

PHYLLIS C. BURRELL	)	
(Widow of LOUIS BURRELL, SR.)	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 05/23/2006
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-0067) of Administrative Law Judge Larry W. Price 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's spouse (the decedent) worked for employer as a welder from 1961 until 1998, and was there exposed to airborne asbestos dust and fibers. On November 15, 1990, decedent was diagnosed with chronic obstructive pulmonary disease (COPD) by Dr. Frey. On March 24, 1995, Dr. Frey diagnosed COPD with bilateral diffuse bullous formation. EX 2. Decedent was subsequently diagnosed with lung cancer and died on March 13, 1998. The death certificate lists cardiac and respiratory arrest as the immediate causes of death. EX 3. On March 20, 1998, based on decedent's autopsy, Dr. Maddox rendered a final anatomic diagnosis which included mixed pneumoconiosis and adenocarcinoma of the lung, stating that based on claimant's occupational asbestos exposure history, asbestos contributed to the development of decedent's lethal adenocarcinoma. EX 4. In a report dated January 3, 1999, Dr. Churg opined that both cigarette smoking and occupational asbestos exposure were the causes of claimant's lung cancer. EX 5. On January 13, 2000, Dr. Tornberg reported that decedent's lung impairment and death were not caused by his lung cancer alone, but were contributed to, hastened by and caused by his pre-existing COPD. Unnumbered Exhibit. In May 2005, upon review of claimant's file, Dr. Maddox concluded that claimant's COPD did not cause the lung cancer, but COPD "more probably than not hastened his death as a result of pulmonary impairment." EX 7. Subsequent to the claim's transfer to the Office of Administrative Law Judges, claimant and employer signed stipulations settling claimant's claim for death benefits; accordingly, the sole issue remaining before the administrative law judge involved employer's request for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge found that employer established that decedent suffered from a manifest, pre-existing, permanent partial disability, specifically COPD, but that employer failed to demonstrate that decedent's COPD either contributed to or hastened decedent's death. Accordingly, the administrative law judge denied employer's request for relief under Section 8(f).

On appeal, employer argues that the administrative law judge erred in denying it relief under Section 8(f). The Director, Office of Workers Compensation Programs, has not responded to this appeal.

Section 8(f) limits employer's liability for compensation to the first 104 weeks of permanent disability or 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) (4<sup>th</sup> Cir. 2001). 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) (4<sup>th</sup> Cir. 1998); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

In the instant case, employer 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 the reports of Drs. Maddox and Tornberg support a determination that the decedent's death was hastened by his pre-existing condition. *See* Emp. Ex. 4, 6, 7; Unnumbered Exhibit. In addressing this issue, the administrative law judge determined that Dr. Maddox's May 2005 report and opinion was entitled to very little weight since it was issued at employer's request seven years after decedent's autopsy, and Dr. Maddox's two prior reports, in March 1998 and November 1999, respectively, made no discernible findings that decedent's COPD contributed to his death. *See* EXs. 4, 6. Additionally, the administrative law judge found that Dr. Maddox provided no explanation or objective data in support of his May 2005 conclusions. The administrative law judge therefore concluded that employer had not met its burden of demonstrating that COPD contributed to or hastened decedent's death, 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 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 Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998)(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. Maddox is within his discretion as the trier-of-fact. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4<sup>th</sup> Cir. 1994) (administrative law judge's inferences and credibility assessments are to be afforded deference); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). The administrative law judge did not, however, address the report of Dr. Tornberg which, if credited, could support employer's request for Section 8(f) relief regarding claimant's

death claim. Specifically, in a report dated January 13, 2000, Dr. Tornberg opined that decedent's "lung impairment and death were not caused by his lung cancer alone, but rather his lung impairment and death were materially and substantially contributed to, materially and significantly hastened by, and materially and substantially caused by his pre-existing C.O.P.D. disease. . . . If [decedent] merely had lung cancer, [he] would have lived significantly longer." Unnumbered Exhibit. We therefore vacate the administrative law judge's finding that employer failed to 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.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge