

ESTATE OF LESLIE R. HUNT)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: 08/30/2005
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 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.

Mark A. Reinhalter and Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-1752) 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 findings of fact and conclusions of law of the administrative law judge which 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).

On February 11, 1999, claimant’s spouse (the decedent) was diagnosed with asbestosis. He apparently sought disability benefits as a result of this diagnosis, and in a letter dated December 9, 1999, to the Department of Labor’s Office of Workers’ Compensation Programs (OWCP), employer requested relief pursuant to Section 8(f). *See* 33 U.S.C. §§908(c)(23), 908(f). Decedent died on January 8, 2003. Thereafter, in a letter to the OWCP dated January 30, 2003, employer requested relief pursuant to Section 8(f) for any liability for both permanent partial disability and death benefits. In March 2004, claimant and employer signed stipulations concerning the decedent’s death; specifically, the parties agreed that the decedent had worked for employer during the early 1940’s, that the decedent had been exposed to asbestos during his employment with employer, that the decedent’s disease and death were caused, in part, by that exposure, and that claimant is accordingly entitled to death benefits pursuant to Section 9 of the Act. *See* 33 U.S.C. §909. On March 24, 2004, these stipulations were forwarded to the administrative law judge who, while noting that Section 8(f) relief remained as an issue, approved them in an Order dated April 13, 2004.

Following the submission of briefs by employer and the Director, Office of Workers’ Compensation Programs (the Director), the administrative law judge, in a Decision and Order dated August 25, 2004, found that, as the Director stated in his brief, employer abandoned the issue of Section 8(f) relief during the period of the decedent’s lifetime since the stipulations presented for approval by claimant and employer made no mention of any disability benefits payable during that time; alternatively, the administrative law judge determined that this initial claim for Section 8(f) relief could be denied on the basis that employer’s evidence failed to satisfy the contribution element necessary for such relief to be granted. Similarly, the administrative law judge denied employer’s request for Section 8(f) relief regarding its liability to claimant for death benefits, finding that “the question of contribution to death borders on speculation in this case.” Decision and Order at 7. Accordingly, the administrative law judge denied employer’s requests for relief from the Special Fund.

The Director thereafter moved for reconsideration, asserting that while the administrative law judge’s April 13, 2004, Order approved the stipulations agreed to by claimant and employer, no compensation order had been issued by the administrative law judge. Accordingly, the Director requested that the administrative law judge’s August 25, 2004 Decision and Order be amended to include a compensation order in accordance with the approved stipulations. On September 13, 2004, the administrative law judge issued an Order Approving the Director’s Motion for Reconsideration wherein he added to his August 25, 2004 decision the language requested by the Director ordering employer to pay claimant death benefits in accordance with the parties’ approved stipulations.

On appeal, employer argues that the administrative law judge erred in denying it

relief under Section 8(f). The Director responds, urging affirmance of the administrative law judge's decision on this issue.

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. *See* 33 U.S.C. §§908(f), 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). Where employer claims Section 8(f) relief and the case involves two separate claims, for example a claim for permanent partial disability, 33 U.S.C. §908(c)(23), 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. *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990). To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, employer must affirmatively establish: 1) that decedent had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to 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 on other grounds*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). Similarly, employer is entitled to Section 8(f) relief in a death claim if the employee's death is not due solely to the work injury, a standard which can be met if employer establishes the existence of a pre-existing condition which contributed to the employee's death. *See 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 the instant case, employer initially contends that the decedent's claim for permanent partial disability benefits, and its request for Section 8(f) relief as a result of that claim, was never abandoned. Additionally, employer asserts that it presented uncontradicted evidence that decedent's disability prior to his death was substantially and materially the result of the decedent's pre-existing chronic obstructive pulmonary disease, which combined with asbestosis and contributed to the decedent's overall disability while he was alive. Contrary to employer's position on appeal, the

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

administrative law judge's finding that the stipulations presented for approval by claimant and employer make no reference to the payment of any disability benefits due during the lifetime of the decedent is supported by the record, as the stipulations presented to the administrative law judge address only employer's liability for death benefits. Moreover, as the record contains no documentation regarding a compensation claim for permanent disability benefits during the decedent's lifetime, the administrative law judge's multiple decisions do not address an award of permanent disability benefits to claimant or decedent.² As Section 8(f) relief cannot be awarded if, as in the instant case, there is no order awarding permanent disability benefits in excess of 104 weeks, *see* 33 U.S.C. §908(f)(1); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997), the administrative law judge herein was procedurally precluded from addressing the applicability of Section 8(f) to a permanent disability claim that was not before him. *See Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). Accordingly, as this prerequisite for Section 8(f) relief, *i.e.*, an underlying award of permanent partial disability benefits, is not present in the instant case, we reject employer's contention of error. Moreover, as the administrative law judge lacked the necessary basis for consideration of this issue, we vacate his conclusions regarding the potential applicability of Section 8(f) to a claim for disability benefits.

Employer next avers that the administrative law judge erred in concluding that the decedent's pre-existing chronic obstructive pulmonary disease did not hasten his demise. In support of its position on appeal, employer asserts that decedent's death certificate lists his pre-existing chronic obstructive pulmonary disease as a contributing factor to his death and that the reports of Drs. Foreman and Apostoles support a determination that the decedent's demise was hastened by his pre-existing condition. *See* Emp. Exs. 6 at 3-4, 9. In addressing this issue, the administrative law judge initially determined that while Dr. Foreman cited to autopsy results, the decedent's death certificate indicates that an autopsy was not performed and no autopsy report was submitted into evidence. Additionally, the administrative law judge found that the record contained no clinical records for the last three years of the decedent's life, and that neither Dr. Fan nor Dr. Foreman provided pertinent clinical records. The administrative law judge therefore concluded that the question of the contribution of decedent's pre-existing conditions to his death borders on speculation, and he accordingly denied employer's request for Section 8(f) relief on claimant's death claim.

For the reasons that follow, we conclude that the case must be remanded for further consideration by the administrative law judge. The appropriate standard for determining whether decedent's pre-existing chronic obstructive pulmonary disease

²Employer has attached to its brief a copy of stipulations signed by the decedent and employer in October and November 2002, as well as a Form LS-208 Notice of Final Payment or Suspension of Compensation Payments dated November 12, 2002. As these documents are not part of the record, they constitute new evidence that cannot be considered by the Board. *See* 20 C.F.R. §802.301(b).

contributed to his death in a case such as this one, in which the work-related injury could have produced death by itself, is whether the pre-existing condition “hastened” the death. *Sain*, 162 F.3d at 821, 32 BRBS at 211(CRT). In addressing this issue, the administrative law judge must determine the weight to be given to all of the medical evidence of record, based on factors such as whether the opinions are well-reasoned and/or are supported by objective information. *See Carmines*, 138 F.3d 134, 32 BRBS 48(CRT) (wherein the court emphasized that an administrative law judge may not merely credulously accept a physician’s assertions, but must examine the logic of the physician’s conclusions and evaluate the evidence upon which those conclusions are based). Thus, the Fourth Circuit’s holding in *Carmines* requires the administrative law judge to determine whether there is a reasoned and documented basis for a medical opinion, and to evaluate the opinion in light of the evidence in the record considered as a whole. *See Carmines*, 138 F.3d at 140-141, 32 BRBS at 52(CRT). In so doing the administrative law judge may accept or reject all or any part of any testimony according to his judgment. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, the administrative law judge’s decision not to rely upon the report of Dr. Foreman based upon the uncertainty of whether an autopsy was performed, as well as Dr. Foreman’s failure to provide clinical records, is within his discretion as the trier-of-fact.³ *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994) (administrative law judge’s inferences and credibility assessments are to be afforded deference); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge did not, however, address either the report of Dr. Apostoles or the decedent’s death certificate which, if credited, could support employer’s request for Section 8(f) relief regarding claimant’s death claim. Specifically, in a report dated January 30, 2003, Dr. Apostoles opined that decedent’s pre-existing chronic obstructive pulmonary disease significantly contributed to and hastened decedent’s death. *See* EX 6 at 4. Decedent’s death certificate, while listing respiratory acidosis as the immediate cause of decedent’s demise,⁴ states that community pneumonia, chronic obstructive pulmonary disease, and asbestosis were conditions leading to the immediate cause of decedent’s demise.⁵ *Id.* at 9. We therefore vacate the administrative law judge’s finding that employer failed to

³Although the administrative law judge specifically noted the lack of clinical records addressing the last three years of the decedent’s life, such a gap in documentation in and of itself is not necessarily fatal to employer’s position since the record contains documentation regarding the extent of the decedent’s pre-existing condition.

⁴Respiratory acidosis is defined as a state due to excess retention of carbon dioxide in the body. *Dorland’s Illustrated Medical Dictionary*, 25th ed. at 27.

⁵We note that Dr. Fan’s November 19, 2003, letter, which the administrative law judge declined to reply upon, appears to be a recitation of the decedent’s death certificate. *See* EX 4.

establish the contribution element required for relief pursuant to Section 8(f) regarding its liability for death benefits under the Act, and we remand the case for the administrative law judge to consider and discuss all of the evidence relevant to this issue, and to make appropriate findings based on the relevant law and evidence.

Accordingly, the administrative law judge's Decision and Order denying Section 8(f) relief is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge