

L.D. (widow of E.D.))	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEW SHIPBUILDING AND)	DATE ISSUED: 09/28/2007
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Denying Section 8(f) Relief for Permanent Partial Disability Benefits and Granting Section 8(f) Relief for Death Benefits and the Decision and Order Denying Director's Motion for Reconsideration of the Award of Section 8(f) Relief for Death Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Kathleen H. Kim (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Denying Section 8(f) Relief for Permanent Partial Disability

Benefits and Granting Section 8(f) Relief for Death Benefits and the Decision and Order Denying Director's Motion for Reconsideration of the Award of Section 8(f) Relief for Death Benefits (2005-LHC-2091) of Administrative Law Judge Richard K. Malamphy 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Prior to his death, decedent filed a claim for disability benefits due to work-related mesothelioma. 33 U.S.C. §908(c)(23). After decedent's death on November 20, 2003, his widow, claimant, filed a claim for death benefits. 33 U.S.C. §909. The private parties stipulated to claimant's entitlement to disability and death benefits, and employer timely filed a request for Section 8(f), 33 U.S.C. §908(f), relief. The Director conceded that decedent's pre-existing chronic obstructive pulmonary disease (COPD) constituted a pre-existing permanent partial disability within the meaning of Section 8(f). The administrative law judge denied Section 8(f) relief with respect to the disability benefits, stating that employer's evidence failed to adequately quantify the disability related solely to decedent's work-related mesothelioma and, thus, the contribution element was not satisfied. However, the administrative law judge granted employer's request for Section 8(f) relief on the death benefits claim, finding that the COPD hastened decedent's death. The administrative law judge denied the Director's motion for reconsideration of the award of Section 8(f) relief.

The Director appeals the administrative law judge's decisions and argues that he erred in awarding Section 8(f) relief in the death benefits claim. The Director contends the administrative law judge's decision is not supported by substantial evidence and violates the Administrative Procedure Act (APA), and he argues that employer's evidence does not satisfy the contribution element because it does not establish that decedent's pre-existing COPD hastened his death. Employer has not filed a response brief.

Section 8(f) shifts the liability to pay compensation for a work-related permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §908(f), 944. An employer may be granted Special Fund relief in a retiree death benefits case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit if it establishes that the employee had a pre-existing permanent partial disability and that this disability contributed to the employee's death. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). An employer must establish the contribution element by showing that the

work injury was not the sole cause of the death. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). One way of establishing the contribution element is to show that a decedent's pre-existing condition hastened the decedent's death. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd on other grounds*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Fineman*, 27 BRBS 104.

Decedent worked for employer from 1956 until 1992 and was exposed to asbestos. In May 1997, decedent was diagnosed with COPD, in February 1999, he was diagnosed with COPD and acute bronchitis, and in July 2002, he was diagnosed with malignant mesothelioma. Decedent died on November 20, 2003. The death certificate signed by Dr. Powell listed "sepsis" as the cause of death and "mesothelioma and severe COPD" as underlying causes. Emp. Ex. 2 at 8. In addition to that evidence, the administrative law judge discussed a brief 2003 letter from Dr. Umstott which stated that decedent had severe COPD and mesothelioma and that both "cause significant disabilities," Emp. Ex. 2 at 7, and he relied on a letter from Dr. Powell dated December 13, 2005, that discussed the "interplay of patient's known mesothelioma with his severe COPD and how it more probably than not contributed or hastened his demise." Dr. Powell explained that decedent suffered from COPD, which can result from smoking, and that COPD can result in diminished oxygenation of the body tissues. Emp. Ex. 4. Finally, the administrative law judge relied on a 2004 letter from Dr. Apostoles, who reviewed decedent's medical records and stated that decedent's lung impairment and death were not caused by mesothelioma alone but were materially and substantially caused by his pre-existing COPD. Emp. Ex. 2 at 2. Based on this evidence, the administrative law judge found that employer satisfied the contribution element as decedent's death was not due solely to the work-related mesothelioma. Decision and Order at 8.

The Director contends the evidence relied upon is insufficient to support a finding of contribution. We disagree. Section 8(f) specifically requires that, in order to obtain relief, an employer must show that a decedent's death is not due solely to the work injury. 33 U.S.C. §908(f). In this case, the death certificate establishes that decedent's death was caused by sepsis and contributed to by mesothelioma and COPD, and Dr. Powell further explained the effects of severe COPD and how it likely affected decedent's condition. There is no evidence of record contradicting the medical reports relied upon by the administrative law judge. Although the Director argues that there is no evidence proving that decedent's COPD hastened his death, employer has established that decedent's COPD was an actual cause of death, which is legally sufficient for a grant of Section 8(f) relief. As the administrative law judge's findings that work-related mesothelioma was not the sole cause of decedent's death and that COPD contributed to decedent's death are supported by substantial evidence, we affirm the administrative law judge's finding that

employer satisfied the contribution element. Consequently, we affirm the award of Section 8(f) relief on the death benefits claim.¹

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹Although the administrative law judge's rationale for awarding Section 8(f) relief on the death benefits claim is brief, it is sufficient and does not violate the APA.