

M.M.)
(Widow of S.M.))
)
Claimant)
)
v.)
)
NEWPORT NEWS SHIPBUILDING AND) DATE ISSUED: 09/17/2009
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 the Decision and Order Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order Denying Employer's Motion for Reconsideration (2007-LHC-1077) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The decedent worked for employer as a pipe coverer from 1947 through 1952 and from 1955 through 1965. During the course of his employment, the decedent was exposed to asbestos dust and fibers. He was diagnosed with severe chronic obstructive pulmonary disease (COPD) and emphysema in June 1977. In January 1979, Dr. Carpenter opined that decedent had had extensive asbestosis since May 1977 which totally disabled him. The decedent suffered a heart attack in August 1979. On October 1, 1979, Dr. Carpenter opined that the decedent was totally disabled due to his extensive arthritis, chronic heart condition and chronic pulmonary condition. On July 21, 1999, the decedent was diagnosed as suffering from lung cancer, and he underwent surgery. He also was diagnosed with pulmonary asbestosis in January 2001, as well as recurrent lung cancer. On February 11, 2001, the decedent collapsed and died at home. The autopsy report stated that decedent had squamous cell carcinoma of the right lung and pulmonary asbestosis. Claimant, the decedent's widow, filed a claim for death benefits under the Act, 33 U.S.C. §909, and employer sought relief from continuing death benefits pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).¹

In his decision, the administrative law judge found that claimant established her entitlement to death benefits pursuant to Section 9 of the Act, stating that there is "no doubt" that the COPD and asbestosis were work-related and that "[d]iminished lung capacity due to COPD and asbestosis could reasonably have been a substantially contributing factor in the fatal event." Decision and Order at 10. The administrative law judge found, however, that employer is not entitled to Section 8(f) relief, as the evidence does not establish the existence of a pre-existing permanent partial disability.

Employer filed a motion for reconsideration of the award of death benefits and the denial of Section 8(f) relief, which the administrative law judge denied. In reiterating his

¹ The employee filed a claim for benefits for totally disabling asbestosis in June 1984. In a Decision and Order dated March 28, 1986, Administrative Law Judge von Brand denied the claim on the grounds that the notice of injury and claim were untimely filed pursuant to Sections 12 and 13, 33 U.S.C. §§912, 913. In the present proceeding, the parties stipulated that employer paid decedent permanent partial disability benefits for a 75 percent impairment from July 29, 1999 through February 11, 2001. 33 U.S.C. §908(c)(23); Decision and Order at 3.

denial of Section 8(f) relief, the administrative law judge stated that decedent's COPD and asbestosis were contributing factors in decedent's death. As employer did not establish the existence of any non work-related permanent disabilities pre-existing the diagnosis of these conditions, the administrative law judge stated that the pre-existing permanent partial disability element of Section 8(f) is not satisfied.

On appeal, employer contends the administrative law judge erred in denying Section 8(f) relief as the pre-existing permanent partial disability does not have to be unrelated to work. Employer contends that decedent's death was due to work-related lung cancer and that his pre-existing COPD, asbestosis and heart disease contributed to his death, thus entitling employer to Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing that the administrative law judge's Section 8(f) analysis is faulty as a pre-existing permanent partial disability for this purpose need not be work-related. The Director contends that the case must be remanded, as the administrative law judge failed to make a necessary finding regarding whether the decedent suffered a "second injury," which must be work-related for Section 8(f) purposes; the elements of Section 8(f) entitlement must then be assessed with regard to this injury.

Section 8(f) provides that in a case in which an employee has a pre-existing permanent partial disability and suffers a second injury which causes death, employer's liability is limited to 104 weeks if the death is not due solely to the second injury, but is contributed to by the pre-existing disability.² 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) (4th Cir. 2001). The contribution element may be met with evidence that the pre-existing disability hastened 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).

² The third element for Section 8(f) relief is that the pre-existing disability must have been manifest to employer prior to the subsequent injury. See *Lambert's Point Docks, Inc. v. Harris*, 718 F.2d 644, 16 BRBS 1(CRT) (4th Cir. 1983). The Fourth Circuit, in whose jurisdiction this case arises, has held that this element is not applicable in the case of a retiree whose work-related occupational disease becomes manifest after retirement. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). In this case, it appears that employer had knowledge of all of decedent's pre-existing conditions and the Director does not contend that decedent's conditions were not manifest to employer. Thus, it need not be determined whether the *Harris* decision is applicable in this case.

We agree with employer and the Director that the denial of Section 8(f) cannot be affirmed and that the case must be remanded for further analysis. The critical factors for obtaining Section 8(f) relief in a case such as this are: (1) the death must be due at least in part to a work-related disease; and (2) one or more separate “serious lasting physical conditions,” work-related or not, must have contributed to or hastened the death. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT). Employer averred that decedent’s lung cancer was work-related, *i.e.*, due to asbestos exposure, and that the death was contributed to by pre-existing disabilities due to COPD, asbestosis, and/or heart disease. The administrative law judge did not make a finding as to whether decedent’s lung cancer was work-related or specify the cause of death other than to say that claimant’s COPD and asbestosis could reasonably have contributed to it.³ If work-related asbestosis and COPD contributed to death, the death is work-related for purposes of establishing causation, and employer has a basis for securing Section 8(f) relief. *See* 33 U.S.C. §§902(2), 908(f)(1); *see Fineman*, 27 BRBS 104. In order to be entitled to relief under Section 8(f), employer must establish that claimant had a pre-existing permanent partial disability which combined with a second work-related condition to result in his death. As the Director states, the administrative law judge must identify the “second injury;” if claimant’s existing asbestosis simply progressed to the point that it hastened death, it cannot meet this requirement.⁴ Decedent’s work-related COPD and asbestosis together may satisfy these requirements, as they are separate conditions, if one of them pre-existed the other and both contributed to decedent’s work-related death. *See id.* at 111. The administrative law judge, however, did not address these conditions separately as contributing causes of death or determine whether either pre-existed the other. He also did not address whether decedent’s lung cancer was work-related and contributed to his death. If so, then employer could be entitled to Section 8(f) relief on this basis if a pre-existing condition combined with work-related lung cancer as a cause of death.

Therefore, the case must be remanded for the administrative law judge to make specific findings regarding precisely which conditions caused or contributed to decedent’s death for purposes of Section 8(f). *See Fineman*, 27 BRBS 104. The

³ A finding that these work-related conditions contributed to decedent’s death is sufficient to establish that the death was work-related, at least in part, and thus compensable under Section 9 of the Act, 33 U.S.C. §909. As the award of death benefits was not appealed by employer or the Director, it is affirmed. *Scalio v. Ceres Marine Terminals*, 41 BRBS 57 (2007).

⁴ Because decedent last worked in covered employment in 1965, employer cannot obtain Section 8(f) relief by establishing that decedent’s conditions which were diagnosed thereafter were aggravated by additional work exposures. *See, e.g., Armand v. American Marine Corp.*, 21 BRBS 305 (1988).

administrative law judge should first identify the condition(s) that caused death, and then address the other elements for entitlement to Section 8(f) relief. *See generally Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002). With regard to the pre-existing permanent partial disability element, the administrative law judge must reconsider whether employer established that any of decedent's conditions pre-existed a work-related condition leading to death and constituted a "serious, lasting, physical condition." *See Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 7(CRT) (4th Cir. 2003); *see also Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977).

In this regard, the administrative law judge's finding that a pre-existing permanent partial disability was not demonstrated cannot be affirmed. In his decision, the administrative law judge initially stated that COPD, asbestosis and heart disease are separately permanent disabilities. Decision and Order at 10. He acknowledged a 1977 medical report of pulmonary emphysema and possible asbestosis, and a 1979 report of COPD, asbestosis and possible heart disease. He then stated "work-related impairments are COPD and asbestosis and these disabilities are shown in the earliest records. Cardiac impairment was reported at a later date," and he concluded that the pre-existing permanent partial disability element was not met. Decision and Order at 11. In denying reconsideration, he stated "Employer was unable to show that decedent had a pre-existing permanent partial disability that was unrelated to his employment with Employer." Decision and Order Denying Recon. at 2. As the parties assert, a finding that neither the decedent's chronic obstructive pulmonary disease nor his asbestosis constitutes a pre-existing permanent partial disability because these conditions were work-related cannot be affirmed.⁵ Section 8(f) does not require that the pre-existing conditions be unrelated to the decedent's work, but only that they be "serious, lasting physical conditions." *See generally Electric Boat Corp. v. DeMartino*, 495 F.3d 14, 41 BRBS 45(CRT) (2^d Cir. 2007). On remand, the administrative law judge must reconsider whether decedent had such a condition which pre-existed another work-related condition. If the administrative law judge finds that employer met the pre-existing permanent partial disability

⁵ It is possible that the administrative law judge was finding that these are the conditions that caused death and that no other conditions were shown to have pre-existed them. *See* Decision and Order Denying Recon. at 2. As discussed above, however, the asbestosis and COPD are separate conditions, but the administrative law judge did not analyze them as such, nor did he address whether the decedent's subsequent lung cancer was work-related and a cause of death. The administrative law judge's decision consists primarily of recitation of the evidence and statements of the parties' arguments followed by terse conclusions. On remand, he must provide a reasoned analysis applying applicable law.

requirement of Section 8(f), he must then address whether the prior condition combined with a subsequent work related condition as causes of decedent's death. *Sain*, 162 F.3d 813, 32 BRBS 205(CRT).

Accordingly, the denial of Section 8(f) relief is vacated, and the case is remanded for further consideration consistent with this opinion. The award of death benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge