

LINELL C. QUINN)	
(Widow of ROBERT V. QUINN))	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: _____
& 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 Denying the Petition for Relief Under Section 8(f) and the Order Denying Employer's Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Mark Reinhalter (J. Davitt McAteer, 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying the Petition for Relief Under Section 8(f) and the Order Denying Employer's Motion for Reconsideration (94-LHC-2384) 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. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's husband (decedent) was exposed to asbestos during the course of his employment with employer from the 1930's until 1977 when he retired. Decedent died on August 2, 1993; his death certificate lists "Large Cell Carcinoma Lung" as the cause of death. DX 4A. The autopsy report includes lung carcinoma with cerebral metastases, pulmonary aspergillosis, asbestosis, emphysema, and arteriosclerosis of coronary arteries as among the final diagnoses. EX 11. Claimant subsequently filed a claim for death benefits under Section 9, 33 U.S.C. §909, of the Act.

In his Decision and Order, the administrative law judge noted the parties' stipulations that decedent's death was caused in part by his occupational exposure to asbestos and that claimant is thus entitled to compensation from employer for death benefits pursuant to Section 9 of the Act. The administrative law judge also denied employer's application for Section 8(f), 33 U.S.C. §908(f), relief based on its failure to establish that decedent's manifest pre-existing permanent partial disabilities contributed to his death. The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in relying on Dr. Kessler's opinion to deny Section 8(f) relief because Dr. Kessler's reports establish, along with other evidence of record, that decedent's pre-existing chronic obstructive pulmonary disease and/or heart disease hastened or contributed to his death. The Director, Office of Workers' Compensation Programs, 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.¹ 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). Thus, in cases involving permanent total disability or death, an employer must demonstrate that the total disability or death is a result of both the work injury and the pre-existing condition in order to receive Section 8(f) relief. *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe*, 380 U.S. at 359; see *Patrick v. Newport News Shipbuilding and Dry Dock Co.*, 15 BRBS

¹No party challenges the administrative law judge's finding that decedent had manifest pre-existing permanent partial disabilities.

274 (1983)(Kalaris, J., dissenting). In addressing the contribution element of Section 8(f), the administrative law judge credited the testimony of claimant's treating physician, Dr. Kessler, which he found to be more complete, better reasoned and more persuasive than the remaining opinions of record, in concluding that claimant's pre-existing permanent partial disabilities did not contribute to or hasten claimant's death.² Decision and Order at 12-13. Contrary to employer's contention, Dr. Kessler's testimony, *in toto*, reveals that that physician opined that decedent's death was due to lung cancer with brain metastases, *see* DXS 3, 5, 6, 10, 12; thus Dr. Kessler's testimony does not support a finding that decedent's death occurred in part due to his pre-existing permanent partial disabilities, rather than solely as a result of his lung cancer. *See* DXS 3, 5, 6, 10, 12. The administrative law judge's decision to credit this testimony is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Thus, as the administrative law judge's determination that employer failed to establish the contribution element necessary for Section 8(f) relief is supported by the record, that finding is affirmed.³ *See O'Keefe*, 380 U.S. at 359.

²The administrative law judge found that the contrary opinions of Drs. Maddra, Reed and Hall, who opined that decedent's chronic obstructive pulmonary disease and/or his cardiovascular disease contributed to his death, were not supported by the record.

³We reject employer's contention that, since the administrative law judge failed to explain his weighing of Dr. Maddox's opinion, his decision does not comport with the requirements of the Administrative Procedure Act. Contrary to employer's assertion, the administrative law judge set forth and discussed Dr. Maddox's opinion in both his Decision and Order and his Order Denying Employer's Motion for Reconsideration.

Accordingly, the administrative law judge's Decision and Order Denying the Petition for Relief Under Section 8(f) and the Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge