

BRB No. 96-1160

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| ELEANOR CASTAGNARO |) | |
| (Widow of JOHN W. CASTAGNARO) |) | |
| |) | |
| Claimant |) | |
| |) | |
| v. |) | |
| |) | |
| GENERAL DYNAMICS CORPORATION |) | DATE ISSUED: _____ |
| |) | |
| 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 - Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Edward J. Murphy, Jr. (Murphy and Beane), Boston, Massachusetts, for self-insured employer.

Laura Stomski (J. Davitt McActeer, Acting Solicitor of Labor; Carol 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, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order-Awarding Benefits of Administrative Law Judge David W. DiNardi (95-LHC-2179) 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'Keefe v.*

Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent worked for employer as a painter from 1952 until he voluntarily retired in 1987. During the course of his employment, decedent was exposed to asbestos dust and fibers. Screening x-rays taken during the course of decedent's employment revealed early abnormalities consistent with asbestos exposure but pulmonary function testing was within normal limits. In the summer of 1993, decedent began experiencing lung problems and was diagnosed as having metastatic lung cancer on August 10, 1993. Decedent's condition rapidly deteriorated, and he died on February 7, 1994. According to decedent's death certificate, the sole cause of death was metastatic lung cancer with metastatic lesion.

Cx. 26. An *inter vivos* disability claim was filed for pulmonary asbestosis and lung cancer on December 1993, and decedent's widow, the claimant in the present case, filed a claim for death benefits on April 28, 1994.

The administrative law judge found that decedent's bronchogenic carcinoma and pulmonary asbestosis resulted from his exposure to asbestos and awarded his estate permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(23) for a 100 percent permanent physical impairment from August 10, 1993 through February 7, 1994, the date of his death. The administrative law judge further determined that as decedent's death resulted from a combination of his work-related pulmonary asbestosis and his bronchogenic carcinoma, his widow is entitled to death benefits. Finally, the administrative law judge awarded medical benefits and determined that employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief.

On appeal, the Director contends that the administrative law judge erred in awarding relief under Section 8(f) as there is no evidence sufficient to satisfy the legal requirement of contribution. Employer responds, urging affirmance.

Section 8(f) shifts liability to pay compensation for permanent disability or death from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the employee's current disability or death is not due solely to the subsequent work-related injury but results from the combined effects of that injury and the pre-existing permanent partial disability. See 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34 (CRT)(5th Cir. 1990); *John T. Clark & Son of Maryland v. Benefits Review Board*, 622 F.2d 93, 12 BRBS 229 (4th Cir. 1980); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

On appeal, the Director contends that although the administrative law judge found that claimant's pulmonary problems first seen in 1980 constituted a pre-existing permanent partial disability, the record is devoid of any evidence establishing the extent of permanent impairment that decedent would have suffered but for his pre-existing lung conditions, that his pre-existing lung problems contributed to the 100 percent permanent impairment being

compensated under Section 8(c)(23), or that his death was not due solely to his work-related cancer.

In considering the applicability of Section 8(f), the administrative law judge initially noted the following facts: decedent worked in employer's shipyard from 1952 to 1987 where he was exposed to asbestos dust and fibers and other respiratory irritants; an x-ray performed in 1976 was read as abnormal; decedent's pulmonary problems began in the summer or fall of 1980 when he was diagnosed as having acute bronchitis; Dr. Pella recommended that he be removed from a work environment involving exposure to respiratory irritants; and decedent continued working, with his continued exposure resulting in effects seen on his serial chest x-rays as increased interstitial markings and fibrosis. In addition, the administrative law judge found that decedent continued to smoke despite his physician's warnings, that his breathing problems worsened over the years, and that employer retained him as a valued employee with actual knowledge of his medical problems until he took regular retirement on February 27, 1987. The administrative law judge then concluded, "decedent's permanent partial impairment is the result of the combination of his pre-existing permanent partial disability (*i.e.*, his pulmonary problems first seen in 1980), and his August 10, 1993 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability" according to Dr. Pella and Dr. Gee. Decision and Order at 19; Cx. 25; Rx. 14. The administrative law judge further determined that employer's liability under the Act was limited to one period of 104 weeks, concluding that Section 8(f) was also applicable to the award of death benefits because decedent's and claimant's benefits were awarded based the cumulative effect of decedent's asbestos exposure and smoking history.

While a work-related aggravation of a prior condition may establish contribution for Section 8(f) purposes, *see, e.g., Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT)(1st Cir. 1983), to establish this element where the employee is permanently partially disabled, employer must also show by *medical evidence or otherwise* that claimant's disability as a result of the pre-existing condition is materially and substantially greater than that which would have resulted from the work injury alone, and that the last injury alone did not cause claimant's permanent partial disability. 33 U.S.C. §908(f)(1); *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT) (9th Cir. 1996); *see generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122 (1995); *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). We agree with the Director that the medical opinions of Drs. Pella and Gee do not provide substantial evidence to support the administrative law judge's finding of contribution under this standard.

After reviewing decedent's medical records dating back to 1980, a pathology report of a needle biopsy of the lung, the death certificate dated February 7, 1994, and decedent's May 11, 1987, deposition, as well as noting that despite x-ray evidence of fibrosis decedent exhibited no impairment on pulmonary function studies performed in 1980 and 1987, Dr. Pella gave his opinion to a reasonable degree of medical certainty that the diagnosis of pulmonary asbestosis was established based on decedent's occupational history,

roentgenographic findings, and his early and subsequent findings of lung crackles on physical examination by several observers in association with the finding of interstitial fibrosis on biopsy. Dr. Pella further indicated that decedent developed a well-described complication of both pulmonary asbestosis and cigarette smoking, *i.e.*, bronchogenic carcinoma, and this malignant tumor resulted in his demise. Dr. Pella's report diagnoses claimant's conditions, but provides no evidence that decedent's pre-existing lung problems resulted in any permanent impairment which could have contributed to his compensable 100 percent disability under Section 8(c)(23), and it attributes decedent's death only to work-related lung cancer. Thus, Dr. Pella's opinion does not establish that decedent's disability is materially and substantially greater due to the combination of a pre-existing disability and a subsequent injury or that decedent's death was not solely due to lung cancer. *See generally Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); *Luccitelli*, 964 F.2d at 1306, 26 BRBS at 7(CRT).

Dr. Gee's September 8, 1995 report also cannot properly support the administrative law judge's finding of contribution with regard to the disability claim under similar reasoning. Ex. 9. In his report, Dr. Gee states that although in the 1980s decedent complained of dyspnea on exertion, his x-rays and pulmonary function tests were normal. Dr. Gee gave no opinion regarding the contributory effect, if any, of claimant's pre-existing lung problems on his compensable disability. With regard to cause of death, Dr. Gee found that decedent died of lung cancer, which he attributed solely to cigarette smoking, indicating that decedent exhibited virtually no evidence of asbestos-related lung disease and that asbestos exposure played no role in causing this disease. Thus, Dr. Gee's opinion also cannot support a finding of contribution with regard to either the death or disability claims. *See Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987). Inasmuch as the medical evidence cited by the administrative law judge is insufficient to support a finding of contribution, and there is no other evidence of record sufficient to meet employer's burden, the award of Section 8(f) relief in the present case must be reversed.

Accordingly, the administrative law judge's award of Section 8(f) relief to employer is reversed and the decision is modified to hold employer liable for all benefits. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge