant is entitled to death benefits and reasonable funeral

¹The administrative law judge specifically found that decedent's asbestos-related lung disease and lung cancer are work-related as they resulted from the synergistic effect of his cigarette smoking and his asbestos exposure at employer's shipyard.

expenses.² In addition, the administrative law judge determined that employer is not entitled to Section 8(f), 33 U.S.C. §908(f), relief as it did not establish the requisite contribution element, since decedent died as a result of lung cancer, which he found to be a fatal disease, *per se*.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion for Summary Remand on the ground that the administrative law judge did not address employer's entitlement to Section 8(f) relief for its liability on the Section 8(c)(23) claim. The Board, by Order dated August 11, 1998, denied the Director's motion, noting that his contention would be considered in its decision on the merits.

Employer argues that the uncontradicted medical report of Dr. James Reid, that decedent's manifest, pre-existing chronic obstructive pulmonary disease materially and substantially contributed to and caused decedent's permanent partial disability and significantly hastened his death due to lung cancer, is sufficient to meet its burden for establishing entitlement to Section 8(f) relief on both claims in this case. The Director asserts that the administrative law judge's decision only addresses the issue of Section 8(f) relief as it pertains to the claim for death benefits and does not address employer's claim for Section 8(f) relief for its liability for the Section 8(c)(23) claim. The Director thus argues that the case must be remanded for consideration of this issue.

In his decision, the administrative law judge determined that on the basis of the totality of the record, employer has not satisfied the contribution element for Section 8(f) relief because the record reflects that decedent died solely as a result of his lung cancer, a fatal disease *per se*, and that there was no coalescence or combination with any underlying pre-existing disability. The administrative law judge further noted that even assuming the existence of a coalescence with an underlying pre-existing disability, the Board's decision in *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989), precludes Section 8(f) relief in this case, since decedent was in good health at the time of his voluntary retirement on November 30, 1993, and his permanent impairment due to lung cancer did not become manifest, and was not diagnosed until March 21, 1994, when he was examined by Dr. Murphy.

As an initial matter, we note that the Director correctly contends that the

²The administrative law judge determined that decedent's death resulted from a combination of his work-related asbestosis and his bronchogenic carcinoma.

administrative law judge addressed only the issue of employer's entitlement to Section 8(f) relief with regard to the death claim, as exhibited by the fact that the administrative law judge's finding of no contribution is based on the conclusion that decedent died solely as a result of his lung cancer and that employer failed to establish that there was any other cause of death. Because there are two claims in this case, one for permanent partial disability benefits and one for death benefits, and employer raised entitlement to Section 8(f) on each claim, the administrative law judge must consider its entitlement to Section 8(f) relief for each claim. If employer proves the elements of Section 8(f) relief on both claims, it will be liable for only one period of 104 weeks on both claims, inasmuch as both the disability and death arose from the same occupational disease, and the Special Fund will be liable thereafter. See generally *Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 209-210, 23 BRBS 131, 134 (CRT) (4th Cir. 1990); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Henry v. George Hyman Construction Co.*, 21 BRBS 329 (1988); see also *Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988); *Cooper v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 284 (1986). In the instant case, the administrative law judge did not separately analyze employer's application for Section 8(f) relief for its liability on the Section 8(c)(23) claim.

The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, has held that in order to establish entitlement to Section 8(f) relief in a case involving a post-retirement occupational disease, an employer need only show that an employee's pre-existing permanent partial disability pre-dated the manifestation of the occupational disease, and that the employee's death is not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991). In the case of permanent partial disability, the resultant disability must be "materially and substantially" greater than that which would have resulted from the subsequent injury alone. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Bath Iron Works Corp. (Johnson)*, 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997); *Two "R" Drilling Co., Inc. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990). In *Adams*, which dealt with an award of Section 8(f) relief where benefits were awarded pursuant to Section 8(c)(23), the Board held as matter of law that while the decedent's pre-existing chronic obstructive pulmonary disease could have contributed to his compensable disability due to mesothelioma for Section 8(f) purposes, his pre-existing hearing loss, back condition, anemia and arthritis could not have played any role in the occupational lung impairment being compensated. *Adams*, 22 BRBS at 85; see also *Johnson*, 129 F.3d at 45, 31 BRBS at 155 (CRT); *Fineman*, 27 BRBS at 104.

In the instant case, there is evidence that prior to the diagnosis of lung cancer in March 1994, decedent suffered from chronic obstructive pulmonary disease and hypertension.³ Upon his review of the medical records of evidence, Dr. Reid explicitly opined that decedent's subjective complaints of "shortness of breath" and "chronic cough . . . with sputum expulsion," as of February 1989, along with the existence of x-rays around that same time that revealed bilateral apical blebs which were "emphysematous," are diagnostic for chronic obstructive pulmonary disease. Employer's Exhibit 5. In addition, Dr. Reid noted that the existence of chronic obstructive pulmonary disease was confirmed during decedent's annual examinations in February 1991 and 1992, and that objective testing (*i.e.*, blood gas studies and pulmonary function studies) administered on October 23, 1992, likewise revealed that decedent suffered from mild obstructive disease which resulted in at least a ten percent permanent impairment under the American Medical Association guidelines. Similarly, Dr. Reid notes that decedent's medical records indicate an initial diagnosis of hypertension in 1989, which is subsequently repeated thereafter. Moreover, Dr. Reid explicitly opined that the decedent's disability was materially and substantially contributed to, and his death was materially and significantly hastened by, his chronic obstructive pulmonary disease and hypertension. The administrative law judge's discussion of Section 8(f) however lacks any consideration of Dr. Reid's opinion.⁴ This evidence, if credited, could support employer's application for Section 8(f) relief on both the permanent partial disability and the death claim. Consequently, we vacate the administrative law judge's determination that employer is not entitled to Section 8(f) relief and remand the case for reconsideration of this issue in light of all the relevant evidence of record.⁵ If the

³Thus, this case does not involve conditions like the hearing loss, back problems, anemia and arthritis which could not contribute to the compensable conditions.

⁴Furthermore, as employer notes, the administrative law judge's finding pursuant to Section 8(f) that decedent's death is due solely to lung cancer directly contradicts his prior finding in awarding death benefits that decedent's death resulted from a combination of his work-related pulmonary asbestosis and his bronchogenic carcinoma, conditions which were first diagnosed and reported by Dr. Shaw on March 31, 1989. The asbestosis, however, cannot support an award of Section 8(f) relief as it did not pre-exist the lung cancer. *Fineman*, 27 BRBS at 111.

⁵In addition, we note that as the Fourth Circuit has held that the manifest element serves no useful purpose in post-retirement occupational disease cases and thus will not be applied in those instances, *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), we hold that the administrative law judge's denial of Section 8(f) relief on the grounds that decedent's permanent impairment did not become

administrative law judge determines that Section 8(f) applies to both claims, then employer is liable for only one 104-week period, and thereafter the Special Fund is liable for payments. See *Fineman*, 27 BRBS at 104; *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); 33 U.S.C. §§908(f), 944. We note that if the administrative law judge finds Section 8(f) inapplicable on the disability claim, employer may, in any event, be entitled to Section 8(f) relief on the death claim alone.⁶

manifest until after his retirement, *see* Decision and Order at 30, is erroneous.

⁶Employer cannot be entitled to Section 8(f) relief on the disability claim alone as it did not run for more than 104 weeks. 33 U.S.C. §908(f)(1).

Accordingly, the administrative law judge's determination that employer is not entitled to Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge