

PHYLLIS A. CHAMBERLIN)
(widow of EUGENE G. CHAMBERLIN))

Claimant)

v.)

GENERAL DYNAMICS)
CORPORATION)

DATE ISSUED: _____

and)

INA/CIGNA)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)

Petitioner)

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Lucas D. Strunk (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for employer/carrier.

Laura Stomski (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand Awarding Benefits (95-LHC-2251) of Administrative Law Judge David W. Di Nardi 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).

This is the second time this case has been before the Board. In this case, decedent worked at employer's Electric Boat Division as a painter/cleaner from 1953 to 1964. He was exposed to asbestos during this period. Cl. Ex. 4 at 4; Emp. Ex. 4. He worked in non-maritime work from 1964 to 1976. Cl. Ex. 4 at 7, 10. From 1976 until his retirement in 1994, decedent worked at employer's Quonset Point facility as a material controller. He was not exposed to asbestos during this time. Cl. Ex. 4 at 10, 13; Emp. Ex. 4. Decedent last worked in October 1994. He died on April 27, 1995, due to acute respiratory failure, asbestosis and chronic obstructive pulmonary disease (COPD). ALJ Ex. 9.

The administrative law judge awarded decedent's estate permanent total disability benefits, medical expenses, funeral expenses and interest. Decision and Order at 16-20. He also awarded claimant, decedent's widow, death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. Additionally, he determined that employer is entitled to relief from continuing liability for compensation pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). *Id.* at 16, 24. The Director appealed the award of Section 8(f) relief, and, subsequently, the Director and employer filed a Joint Motion to Remand, as they agreed the administrative law judge's decision did not support his Section 8(f) award. The Board vacated the award of Section 8(f) relief and remanded the case for the administrative law judge to identify the pre-existing permanent partial disability, state whether it was manifest and whether it contributed to decedent's permanent total disability and death. *Chamberlin v. General Dynamics Corp.*, BRB No. 96-843 (Dec. 4, 1996).

On remand, the administrative law judge again concluded that employer satisfied the requirements for Section 8(f) relief. He found that decedent had lung markings since 1980 and that over the years these markings grew worse, developing into both obstructive and restrictive problems. He also found that decedent's total disability was not due to his asbestosis alone, but rather was due to the combination of the work-related asbestosis disability of 40 percent (as of January 7, 1994) as well as "his October 14, 1994 injury." Decision and Order on Rem. at 8-10. Additionally, the administrative law judge found that the evidence demonstrates that decedent's death was caused by both work-related asbestosis and COPD caused by cigarette smoking. *Id.* Based on these conclusions, the administrative law judge awarded Section 8(f) relief on both the disability and the death benefits, and thus employer was held liable for benefits for only one 104-week period. The Director appeals the award of Section 8(f) relief, and employer responds, urging affirmance.

Initially, the Director notes that the administrative law judge inadvertently ordered payment of temporary total disability benefits instead of permanent total disability benefits. Employer agrees that the order should have referred to permanent total disability benefits. In his original decision, the administrative law judge found decedent's disability to be permanent and total. Decision and Order at 16. Additionally, Section 8(f) relief may not be obtained when the award is for a temporary disability. 33 U.S.C. §908(f). Consequently, we modify the administrative law judge's order to reflect decedent's estate's entitlement to permanent total disability benefits from October 15, 1994, until decedent's death in April 1995.

Next, the Director contends the administrative law judge erred in awarding Section 8(f) relief. Specifically, the Director argues that employer has failed to demonstrate a manifest pre-existing permanent partial disability which contributed to either decedent's permanent total disability or his death. Employer asserts that the administrative law judge's findings should be affirmed as decedent's death and disability were caused by the combination of his asbestosis and his COPD. Section 8(f) shifts the liability to pay compensation for 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 the case of permanent total disability or death, if it establishes that the decedent had a manifest pre-existing permanent partial disability, and that his permanent total disability and/or death was not due solely to the subsequent work injury. 33 U.S.C. §908(f)(1); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992). Because there are two claims in this case, one for permanent total disability benefits and one for death benefits, employer must show entitlement to Section 8(f) relief on each claim. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

A review of the administrative law judge's decision on remand reveals that he has again failed to identify a manifest pre-existing permanent partial disability which contributed to decedent's total disability and death. According to his decision, decedent's pre-existing permanent partial disability consisted of his 40 percent pulmonary impairment as of January 7, 1994. Decision and Order on Rem. at 10. This rating, assessed by Dr. Koyamatsu, was based on decedent's moderate restrictive lung disease, *i.e.*, decedent's work-related asbestosis. Cl. Ex. 30. The administrative law judge then stated that the second injury was the injury which occurred on October 14, 1994. Decision and Order on Rem. at 10. Contrary to the administrative law judge's statement, no injury occurred on this date. Rather, this was the day before decedent ceased working, and there is no evidence that decedent's condition was aggravated between January and October 1994.¹ Moreover, as asbestosis and asbestos-related conditions constitute the work-related injury, *i.e.*, the "second injury," they cannot also be the pre-existing disability. *Director, OWCP v. Cooper*

¹In his original Decision and Order, the administrative law judge specifically found that decedent was not exposed to asbestos after 1964. Decision and Order at 21.

Associates, Inc., 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). Accordingly, the administrative law judge's award of Section 8(f) relief based on asbestosis as the pre-existing permanent partial disability is reversed.

The administrative law judge also discussed claimant's COPD as a basis for Section 8(f) relief. However, the COPD cannot suffice in light of employer's failure to satisfy the manifest element. In this case, the administrative law judge found that decedent's pulmonary problems began as early as 1980 and that employer kept decedent as an employee despite "actual knowledge of his worsening asbestos-related disease manifested by increased breathing problems." Decision and Order on Rem. at 9. The record reveals that in 1980, Dr. Pella interpreted an x-ray as showing lung abnormalities caused by decedent's exposure to asbestos. Cl. Ex. 7. In 1982, an x-ray revealed possible early changes related to COPD. Cl. Ex. 8. Thereafter, between March 1982 and April 1987, decedent had clear lungs and normal x-rays. Cl. Exs. 9-10, 12, 14. It was not until 1991 that decedent's condition changed dramatically. On November 5, 1991, the doctor's report stated that x-rays revealed abnormalities due to asbestos and recommended treatment for an asbestos-related condition. Cl. Ex. 15. An x-ray the following day revealed increased pulmonary markings consistent with COPD. Cl. Ex. 16. Thus, as decedent had normal x-rays for many years and as COPD was diagnosed after the asbestos-related condition, there is no evidence of a serious, lasting physical condition manifest prior to the onset of decedent's occupational asbestos-related conditions.² *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT) (D.C. Cir. 1990); *Armstrong v. General Dynamics Corp.*, 22 BRBS 276 (1989). Consequently, employer is not entitled to Section 8(f) relief from liability for either the permanent total disability benefits or the death benefits.³

²The Director argues that decedent's pre-existing permanent partial disability must have been manifest before 1964, the date he was last exposed to asbestos, in order to satisfy the requirements for Section 8(f) relief. We reject this argument. As the Board held in *Ehrentraut v. Sun Ship, Inc.*, 30 BRBS 146 (1996), *appeal pending*, No. 96-3648 (3d Cir.), the pre-existing disability need only be manifest prior to the second injury. See also *C. G. Willis, Inc. v. Director, OWCP*, 31 F.3d 1112, 28 BRBS 84 (CRT) (11th Cir. 1994); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7 (CRT) (2d Cir. 1993).

³In light of our decision to reverse the award of Section 8(f) relief because employer has not shown a manifest pre-existing permanent partial disability, we need not address the Director's remaining arguments.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Section 8(f) relief is reversed. The award of benefits is modified to reflect that decedent's estate is entitled to receive permanent total disability benefits, and is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge