

BRB Nos. 92-1813
and 92-1813A

LOUIS E. MAYNARD)
(Executor of the estate of)
JOHN J. MAYNARD, SR.))
)
Claimant-Respondent)
Cross-Respondent)
)
v.)
)
INGALLS SHIPBUILDING,)
INCORPORATED)
)
and)
)
MISSISSIPPI INSURANCE)
GUARANTY ASSOCIATION)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
)
Petitioner)

DATE ISSUED: _____

DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Ruth Bennett Whitfield (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer/carrier.

Mark A. Reinhalter (Thomas S. Williamson, Jr., 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: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order, and employer cross-appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee (90-LHC-371) of Administrative Law Judge James W. Kerr, Jr., awarding benefits 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).¹ 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 from 1961 through 1966. Emp. Ex. 3. On February 1, 1989, he underwent an audiometric evaluation which revealed a 54.33 percent binaural impairment. ALJ Ex. 1. Thereafter, decedent filed a claim for compensation benefits under the Act. Before the case was adjudicated, decedent died on April 13, 1990, and his adult son was appointed executor of his estate and claimant herein. Cl. Exs. 1-2.

A formal hearing was held on January 28, 1992, during which claimant and employer stipulated that the date of injury is February 1, 1989, the applicable average weekly wage is \$318.12, and that decedent sustained a 54.33 percent binaural impairment. ALJ Ex. 1. The administrative law judge accepted the stipulations, converted the binaural impairment to a 19 percent impairment of the whole person, and noted employer's willingness to pay benefits to either claimant or the Special Fund. Decision and Order at 2-3. Thus, the administrative law judge awarded decedent's estate benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988), and interest, and he determined that claimant's counsel is entitled to an attorney's fee. Decision and Order at 4-6. In a supplemental decision, the administrative law judge awarded claimant's counsel an attorney's fee of \$2,162.25. Supp. Decision and Order at 4.

¹Employer's original insurer, American Mutual Liability Insurance Company, is insolvent.

On appeal, the Director challenges the calculation of benefits under Section 8(c)(23) and the award of benefits to decedent's estate. He avers that benefits should be calculated under Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988), pursuant to the United States Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP (Brown)*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), and that Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3) (1988), mandates payment of the award to the Special Fund. Employer responds with a cross-appeal, alleging the administrative law judge committed no error, but arguing that if the Board awards the compensation to the Special Fund, then it should not be liable for an attorney's fee or interest. In a Supplemental Petition for Review and Brief, employer challenges the administrative law judge's Supplemental Decision and Order, reiterating its contention concerning its liability for an attorney's fee. Claimant responds to both appeals, urging affirmance of the award of benefits, interest, and the attorney's fee, but he notes that even if benefits are awarded to the Special Fund, counsel is still entitled to a fee.

Initially, we agree with the Director that, in light of *Bath Iron Works*, compensation for decedent's hearing loss must be calculated pursuant to Section 8(c)(13) of the Act. We therefore vacate the administrative law judge's award of benefits under Section 8(c)(23), and, as neither the administrative law judge's finding that decedent sustained a 54.33 percent binaural impairment nor his acceptance of the stipulated average weekly wage of \$318.12 is challenged on appeal, we modify the award to reflect employer's liability for 108.66 weeks (54.33 percent of 200 weeks) of permanent partial disability benefits, based upon the stipulated average weekly wage, pursuant to Section 8(c)(13) of the Act. *Bath Iron Works*, U.S. at , 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Next, we address the Section 8(d), 33 U.S.C. §908(d) (1988), issues raised by the Director. The Director contends the administrative law judge erred in awarding decedent's benefits to the estate, arguing that the plain language of Section 8(d)(3) mandates payment of the award to the Special Fund as decedent died without statutory survivors.² Section 8(d) of the Act provides for the disbursement of a deceased employee's disability benefits in the event he dies prior to the payment of benefits for reasons unassociated with his work-related injury. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid benefits are distributed accordingly; however, if he dies without statutory survivors, his unpaid benefits are paid to the Special Fund pursuant to Section 8(d)(3). The issues raised by the Director regarding the interpretation of Section 8(d) were recently addressed by the Board, which subsequently held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is made. *Clemon v. ADDSCO Industries*, BRBS , BRB No. 91-1801 (April 19, 1994); *Wood v. Ingalls Shipbuilding, Inc.*, BRBS , BRB No. 92-2532 (March 18, 1994). *Accord Alabama Dry Dock & Shipbuilding Corp.*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948); *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983). In accordance with this holding, the Board additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent

²Decedent was a widower with no minor children as of the date of his death. Emp. Ex. 4 at 7-8.

partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors. *Clemon*, slip op. at 9; *Wood*, slip op. at 9-11.

In the instant case, because decedent was last exposed to injurious noise at employer's facility in 1966,³ it is uncontroverted that the entire 108.66 weeks of benefits due decedent for his hearing loss claim accrued prior to his death in 1990. 33 U.S.C. §908(c)(13) (1988); *Bath Iron Works*, U.S. at , 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore*, 27 BRBS at 79. Consequently, as there are no unaccrued benefits remaining, Section 8(d) does not apply to this case, and for the reasons set forth in *Clemon* and *Wood*, we affirm the administrative law judge's award of the accrued scheduled permanent partial disability benefits to decedent's estate. *Clemon*, slip op. at 9; *Wood*, slip op. at 9.

Finally, on cross-appeal, employer contends it should not be held liable for an attorney's fee or interest if the Special Fund is determined to be entitled to decedent's accrued benefits. In response, claimant argues that if the Special Fund is the proper recipient of decedent's benefits, counsel is entitled to a fee either payable by the Special Fund or as a lien against the benefits awarded. As we affirm the award of benefits to decedent's estate, these arguments are moot.⁴ Consequently, because claimant succeeded in establishing employer's liability for benefits, we affirm the administrative law judge's findings regarding claimant's entitlement to interest and claimant's counsel's entitlement to an attorney's fee. See 33 U.S.C. §928(a); *Quave v. Progress Marine*, 912 F.2d 798, 24 BRBS 43 (CRT) (5th Cir. 1990), *cert. denied*, U.S. , 111 S.Ct. 2012 (1991); *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992); *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990).

³Decedent did not retire from the workforce until approximately 1975. Emp. Ex. 4 at 6, 18.

⁴In any event, the Board has held that, under the Act, attorney's fees may not be assessed against the Special Fund. *Bordelon v. Republic Bulk Stevedores*, BRBS , BRB Nos. 91-1597/A (January 31, 1994).

Accordingly, the administrative law judge's Decision and Order awarding benefits under Section 8(c)(23) is vacated, and the decision is modified to award decedent's estate benefits for a 54.33 percent binaural hearing loss pursuant to Section 8(c)(13). In all other respects, the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fee are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge