

BRB No. 93-0607

BRENDA MALONE	)	
(Executrix of the Estate of	)	
JOSEPH MALONE)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

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

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Mark A. Reinhalter (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judges, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order Awarding Benefits (91-LHC-0519) of

<sup>1</sup> Claimant, decedent's adult daughter, is the executrix of decedent's estate.

Administrative Law Judge A. A. Simpson, 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, who was exposed to injurious noise during his employment with employer, underwent an audiometric evaluation on March 11, 1987, the results of which revealed an 5.9 percent binaural hearing impairment. Based on these results, decedent filed a claim for compensation under the Act on April 21, 1987; however, he died on November 10, 1987, due to non work-related causes. At the formal hearing, claimant and employer stipulated that decedent's date of injury was March 11, 1987, that decedent had sustained a 5.9 percent binaural hearing impairment, and that the applicable average weekly wage for compensation purposes is \$501.85.

The administrative law judge, having found that claimant, decedent's executrix, did not fit into the definition of statutory survivor under Section 8(d)(1), 33 U.S.C. §908(d)(1), ordered employer to pay scheduled permanent partial disability benefits for a period of 11.8 weeks, commencing on March 11, 1987, as well as interest to the Special Fund pursuant to Section 8(d)(3), 33 U.S.C. §908(d)(3). *See* 33 U.S.C. §908(c)(13). Additionally, the administrative law judge found that as there has been no successful prosecution of this claim, claimant's counsel is not entitled to attorney's fees pursuant to Section 28 of the Act.

On appeal, claimant challenges the administrative law judge's decision to award benefits to the Special Fund and asserts that her counsel is entitled to an attorney's fee inasmuch as this case resulted in a successful prosecution of this claim under the Act. The Director, Office of Workers Compensation Programs (the Director), responds, urging affirmance of the award of benefits to the Special Fund. Employer responds, agreeing with the Director's position and additionally asserting that claimant's counsel is not entitled to attorney's fees as there has been no successful prosecution of this case.

Claimant initially argues that the administrative law judge erred in awarding decedent's benefits to the Special Fund rather than to decedent's estate. In response, the Director argues, and employer agrees, that, as decedent died without statutory survivors, the plain language of Section 8(d)(3) of the Act mandates payment of the decedent's unpaid benefits to the Special Fund. Section 8(d) provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies for reasons not associated with his work-related injury, prior to the payment of benefits. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has 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 entered. *See Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994)(McGranery, J., dissenting on other grounds); *Clemon v. ADDSCO Industries*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994); *see generally 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). The Board has additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death

of an employee, his unaccrued scheduled permanent 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. *Krohn*, 29 BRBS at 73; *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS at 36-38.

In the instant case, all permanent partial disability benefits due decedent as a result of his work-related hearing loss accrued prior to his death. *See Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). For the reasons set forth in *Krohn*, *Clemon*, and *Wood*, we reverse the administrative law judge's decision to award to the Special Fund the amount of benefits due decedent, and we modify the administrative law judge's decision to reflect decedent's estate's entitlement to the accrued scheduled permanent partial disability benefits.<sup>2</sup> *See Krohn*, 29 BRBS at 74; *Clemon*, 28 BRBS at 112; *Wood*, 28 BRBS at 36.

Lastly, claimant contends that the administrative law judge erred in denying counsel an attorney's fee. We agree. In light of our holding that decedent's estate is entitled to the accrued scheduled permanent partial disability benefits payable by employer, claimant's counsel successfully prosecuted the instant claim and therefore is entitled to a fee. *Krohn*, 29 BRBS at 75. Therefore, we reverse the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee, and we remand the case for the administrative law judge to consider counsel's fee petition.

Accordingly, the administrative law judge's award of benefits to the Special Fund and his denial of an attorney's fee is reversed. The award of benefits is modified to reflect that benefits are payable to decedent's estate. This case is remanded to the administrative law judge for consideration of counsel's fee request. In all other requests, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

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<sup>2</sup>Contrary to claimant's assertion on appeal, the administrative law judge in the instant case found employer liable for interest on all unpaid accrued compensation.

Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge