

CATHERINE PRATT)
(Widow of DOC JASPER PRATT))
)
 Claimant-Respondent)

v.)

NEWPORT NEWS SHIPBUILDING)

DATE ISSUED: March 19, 2001

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 and Order Denying Motion for Reconsideration of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom, Hatten & Diamonstein), Newport News, Virginia, for claimant.

Christopher A. Taggi (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Laura Stomski (Judith E. Kramer, Acting Solicitor of Labor; Carol A. 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: HALL, Chief Administrative Appeals Judge, SMITH and McATEER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Motion for Reconsideration (98-LHC-0133) of Administrative Law Judge Richard E. Huddleston 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).

Claimant, decedent's surviving spouse,¹ filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's death was caused by his occupational exposure to asbestos. Prior to the formal hearing, claimant and employer entered into a series of stipulations regarding claimant's claim, and her entitlement to death benefits.² Included in these stipulations was the statement that "[t]he decedent's death was caused, in part, by his exposure to airborne asbestos dust and fibers in the course of his aforesaid employment at [employer's facility]." Decision and Order at 3, Stipulation 6. Employer sought Section 8(f) relief, 33 U.S.C. §908(f), based on the decedent's pre-existing chronic obstructive pulmonary disease and Huntington's Chorea.

In his Decision and Order, the administrative law judge determined that the joint stipulations of claimant and employer were supported by substantial evidence in the record. He therefore adopted them as his findings of fact and accordingly awarded death benefits. He then considered but denied employer's request for Section 8(f) relief, as employer did not establish the existence of a second, or work-related injury. Specifically, the administrative law judge determined that there was no affirmative evidence that decedent's work-related asbestosis in any way contributed to or hastened his death. The administrative law judge

¹Decedent, Doc Jasper Pratt, died on August 10, 1997.

²Pursuant to these stipulations, claimant was to receive death benefits under Section 9 at the rate of \$200.27 per week from August 10, 1997, and continuing, and funeral expenses totaling \$3,000. In addition, it was agreed that claimant's attorney would receive an attorney's fee of \$800.

thereafter denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief, and alternatively challenges the administrative law judge's award of death benefits. The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial of Section 8(f) relief. Claimant also responds, urging affirmance of the award of benefits on the death claim.

Employer asserts that the administrative law judge's decision is arbitrary and capricious because it contains inconsistent findings with regard to the same question, *i.e.*, whether decedent's death was causally related to his employment. Specifically, employer argues that it is clearly erroneous for the administrative law judge to accept the parties' stipulation that decedent's employment-related exposure to asbestos caused or hastened his death for purposes of establishing claimant's entitlement to death benefits, and then to subsequently determine, for purposes of employer's entitlement to Section 8(f) relief, that decedent's death was not in any way due to his work-related asbestosis. Employer maintains that the administrative law judge should have come to only one conclusion with regard to the role that decedent's asbestosis played in his death, and thus either awarded benefits and granted Section 8(f) relief, or denied benefits altogether.

It is well-established that stipulations between employer and claimant affecting the liability of the Special Fund are not binding on the Special Fund absent the participation of the Director. *See E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985); *see also Director, OWCP v. Coos Head Lumber & Plywood Co.*, 194 F.3d 1032, 33 BRBS 131(CRT)(9th Cir. 1998). In this regard, the Board has held that an administrative law judge may find stipulations binding as between claimant and employer, but reject them with regard to the claim for Section 8(f) relief, which is essentially a separate case involving employer and the Special Fund.³ *See Truitt v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 79 (1987); *Beltran v. California Shipbuilding & Dry Dock*, 17 BRBS 225 (1985).

³Stipulations affecting the Special Fund may be accepted, however, if there is evidence of record to support them. *See McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part, part sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993).

In *Brady*, the Board held that, that absent the agreement of the Director, an administrative law judge must make findings based on the record regarding claimant's actual entitlement to benefits before addressing the applicability of Section 8(f) relief so as to prevent the possibility of fraud and collusion between claimant and employer in a non-meritorious case, as claimant and employer would otherwise have no motivation to develop supporting evidence, and the burden of defending the claim would be shifted from employer to the Director. *Brady*, 17 BRBS at 54. In the instant case, the administrative law judge did this, in that he found that the stipulations entered into by claimant and employer were supported by substantial evidence and thus adopted them as his findings of fact on the claim for death benefits pursuant to Section 9 of the Act. The administrative law judge however properly reconsidered the relevant evidence of record with record to the separate claim for Section 8(f) relief as the Director did not agree to the parties' stipulations and as the record contains conflicting evidence regarding the role, if any, that decedent's asbestosis played in his death.⁴

Based upon the foregoing, we reject employer's argument that the administrative law judge committed error by accepting the stipulations agreed to by claimant and employer with regard to entitlement and then rejecting those stipulations in consideration of employer's request for Section 8(f) relief. *Beltran*, 17 BRBS at 227. The administrative law judge's decision is not, as employer suggests, inconsistent; rather, the decision in the case at bar reflects the case law acknowledging that employer's claim for Section 8(f) relief is properly viewed as a separate claim from claimant's claim for benefits. Thus, in the instant case, we hold that the administrative law judge, after accepting claimant's and employer's stipulations, properly held employer bound by said stipulations in the context of the death claim and thus the administrative law judge's award of death benefits is affirmed. *See generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); *Brown v. Maryland Shipbuilding & Dry Dock Co.*, 18 BRBS 104 (1986); *Beltran*, 17 BRBS at 227. Moreover, we hold that inasmuch as the Director is not bound by the parties' stipulation that decedent's

⁴The final anatomic autopsy listed asbestosis as a contributing factor in decedent's death. In contrast, Dr. Hutchins, who reviewed the autopsy report and slides, opined that decedent's very mild asbestosis was of no functional significance and would have played no role in any respiratory or pulmonary impairment nor would it have hastened or contributed to his death. Dr. Hutchins succinctly stated that decedent would have died at the same time and in the same manner even if he never had any asbestos or other occupational exposure. In the instant case, employer stipulated to the fact that decedent's asbestosis contributed to his death despite its submission of Dr. Hutchins's opinion to the contrary. The Director, however, is not bound by employer's judgment on this issue, and instead is entitled to a complete reconsideration and weighing of this conflicting evidence in the resolution of the separate Section 8(f) claim. *Truitt*, 20 BRBS 79.

death was work-related, the administrative law judge properly addressed employer's request for relief from the Special Fund by specifically setting forth and discussing the evidence of record submitted by employer in support of its request for such relief, including the threshold issue of whether decedent's death is work-related. *Id.*

Employer is entitled to Section 8(f) relief in a death claim if the death is not due solely to the work injury, a standard which can be met if the pre-existing condition hastens the employee's death. *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). Thus, the decedent's death must be due to a combination of the work injury and his pre-existing conditions. *Id.* A second injury has not occurred when a claimant's disability, or in the instant case decedent's death, is due solely to the direct or natural progression of the pre-existing disability. See generally *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979); *Vlasic v. American President Lines*, 20 BRBS 188 (1987).

With regard to the issue of Section 8(f) relief, the administrative law judge considered the conflicting evidence regarding the role, if any, that decedent's asbestosis played in his death. The administrative law judge credited Dr. Hutchins's opinion, that decedent's very mild asbestosis did not hasten or contribute to his death, over the contrary autopsy report, as he is a highly qualified expert and the record does not reveal the identity or for that matter the qualifications of the autopsy prosector.⁵ Based on Dr. Hutchins's credible report, the administrative law judge determined that decedent's death was due solely to his pre-existing conditions. The administrative law judge therefore concluded that employer is not entitled to Section 8(f) relief as employer did not meet its burden of showing that the second injury, *i.e.*, the work-related asbestosis, contributed to decedent's death. The administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). We therefore affirm the administrative law judge's denial of Section 8(f) relief. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Fineman*, 27 BRBS 104; see also *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987).

⁵The administrative law judge determined that it is not clear whether Dr. Ross, or Dr. Harris, or both performed the autopsy, as the signature on the corresponding report is illegible.

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge