

BRB No. 05-0103

ELLA V. LEGGETT )  
(Widow of CHARLIE C. LEGGETT) )  
 )  
Claimant )  
 )  
v. )  
 )  
NEWPORT NEWS SHIPBUILDING ) DATE ISSUED: 09/22/2005  
AND DRY DOCK COMPANY )  
 )  
Self-Insured )  
Employer-Petitioner )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT OF )  
LABOR )  
 ) DECISION and ORDER  
Respondent )

Appeal of the Decision and Order Denying Section 8(f) Relief and the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Peter B. Silvain (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Relief and the Decision and Order on Remand (2002-LHC-2050) 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 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).

Decedent worked for employer as a joiner from 1946 until 1948. Claimant, decedent's widow, and employer stipulated that decedent was exposed to asbestos during his employment and that he was diagnosed with asbestosis, which was listed on the death certificate as another factor contributing to his death in 1999. Emp. Exs. 14, 18-20. Claimant and employer also stipulated that decedent's disease and death were caused by his exposure to asbestos at employer's facility and that claimant is entitled to benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. Emp. Exs. 18-20; *see* Decision and Order at 2-5. After evaluating the medical records submitted by employer, the administrative law judge denied employer's application for Section 8(f), 33 U.S.C. §908(f), relief. *Id.* at 7-8. Employer appealed the denial of Section 8(f) relief, and the Director, Office of Workers' Compensation Programs (the Director), filed a motion to vacate the decision and to remand the case for entry of an order awarding claimant benefits. On appeal, the Board determined that the stipulations were filed with the district director, but the district director did not issue a compensation order, and the administrative law judge addressed only the application for Section 8(f) relief. Accordingly, the Board vacated the decision and remanded the case for entry of an award of death benefits, and it, therefore, dismissed employer's appeal. *Leggett v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-641 (April 9, 2004).

On remand, the administrative law judge accepted the parties' stipulations and awarded claimant death benefits from July 24, 1999, and continuing, as well as funeral expenses.<sup>1</sup> Stating that the stipulations between claimant and employer have no effect on his denial of Section 8(f) relief, he again denied employer's application for Section 8(f) relief. Decision and Order on Remand at 3. Employer appeals the denial of Section 8(f) relief, and the Director responds, urging affirmance.

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<sup>1</sup>The administrative law judge also ordered payment of permanent total disability benefits from January 19 through July 23, 1999. Decision and Order on Remand at 3. However, employer filed a motion for reconsideration and stated there was no claim for disability benefits. In an Errata Order dated September 15, 2004, the administrative law judge deleted the award for disability benefits from his order.

Section 8(f) shifts the liability to pay compensation for a work-related permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief in a retiree death benefits case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit if it establishes that the employee had a pre-existing permanent partial disability and that the disability contributed to the employee's death. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4<sup>th</sup> Cir. 1998); *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4<sup>th</sup> Cir. 1991). In this case, the administrative law judge found that employer failed to satisfy the contribution element necessary for Section 8(f) relief. Employer contends the administrative law judge erred by applying the standard normally applied in permanent partial disability cases, *i.e.*, the requirement that the ultimate permanent partial disability be "materially and substantially greater" than it would have been absent the pre-existing disability, to this case involving a claim for only death benefits. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4<sup>th</sup> Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4<sup>th</sup> Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). The Director responds, urging affirmance of the denial of Section 8(f) relief. He contends that the parties' stipulations regarding the work-relatedness of the death are not binding on the Special Fund and that employer failed to prove either that decedent's pre-existing condition or his work-related condition hastened his death.

In this case, the administrative law judge found that the "file is replete" with evidence of pre-existing heart and renal impairments. Emp. Exs. 7-13. He found, however, that only Drs. Tornberg and Givens addressed decedent's asbestosis and pulmonary functions. Emp. Exs. 3-4, 15-16. Dr. Tornberg, employer's medical director who reviewed decedent's records in 2001, stated that decedent had pre-existing hypertensive cardiovascular disease and diabetes, had undergone a coronary artery bypass, and had uncontrolled high blood pressure. Dr. Tornberg concluded that decedent's death was not caused by his asbestosis alone, that his death was "materially and substantially" contributed to by his pre-existing condition, and that if decedent only had asbestosis his disability would have been 14 percent less. Finally, Dr. Tornberg summarily stated that decedent's death was hastened by his coronary artery disease. Emp. Exs. 3-4. Dr. Givens, who evaluated the employee in January 1999, stated that he had asbestosis diagnosed in 1998 and that his respiratory condition was worsening. Emp. Exs. 15-16. The death certificate identified decedent's immediate cause of death as myocardial insufficiency and the underlying cause as coronary artery disease. Other significant contributing conditions included asbestosis and kidney disease. Emp. Ex. 14.

The administrative law judge found that Dr. Givens did not report on decedent's pulmonary restrictions, implicitly rendering the report insufficient to satisfy the

“materially and substantially greater” requirement. Decision and Order at 7; Emp. Exs. 15-16. Additionally, he found that Dr. Tornberg’s opinion that decedent’s asbestosis accounted for 14 percent of his overall impairment is not supported by either Dr. Givens’s report or reference to a medical treatise. Therefore, he concluded that employer “failed to establish the contribution element necessary for Section 8(f) regarding permanent partial disability.” Decision and Order at 7. The administrative law judge also determined: that the death certificate focused on decedent’s heart disease; that there is no doubt decedent’s “cardiovascular disease played a significant part in the fatal event;” that the record is devoid of evidence pertaining to decedent’s last six months of life; and there is no autopsy report. Decision and Order at 7. Citing *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4<sup>th</sup> Cir. 2000), the administrative law judge found that Dr. Tornberg’s unsupported hastening theory is not credible.<sup>2</sup> Decision and Order at 7.

Initially, we hold that employer is correct in stating that the administrative law judge applied an incorrect standard of law to determine whether decedent’s pre-existing condition contributed to his death. In rendering his decision, the administrative law judge used the “materially and substantially greater” standard, reserved for cases involving permanent partial disabilities. Decision and Order at 7. Indeed, he stated that employer failed to satisfy the contribution element for a permanent partial disability, and he cited *Harcum I* as well as *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998), both of which involved claims for permanent partial disability benefits. In those cases, the Fourth Circuit, within whose jurisdiction this cases arises, held that an employer must quantify the extent of an employee’s disability that would result from the work-related injury alone by more than mere subtraction of the pre-existing impairment from the current impairment. *Id.* In a death benefits case, however, the Fourth Circuit explained that an employer must establish the contribution element by showing that the work injury was not the sole cause of the death. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Independent Stevedore Co. v. O’Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). Specifically, the Fourth Circuit stated:

the appropriate standard for determining whether a pre-existing condition ‘contributed’ to the employee’s death in a case such as this one, in which

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<sup>2</sup>Where an employee died of a heart attack caused by occluded arteries, the court held that the listing of pneumoconiosis as an “other significant condition contributing to death” on the death certificate and the notation of the presence of pneumoconiosis in the body on the autopsy report were insufficient, alone, to explain how pneumoconiosis contributed to or hastened the employee’s death. *Sparks*, 213 F.3d 186, 22 BLR 2-251.

the work-related injury could have produced the death by itself, is whether the pre-existing condition ‘hastened’ the death.

*Sain*, 162 F.3d at 821, 32 BRBS at 211(CRT). Thus, there is no additional requirement for an employer to separately quantify the extent of the permanent partial disability. Because the administrative law judge applied incorrect law to determine whether employer satisfied the contribution element for Section 8(f) relief in this death benefits case, we vacate the denial of Section 8(f) relief, and we remand the case to the administrative law judge for further consideration using the appropriate standard.

Additionally, as the Director argues, decedent’s death must be work-related for employer to be eligible for Section 8(f) relief. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4<sup>th</sup> Cir. 1982); *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). If his death was the result of the progression or natural consequence of the pre-existing condition, then Section 8(f) is not applicable. *See Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002) (permanent total disability case); *Vlasic v. American President Lines*, 20 BRBS 188 (1987) (permanent total disability case). The stipulations between claimant and employer are not binding on the Director and the Special Fund, absent the Director’s participation, *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9<sup>th</sup> Cir. 1993); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984), and, therefore, employer must establish by substantial evidence that decedent’s death was work-related.<sup>3</sup> Because the administrative law judge did not make a finding in this regard, on remand, he must also determine whether decedent’s death was work-related, that is, he must determine whether decedent’s asbestosis contributed to or hastened decedent’s death. *Fineman*, 27 BRBS 104. If the administrative law judge finds that decedent’s death is work-related and that decedent’s pre-existing heart condition contributed to his death, employer would be entitled to Section 8(f) relief. *Sain*, 162 F.3d at 821, 32 BRBS at 211(CRT); *see generally Dugan v. Todd Shipyards, Inc.*, 22 BRBS 42 (1989). If decedent’s death is not work-related, then employer is not even eligible for Section 8(f) relief.

Accordingly, the administrative law judge’s denial of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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<sup>3</sup>The Director’s contention that decedent’s death is not work-related does not affect the stipulation between claimant and employer or claimant’s award of death benefits. *Brady v. J. Young & Co.*, 17 BRBS 46, *aff’d on recon.*, 18 BRBS 167 (1985).

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge