



BRB No. 17-0589

ESTATE of GERALD GUESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	DATE ISSUED: <u>Aug. 9, 2018</u>
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Timothy J. McGrath, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Offices of Scott Roberts, L.L.C.), Groton, Connecticut, for claimant.

Robert J. Quigley, Jr., and Sydney R. Kirsch (McKenney, Quigley & Clarkin, L.L.P.), Providence, Rhode Island, for self-insured employer.

Matthew W. Boyle (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: BOGGS, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant, the estate of the deceased employee (decedent), appeals the Decision and Order Granting Modification (2016-LHC-00595) of Administrative Law Judge Timothy J. McGrath 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent sustained injuries to his left and right wrists during the course of his employment, and he filed a claim for benefits.<sup>1</sup> In January 2014, Administrative Law Judge Geraghty awarded decedent continuing temporary total disability benefits from December 19, 2012. JX 1. Employer paid those benefits until August 3, 2015, when it learned decedent had died on July 23, 2015. Decision and Order on Modif. at 2 n.1; JX 3.

On August 4, 2015, employer filed a Motion for Summary Decision and Modification, seeking termination of the temporary total disability award. On June 16, 2016, Administrative Law Judge McGrath (the administrative law judge) received claimant's Motion for Summary Decision asserting decedent's estate's entitlement to scheduled permanent partial disability benefits for decedent's impaired hands, pursuant to Section 8(d) of the Act, 33 U.S.C. §908(d). *See* Decision and Order on Modif. at 1-2. Employer objected and filed a cross-motion for modification, asserting decedent's condition had become permanent and total as of August 6, 2013, when his left hand condition reached maximum medical improvement. *Id.* at 7 n.8. Thus, employer asserted that entitlement to all benefits terminated upon decedent's death and that there were no unpaid scheduled benefits due.

Based on doctors' reports generated before decedent died, the parties stipulated that decedent's left hand condition reached maximum medical improvement on August 6, 2013, with a five percent permanent impairment, and decedent's right hand condition reached maximum medical improvement on April 10, 2014, with an eight percent permanent impairment. Decision and Order on Modif. at 3; JXs 4-6. The administrative law judge denied the claim for permanent partial disability benefits pursuant to Section 8(d). He found that the present claim is that of decedent's estate and a decedent's estate is not entitled to benefits pursuant to Section 8(d). He also found that decedent's total disability did not end, and his temporary total disability status was never modified, during his

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<sup>1</sup> Decedent worked as a burner/grinder at employer's facility in Groton, Connecticut, from January 1974 until August 1983 and again from May 2009 until he was laid off in July 2011. JX 1 at 2-3. He underwent endoscopic carpal tunnel release on the right hand but not on the left, though it was recommended. JX 4. He did not return to work at any time after his lay off. JX 1 at 3.

lifetime, such that he never had a vested interest in permanent partial disability benefits.<sup>2</sup> Decision and Order on Modif. at 8-13. The administrative law judge also found that decedent's bilateral hand condition became permanent and total on April 10, 2014, and remained so until his death, warranting an award under Section 8(a), 33 U.S.C. §908(a), from that date until his death on July 23, 2015. Therefore, the administrative law judge modified the prior award of temporary total disability benefits to one for permanent total disability benefits. Decision and Order on Modif. at 14. As a claimant cannot receive concurrent permanent total and permanent partial disability benefits for the same injury, the administrative denied the claim for scheduled benefits. The administrative law judge found that employer is entitled to a credit for any benefits due against its payment of temporary total disability benefits. *Id.* at 15.

Claimant appeals the denial of permanent partial disability benefits pursuant to Section 8(d). Employer urges the Board to affirm the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director) also responds, asserting that because Section 8(d) of the Act, on which claimant relies, applies only to survivors, and not decedents' estates, remand may be necessary to determine if decedent had any statutory survivors.

Claimant contends decedent was assessed as having underlying permanent impairments of five percent and eight percent to his hands, JXs 4-6, and benefits for those impairments have not been paid. Therefore, claimant contends the administrative law judge should have awarded the estate benefits for those permanent partial disabilities pursuant to Section 8(d)(2) of the Act. 33 U.S.C. §§908(c)(3), 908(d)(2). We reject this contention for the following reasons.

Section 8(d) of the Act provides:

(1) If an employee who *is receiving compensation for permanent partial disability* pursuant to subdivision (c)(1)-(20) of this section dies from causes other than the injury, the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors, as follows:

(A) if the employee is survived only by a widow or widower, such unpaid amount of the award shall be payable to such

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<sup>2</sup> The administrative law judge also found that decedent received a greater amount in total disability benefits than he would have received in scheduled permanent partial disability benefits. Employer paid decedent over \$94,000. JX 3. Over \$47,000 of that was paid after April 10, 2014. Were decedent found entitled to permanent partial disability benefits under the schedule, he would have been entitled to \$21,814.48. Decision and Order on Modif. at 13 n.16.

widow or widower, \* \* \*

(2) Notwithstanding any other limitation in section 909 of this title, the total amount of any award for permanent partial disability pursuant to subdivision (c)(1)-(20) of this section unpaid at time of death shall be payable in full in the appropriate distribution.

(3) An award for disability may be made after the death of the injured employee. Except where compensation is payable under subsection (c)(21) of this section if there be no survivors as prescribed in this section, then the compensation payable under this subsection shall be paid to the special fund established under section 944(a) of this title.

33 U.S.C. §908(d) (emphasis added). Section 8(d) mandates the disbursement of a deceased employee's scheduled permanent partial disability benefits in the event he dies prior to the payment of the full amount of those benefits. If he dies for reasons unrelated to his work injury, leaving statutory survivors as enumerated in Section 8(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his unpaid scheduled benefits are paid to the Special Fund pursuant to Section 8(d)(3). 33 U.S.C. §908(d)(1), (3); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27, 31 n.4, *modified in part on other grounds*, 28 BRBS 156 (1994).<sup>3</sup> If the employee's death is work-related, Section 8(d)(2) applies to permit distribution of unpaid scheduled benefits to his statutory survivors. 33 U.S.C. §908(d)(2); *Henry v. George Hyman Constr. Co.*, 749 F.2d 65, 17 BRBS 39(CRT) (D.C. Cir. 1984).<sup>4</sup> In order for Section 8(d) to apply, the

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<sup>3</sup> In *Wood*, the Board noted: "the purpose of Section 8(d) is to ensure the payout of the entire scheduled award, irrespective of an employee's death." *Wood*, 28 BRBS at 31 n.4.

<sup>4</sup> In *Henry*, the decedent injured his right foot during the course of his employment. Due to complications from his pre-existing diabetes and vascular disease, the decedent underwent multiple surgeries, ultimately resulting in amputation of his right leg below the knee. He died of cardiac arrest, and the parties stipulated that his death was causally related to the work injury. On appeal, it was undisputed that the decedent was temporarily totally disabled with an underlying permanent partial disability at the time of his death. His widow filed a claim for his unpaid scheduled permanent partial disability benefits pursuant to Section 8(c)(4), 33 U.S.C. §908(c)(4), and Section 8(d)(2), 33 U.S.C. §908(d)(2). *Henry*, 749 F.2d at 71, 17 BRBS at 43-44(CRT). The court held that the plain language of the preface of Section 8(c) provides that a permanent partial disability award shall be paid "in addition to" temporary total disability benefits. *Id.*, 749 F.2d at 72, 17 BRBS at 44(CRT). Thus, the court held the widow was entitled to the unpaid scheduled benefits pursuant to

decedent must have been receiving permanent partial disability benefits under the schedule,<sup>5</sup> and the party claiming entitlement to unpaid benefits must be a statutory survivor or the Special Fund. 33 U.S.C. §908(d); *Wood*, 28 BRBS 27. In addition, an injured employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered.<sup>6</sup> *Krohn v. Ingalls Shipbuilding, Inc.*, 29 BRBS 72 (1994) (McGranery, J., dissenting on other grounds); *Clemon v. ADDSCO Industries*, 28 BRBS 104 (1994); *Wood*, 28 BRBS 27; *see also Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125, 128 (1994) (decision after remand); *Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114, 119 (1992), *rev'd mem. on other grounds sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc.*, No. 93-4054 (5th Cir. March 10, 1993)).

Contrary to claimant's assertions, this case does not involve one of the two primary factors necessary for the application of Section 8(d). Specifically, decedent was neither "receiving" nor "entitled to" permanent partial disability benefits at the time of his death. Decedent was receiving temporary total disability benefits. Following his death, employer asserted that decedent's condition had previously changed from temporary total to permanent total, whereas claimant asserted it had changed to permanent partial. The undisputed medical reports and the stipulations of the parties support the administrative law judge's finding that decedent's condition reached maximum medical improvement and became permanent as of April 2014. *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413 (1989); *Jones v. Genco, Inc.*, 21 BRBS 12 (1988); *Miranda v. Excavation Constr., Inc.*, 13 BRBS 882 (1981). For a disability to change from total to partial in a scheduled injury case, however, there must be evidence that the employee can return to work, i.e., his usual

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Section 8(d)(2). *Id.*, 749 F.2d at 77, 17 BRBS at 49(CRT). In *Johnson v. Del Monte Tropical Fruit Co.*, 45 BRBS 27 (2011), the Board limited *Henry* to its facts.

<sup>5</sup> The Board has held that the phrase "is receiving compensation" means "is entitled to compensation." *Abercrumbia v. Chaparral Stevedores*, 22 BRBS 18.4, 19 (1989); *see Wood*, 28 BRBS at 35. This interpretation accords with subsequently decided cases regarding Section 6's "currently receiving" clause which has been held to mean "entitled to." 33 U.S.C. §906; *Boroski v. Dyncorp Int'l*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012); *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *aff'd on other grounds sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012); 20 C.F.R. §702.801(b)(3) (2018).

<sup>6</sup> The term "unpaid" in Section 8(d) means "unaccrued," and "upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors or to the Special Fund upon his death without survivors." *Wood*, 28 BRBS at 36; *see Clemon v. ADDSCO Industries*, 28 BRBS 104, 112 (1994). Section 8(d) does not apply to accrued benefits. *Wood*, 28 BRBS 27.

work or suitable alternate employment, and that he has a permanent physical impairment. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1(CRT) (2d Cir. 1991); *Jensen v. Weeks Marine, Inc.*, 34 BRBS 147, 152 (2000), *decision after remand*, 35 BRBS 174 (2001), *aff'd*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003). Once those facts are established, the employee who sustained an injury to a scheduled member is entitled to permanent partial disability benefits under the schedule. *Id.*; *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990); *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 n.4 (1985). Absent a showing of the ability to return to work, the employee's disability is total. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989); *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

In this case, it has not been shown that decedent could have returned to his usual work.<sup>7</sup> Further, the record is devoid of evidence regarding the availability of suitable alternate employment; the administrative law judge so found, and no party disputes this finding. Decision and Order on Modif. at 9, 14; *see Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). Therefore, decedent was not partially disabled prior to his death. The administrative law judge properly concluded that decedent's disability remained total upon reaching maximum medical improvement on April 10, 2014, and he properly awarded decedent's estate accrued permanent total disability benefits plus annual adjustments from that date. 33 U.S.C. §910(f); *Palombo*, 937 F.2d 70, 25 BRBS 1(CRT); *Andrews v. Alabama Dry Dock & Shipbuilding Co.*, 17 BRBS 209 (1985), *aff'd sub nom. Alabama Dry Dock & Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61(CRT) (11th Cir. 1986). As decedent was entitled to permanent total disability benefits at the time of his death, he was not entitled to permanent partial disability benefits under the schedule.<sup>8</sup> *See Korineck v. General Dynamics Corp. Electric Boat Div.*, 835 F.2d 42 (2d Cir. 1987) (a claimant cannot receive concurrent awards for total and partial disability because he cannot be more than totally disabled). Thus, absent either accrued or unaccrued permanent partial disability benefits at the time of death, the administrative law judge properly found that

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<sup>7</sup> Claimant was laid off in 2011, and, according to Dr. Burrows, was retired. JX 4. Both Dr. Burrows and Dr. Ashmead recommended carpal tunnel surgery on the left hand, which had not been performed. JXs 4-6. Although Dr. Ashmead did not "endorse the patient's total disability status since surgery 12/2012," the administrative law judge noted that Dr. Ashmead believed decedent could perform only light, sedentary work. JX 6 at 2.

<sup>8</sup> Decedent was *permanently* totally disabled at the time of his death; therefore, *Henry* is not applicable. *See* n.4, *supra*.

Section 8(d) is wholly inapplicable.<sup>9</sup> *Wood*, 28 BRBS 27. Therefore, as it is supported by substantial evidence and in accordance with law, we affirm the administrative law judge's award of permanent total disability benefits to decedent's estate from April 10, 2014 to July 3, 2015.<sup>10</sup>

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed.

SO ORDERED.

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JUDITH S. BOGGS  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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JONATHAN ROLFE  
Administrative Appeals Judge

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<sup>9</sup> In light of our decision affirming the finding that claimant was permanently totally disabled at the time of death, the issue of whether a statutory survivor exists for purposes of Section 8(d) is moot, and we need not address it.

<sup>10</sup> The administrative law judge properly credited employer's payments of temporary total disability benefits against its liability for permanent total disability benefits. *See* 33 U.S.C. §§914(j), 922; *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 34 BRBS 85(CRT) (2d Cir. 2000); *LaRosa v. King & Co.*, 40 BRBS 29 (2006); *see also* Cl. M/Summary Decision at 3 (June 6, 2016); Cl. M/Summary Decision Br. at 7 (Aug. 1, 2016).