

BRB Nos. 90-115
and 90-115A

MAUDE JOYNER)
(Widow of RUFUS JOYNER))
)
Claimant)
)
v.)
)
NEWPORT NEWS SHIPBUILDING)
AND DRY DOCK COMPANY)
)
Self-Insured)
Employer-Petitioner) DATE ISSUED:
Cross-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent)
Cross-Petitioner) DECISION AND ORDER

Appeals of the Decision and Order Denying Petition For Relief under Section 8(f) of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Antje E. Huck, Newport News, Virginia, for self-insured employer.

Karen B. Kracov (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and the Director, Office of Workers' Compensation Programs (the Director) cross-appeals the Decision and Order Denying Petition for Relief Under Section 8(f) (89-LHC-1329) of Administrative Law Judge Daniel A. Sarno, Jr., 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, claimant's husband, worked for employer as a pipefitter from 1939 to 1983, when he voluntarily retired. Claimant and employer stipulated that decedent was exposed to asbestos dust and fibers throughout his many years of employment. In addition, they stipulated that decedent was diagnosed with work-related mesothelioma on or about June 19, 1988, which permanently impaired his lung function and which caused or contributed to his death on January 24, 1989. The parties further stipulated that decedent would have been entitled to permanent partial disability benefits for a 50 percent permanent lung impairment from June 19, 1988 through January 24, 1989, based on \$308.48, the national average weekly wage at the time his mesothelioma became manifest. The parties also stipulated that claimant was entitled to death benefits from January 25, 1989 and continuing at a weekly rate of \$154.24 (50 percent of \$308.48). The Director, who was not a party to the stipulations, filed a brief in opposition to employer's request for relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

Claimant and employer agreed to forego a hearing in favor of a decision on the record. The sole issue before the administrative law judge was whether employer was eligible for relief from continuing compensation liability pursuant to Section 8(f) of the Act. Section 8(f) shifts liability to pay compensation for permanent partial and permanent total disability or death benefits after 104 weeks from the employer to the Special Fund, established in Section 44 of the Act, 33 U.S.C. §944, if: 1) the injured employee had a pre-existing permanent partial disability; 2) such pre-existing disability combined with the subsequent work injury to result in the disability or death for which benefits are sought; and 3) the pre-existing disability was manifest to employer. See Pino v. International Terminal Operating Co. of North America, 26 BRBS 81 (1992); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 147 (1991).

In his Decision and Order, the administrative law judge, crediting Dr. Harmon's December 23, 1988 opinion, awarded employer Section 8(f) relief on the disability claim, finding that decedent's pre-existing cerebral vascular and coronary artery disease combined with his mesothelioma subsequently diagnosed in June 1988 to produce a greater degree of permanent disability than would have resulted from the subsequent work injury alone.

The administrative law judge denied employer Section 8(f) relief on the death benefit claim, however, based on Dr. Maddox's January 24, 1989, opinion attributing decedent's death to cardiac tamponade resulting from invasion of the pericardium by malignant mesothelioma caused by asbestos exposure.

On appeal, employer contends that the administrative law

judge erred in denying Section 8(f) relief on the death benefit claim because the medical evidence clearly establishes that decedent died due to the same conditions which contributed to his permanent partial disability and which served as the basis for the award of Section 8(f) relief on the disability claim.¹ On cross-appeal, the Director asserts that the administrative law judge erred in awarding Section 8(f) relief on the disability claim because employer failed to establish that decedent's diabetes and heart disease pre-existed his second injury, *i.e.*, his last date of injurious exposure to asbestos in 1974.² The Director also urges that the denial of Section 8(f) relief on the death benefit claim be affirmed, and, in addition, argues that the administrative law judge erred in calculating the award of death benefits based on the national average weekly wage at the time of decedent's injury, rather than the national average weekly wage at the time of decedent's death. Employer replies, reiterating the arguments made in its Petition for Review and, in addition, agrees with the Director that, if the death is regarded as a new injury, the national average weekly wage at the time of decedent's death, *i.e.*, \$318.12, should be applied in calculating the death benefit award.

Initially, subsequent to the time that briefing was completed in this case, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the present case arises, issued Newport News Shipbuilding & Dry Dock Co. v. Harris, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), *rev'g Harris v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 114 (1989), which is dispositive of the argument made by the Director with regard to the award of Section 8(f) relief on the disability claim. In Harris, the Fourth Circuit held that in determining employer's eligibility for Section 8(f) relief in occupational disease cases involving retirees, the manifest requirement is not applicable. Accordingly, employer need only show that a pre-existing disability combined with a subsequent work-related condition to contribute to the resultant disability. In Harris, the court also

¹Employer cites Steele v. Newport News Shipbuilding & Dry Dock Co., BRB No. 88-3271 (March 30, 1990)(unpublished) in support of this argument. Unpublished decisions of the Board, however, lack precedential value. Lopez v. Southern Stevedores, 23 BRBS 295, 300 n.2 (1990).

²Although the Director asserts that decedent's last injurious exposure occurred in 1974, employer and claimant stipulated that decedent received injurious exposure to asbestos throughout his employment. Such stipulations are not, however, binding on the Director as he did not agree to the stipulations. *See, e.g., Brady v. J. Young and Company*, 17 BRBS 46 (1985), aff'd on recon., 18 BRBS 167 (1985).

stated that the date of awareness under Section 10(i), 33 U.S.C. §910(i) (1988), is the time of injury for purposes of determining Section 8(f) entitlement. Thus, as Harris is controlling, employer was only required to establish that decedent had a permanent partial disability which pre-existed the June 1988 diagnosis of mesothelioma to satisfy the pre-existing permanent partial disability requirement of Section 8(f) in this case. Inasmuch as decedent's diabetes and heart disease diagnosed by Dr. Evans in December 1983 clearly pre-existed the manifestation of his mesothelioma in June 1988, we reject Director's assertion that the administrative law judge erred in finding that the pre-existing permanent partial disability requirement of Section 8(f) was satisfied with regard to the disability claim in this case. Inasmuch as Dr. Harmon's December 23, 1988 opinion that decedent's pre-existing heart disease and diabetes mellitus contributed to and materially worsened the level of his permanent disability provides substantial evidence to support the administrative law judge's award of Section 8(f) relief on the disability claim, we affirm this determination. See O'Keefe, supra.

We agree with the Director, however, that the administrative law judge's decision to deny employer Section 8(f) relief on the death benefits claim is supported by substantial evidence. Initially, contrary to employer's suggestion, the fact that the administrative law judge determined that decedent's pre-existing conditions contributed to his disability and awarded Section 8(f) relief on the disability claim does not mandate an award of Section 8(f) relief on the death benefit claim. Employer's eligibility for Section 8(f) relief with regard to the disability and death benefit claim must be separately evaluated in this case. See Adams v. Newport News Shipbuilding and Dry Dock Co., 22 BRBS 78, 86 (1989).

In the present case, after considering the opinions of Drs. Maddox, Harmon and Evans relating to the cause of decedent's death, the administrative law judge found the opinion of Dr. Maddox, the autopsy prosector, most persuasive. The administrative law judge rejected Dr. Harmon's December 23, 1988 opinion, prior to decedent's death, that decedent's pre-existing conditions of arteriosclerotic heart disease and diabetes mellitus will contribute to decedent's death as speculative. The administrative law judge also found that Dr. Harmon's February 22, 1989 opinion, which stated only that decedent's death is work-related, was too vague, noting that he had not offered an opinion as to the specific cause or causes of death after reviewing the autopsy. The administrative law judge, in addition, discredited the opinion of Dr. Evans, the doctor signing decedent's death certificate, which recognized diabetes and heart disease as significant contributing factors in his death, on the rationale that Dr. Evans had not had the benefit of Dr. Maddox's autopsy at the time the death certificate was signed. Because Dr. Maddox's opinion attributing decedent's death solely to mesothelioma

provides substantial evidence to support the administrative law judge's finding that decedent's pre-existing conditions did not contribute to his death, and employer has failed to raise any reversible error made by the administrative law judge in weighing the conflicting medical evidence and making credibility determinations, we affirm the denial of Section 8(f) relief on the death benefits claim. See generally Sproull v. Stevedoring Services of America, 25 BRBS 100, 110-111 (1991) (Brown, J., dissenting on other grounds); Uglesich v. Stevedoring Services of America, 24 BRBS 180, 183 (1991).

We also agree with the Director that the administrative law judge erred in calculating the award of death benefits based on the national average weekly wage at the time of decedent's injury.

In a Section 9, 33 U.S.C. §909, claim for death benefits where the decedent was a voluntary retiree, the applicable average weekly wage is the national average weekly wage in effect on the date claimant becomes aware of the work-relatedness of decedent's death, which can be no earlier than the date of death. See Bailey v. Bath Iron Works Corp., 24 BRBS 229, 232, 233 (1991), aff'd sub nom. Bath Iron Works Corp. v. Director, OWCP, 950 F.2d 56, 25 BRBS 55 (CRT) (1st Cir. 1991); Adams, 22 BRBS at 84; 33 U.S.C. §910(d)(2), (i) (1988). We therefore vacate the administrative law judge's determination that claimant is entitled to death benefits based on 50 percent of the national average weekly wage at the time of decedent's injury and modify the award to reflect that claimant is entitled to weekly death benefits at the rate of \$159.06 based on 50 percent of \$318.12, the national average weekly wage at the time of decedent's death.

Accordingly, the administrative law judge's award of death benefits is modified to provide that claimant is entitled to death benefits based on the national average weekly wage at the time of decedent's death. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY J. STAGE
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge