

BRB Nos. 91-1623
and 91-1623A

ESTELLE FINEMAN)
(Widow of CHARLES FINEMAN))
)
Claimant-Respondent)
)
v.)
)
NEWPORT NEWS SHIPBUILDING)
AND DRY DOCK COMPANY)
)
Self-Insured)
Employer-Petitioner) DATE ISSUED: _____
Cross-Respondent)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)
)
Cross-Petitioner) DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order on Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins), Newport News, Virginia, for claimant.

Antje E. Huck, Newport News, Virginia, for employer.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order and the Decision and Order on Reconsideration (89-LHC-2309) of Administrative Law Judge Richard K. Malamphy awarding benefits 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 applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The facts of this case are undisputed. Decedent worked as a shipfitter for employer from 1952 until his retirement in 1977, and during the course of his employment, he was exposed to asbestos. On or about December 25, 1986, decedent was diagnosed with asbestosis, and on October 11, 1988, Dr. Scheinberg determined decedent had an 18 percent impairment to the whole person. Emp. Ex. 2. Decedent and employer agreed that he was entitled to permanent partial disability benefits pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23) (1988), based on an average weekly wage of \$302.66, at a rate of \$36.32 per week, from December 25, 1986 and continuing. *Id.* On March 30, 1989, employer filed an application for Section 8(f), 33 U.S.C. §908(f), relief with the district director.¹ Decedent died on August 15, 1989. According to Dr. Childs, who completed the death certificate, the primary cause of death was a cerebellar hemorrhage. Interstitial lung disease and asbestosis were listed as "other significant conditions." Cl. Ex. 7; Emp. Ex. 6. Therefore, claimant, decedent's widow, filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909 (1988).

A hearing was held on February 6, 1991, wherein claimant's entitlement to death benefits and employer's entitlement to Section 8(f) relief were at issue. Decision and Order at 5. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking decedent's injury and death to his employment, and he found that decedent's death was "hastened by his underlying lung impairment." Decision and Order at 6. Therefore, he awarded claimant death benefits. *Id.* Additionally, he awarded claimant permanent partial disability benefits for decedent's 18 percent impairment at the rate of \$27.24 per week from August 15, 1989, and funeral expenses of \$3,000. 33 U.S.C. §908(c)(23), 909(a)(1988). He also found that employer is entitled to relief from continuing liability for compensation under Section 8(f). Decision and Order at 7.

¹Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

On reconsideration, the administrative law judge amended his decision to reflect claimant's entitlement to permanent partial disability benefits at a rate of \$36.32 per week for 104 weeks from December 25, 1986. He ordered the Special Fund to assume payments of any remaining permanent partial disability compensation at the expiration of 104 weeks, and death benefits beginning August 15, 1989. Further, the administrative law judge ordered the Special Fund to pay decedent's funeral expenses. Decision and Order on Recon. at 2. Employer appeals the administrative law judge's award of death benefits, and claimant responds, urging affirmance. The Director appeals the award of Section 8(f) relief and the order to pay funeral expenses out of the Special Fund.² Employer has not responded to the Director's appeal.

Employer contends the award of death benefits should be reversed because decedent's death was not caused by work-related asbestosis but was instead caused by a non-occupational stroke. Claimant responds, stating that the administrative law judge's finding that decedent's death was hastened by asbestosis is supported by substantial evidence and that controlling law for this principle is found in *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, C.J., dissenting). Employer, however, urges the Board to adopt Judge Ramsey's dissent in *Woodside*, lest any "small" degree of asbestosis result in an employer's liability for death benefits, regardless of the actual cause of an employee's death.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909 (1988). The Board previously has addressed the scope of Section 9 where the immediate cause of death was not work-related. *See Woodside*, 14 BRBS at 601. In that case, decedent Woodside retired from employment in 1968. He was diagnosed with tuberculosis, pneumonia, chronic obstructive pulmonary disease (COPD), and chronic anemia in July 1973, and in December 1973, he was diagnosed with renal cancer. Woodside died on September 3, 1977 due to renal cell carcinoma, pneumonitis, and congestive heart failure. *Woodside*, 14 BRBS at 601. Claimant, Woodside's widow, alleged that Woodside's COPD was employment-related and that it hastened Woodside's death which was caused primarily by renal cancer. The administrative law judge denied benefits, finding that neither Woodside's lung disease nor his death was work-related. *Id.* at 602. The Board vacated the decision, holding that the administrative law judge failed to invoke the Section 20(a) presumption given the undisputed fact that Woodside was exposed to substances at work which could have caused his lung problems. The Board remanded the case for the administrative law judge to consider whether employer rebutted the presumption. *Id.* Further, the Board held that if employer did not rebut the presumption, then causation is established and the administrative law judge must next consider whether Woodside's COPD caused his death. *Id.* at 603.

Citing *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc*), *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966), and *Avignone Freres, Inc. v. Cardillo*, 117 F.2d 385 (D.C. Cir. 1940), the Board in *Woodside* noted:

²The Director did not address the issue of death benefits in his brief, *per se*; however, he noted his belief that the record contains substantial evidence to support the administrative law judge's decision to award death benefits.

[I]t is well-established that, if an injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease, or underlying condition, the resultant condition is compensable.... This rule is consistent with the maxim that "to hasten death is to cause it."

Woodside, 14 BRBS at 603. The Board then concluded:

[T]he administrative law judge erred in indicating that the fact that a work-related injury hastens death is an insufficient basis for an award of death benefits. Furthermore, if decedent's chronic obstructive pulmonary disease hastened his death, the death is compensable regardless of how much longer decedent would have lived absent the lung condition.

Id.

Although Judge Ramsey agreed with the Board's decision to remand the case for the administrative law judge to determine whether employer rebutted the Section 20(a) presumption, he disagreed with the majority's application of the maxim "to hasten death is to cause it." He stated he would apply this rule only in cases "where there is some direct connection between the occupational disease or injury which allegedly hastened the death and the non-work-related disease or injury which was the immediate cause of death." *Woodside*, 14 BRBS at 603. Judge Ramsey determined that no such relationship existed in *Woodside*, and that he did "not believe it was the intent of Congress to compensate widows where the only effect of decedent's work injury was to shorten decedent's life by mere seconds." *Id.* at 604.

In the instant case, decedent was diagnosed with work-related asbestosis and pulmonary fibrosis in December 1986. Cl. Ex. 6 at K. In August 1989, while watching television, decedent suddenly developed a severe left-sided headache, became diaphoretic, and experienced marked shortness of breath. Decision and Order at 4. He was taken to the hospital and diagnosed with intracranial bleeding, a cerebellar hemorrhage, COPD and hypertension. Cl. Ex. 6 at A. Decedent lapsed into a coma following surgery, and his doctors indicated the prognosis was poor because he had suffered an irreversible brain stem injury. The respirator was removed, and decedent later died. *Id.* at B-C. According to the death certificate, the immediate cause of death was a cerebellar hemorrhage, an underlying cause was hydrocephalus, and "other significant conditions contributing to death but not resulting in the underlying cause" were interstitial lung disease and asbestosis. Cl. Ex. 7; Emp. Ex. 6.

Dr. Shaw, a doctor who treated decedent, was deposed by the parties. He noted that marked shortness of breath is not a normal symptom of a stroke victim but generally occurs in those patients who also have an underlying lung disease. Cl. Ex. 10 at 6-7. While he acknowledged that decedent's major medical problem was the stroke, he stated there might have been a respiratory factor involved because decedent died shortly after his respirator was removed. *Id.* at 8, 16-17. Further, Dr. Shaw stated that asbestosis could have hastened decedent's death, and he testified that he interpreted the death certificate as an indication that the disease affected, and probably hastened, decedent's death. *Id.* at 13-18. Based on Dr. Shaw's testimony and other record evidence, the administrative law judge found that:

[T]he evidence establishes that there was a direct relationship between the consequences of Decedent's asbestosis and his death. Even if the asbestosis only shortened the Decedent's death by mere seconds, Decedent's impaired and damaged pulmonary system played a part in hastening Decedent's death.

Decision and Order at 6. Moreover, the administrative law judge emphasized decedent's marked shortness of breath, the fact that shortness of breath is not a typical symptom of a stroke victim, and the fact that decedent died soon after his respirator was disconnected. He then concluded that, although asbestosis was not the immediate or underlying cause of decedent's death, it was a contributing factor. *Id.*

Employer acknowledges that Dr. Shaw's opinion establishes that decedent's death was hastened by his lung condition. Employer requests that the Board narrow the application of the maxim "to hasten death is to cause it," asserting that a "direct relationship" between the asbestosis and the stroke should be required for establishing causation. We reject employer's argument as it is contrary to the case precedent. In addition to *Woodside* and the cases cited therein, we note that the United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises, has adopted the Director's position in a case arising under Title IV of the Federal Coal Mine Health and Safety Act, 30 U.S.C. §901 *et seq.*, (the Black Lung Act), that if a medical condition hastens a death in any way, it contributes to that death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979, 16 BLR 2-90, 2-92 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 969 (1993); *see also Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989) ("No evidence to suggest that Congress or the Department of Labor intended to deny benefits where pneumoconiosis actually shortened a miner's life, albeit briefly"). Although *Shuff* arose under the Black Lung Act and is not controlling herein, it is consistent with the Board's holding in *Woodside* in adopting the rule that "to hasten death is to cause it."³ *See Shuff*, 967 F.2d at 979-980, 16 BLR at 2-92 - 2-93. Because employer has failed to provide

³Under the Federal Coal Mine Health and Safety Act, a survivor is entitled to benefits only if the miner's death is "due to" pneumoconiosis, *i.e.*, if pneumoconiosis is a "substantially contributing cause" of death. 30 U.S.C. §901(a) (1982); 20 C.F.R. §718.205(c). The courts have accepted the hastening of a death as a "substantially contributing cause" of death. *See Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d

sufficient reason for us to abandon *Woodside* or to narrow the precedent consistent with the dissent in *Woodside*, we decline to do so. Consequently, we affirm the administrative law judge's award of death benefits, as it is supported by substantial evidence and in accordance with the law. *See Woodside*, 14 BRBS at 603.

With regard to the Director's appeal, the Director first objects to the award of Section 8(f) relief to employer. He argues that employer failed to establish that decedent had a pre-existing permanent partial disability prior to the diagnosis of work-related asbestosis. 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. In order to establish entitlement to Section 8(f) relief in a case arising under the jurisdiction of the United States Court of Appeals for the Fourth Circuit, involving a post-retirement occupational disease, an employer need only show that an employee's pre-existing permanent partial disability pre-dated the manifestation of the occupational disease, and that the pre-existing disability contributed to the employee's permanent disability or death. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991), *rev'g* 23 BRBS 114 (1989). This case, which arises in the Fourth Circuit, falls into that category of cases covered by the *Harris* holding because decedent's work-related disease became manifest after his retirement.

Because there are two claims in this case, one for permanent partial disability benefits and one for death benefits, employer must raise and show entitlement to Section 8(f) relief for each claim. *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 209-210, 23 BRBS 131, 134 (CRT) (4th Cir. 1990). Employer sought relief from continuing liability for disability benefits by filing an application with the district director on March 30, 1989, prior to decedent's death. It based its application for Section 8(f) relief on decedent's emphysema, a 20 percent permanent impairment to his right middle finger, a 31 percent binaural hearing loss, and bronchiectasis. Subsequently, in its post-hearing brief, employer raised the issue with regard to death benefits, maintaining that

decedent had pre-existing COPD. Thus, employer has raised Section 8(f) in connection with each claim.

Where permanent partial disability benefits and death benefits have been awarded, and

977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 969 (1993). In *Shuff*, the administrative law judge concluded that the miner was totally disabled by pneumoconiosis. Although he determined that pneumoconiosis may have hastened the miner's death, he concluded that the disease did not substantially contribute to it, as the medical evidence established that the cause of death was pancreatic cancer and the immediate precipitating cause was pneumonia. Accordingly, he denied benefits. The Board affirmed the decision; however, the court remanded the case for a determination as to whether pneumoconiosis hastened the miner's death based on the finding that the disease made the miner more susceptible to pneumonia. *See Shuff*, 967 F.2d at 978-980, 16 BLR at 2-91 - 2-94.

where Section 8(f) applies to each, an employer is liable for only one 104-week period of payments if the disability and the death arose from the same injury. *Henry v. George Hyman Construction Co.*, 21 BRBS 329, 331 (1988); *see also Bingham v. General Dynamics Corp.*, 20 BRBS 198 (1988); *Cooper v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 284 (1986). Conversely, if the employee suffered successive unrelated occupational injuries, then the employer may be liable for a 104-week period for each successive injury. *Howard*, 904 F.2d at 211, 23 BRBS at 135-136 (CRT). In this case, the administrative law judge limited his discussion of Section 8(f) to the following:

In the case at hand, the Decedent had a pre-existing permanent partial disability in his chronic obstructive pulmonary disease and asbestosis. These disabilities were manifest to the Employer as evidenced by the compensation payments to Decedent. And Decedent's death was a combination of both the large cerebellar hemorrhage and Decedent's combined lung diseases. Thus, the Employer has met its burden in establishing entitlement to Section 8(f) relief.

Decision and Order at 7. The administrative law judge ordered employer to pay 104 weeks of permanent partial disability compensation and the Special Fund to pay the remaining disability and death benefits. Because the administrative law judge failed to analyze employer's entitlement to Section 8(f) relief for each claim separately, and because he did not specifically discuss whether any of the conditions enumerated in employer's Section 8(f) application constitute a pre-existing disability, we vacate the award of Section 8(f) relief and remand the case for further consideration. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

In order to limit employer's liability for permanent partial disability or death benefits, the administrative law judge must determine which, if any, of decedent's pre-existing conditions can be considered a serious, lasting physical condition such that it constitutes a pre-existing permanent partial disability within the meaning of Section 8(f). *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990). He must then determine whether that disability materially and substantially contributed to decedent's permanent partial disability and/or contributed to his death. *Harris*, 934 F.2d at 548, 24 BRBS at 190 (CRT). Contrary to employer's Section 8(f) application, bronchiectasis cannot constitute a pre-existing condition because it was diagnosed simultaneously with asbestosis. *Harris*, 948 F.2d at 548, 24 BRBS at 190 (CRT); Cl. Ex. 6 at K, Q. Asbestosis also cannot constitute a pre-existing disability in this case, as it is the work-related disease.⁴ Further, decedent's hearing loss and the injury to his right middle finger did not contribute to his disability under Section 8(c)(23) and cannot be the basis for Section 8(f) relief. *See Adams*, 22 BRBS at 85. Therefore, of the conditions on which employer based its request for Section 8(f) relief, only emphysema and COPD remain as

⁴If asbestosis is considered the pre-existing disability in this case, then there would be no work-related second injury or aggravation on which to base a claim for Section 8(f) relief, as decedent was retired and the stroke was not work-related. *See generally Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988), *vacating* 842 F.2d 1253, 21 BRBS 27 (CRT) (11th Cir. 1988), *aff'g Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986).

potential pre-existing permanent partial disabilities.

On remand, therefore, the administrative law judge must determine whether emphysema or COPD constitutes a pre-existing permanent partial disability within the meaning of Section 8(f). *See generally Adams*, 22 BRBS at 85; *Bickham v. New Orleans Stevedoring Co.*, 18 BRBS 41 (1986). If he determines that decedent had a pre-existing disability which materially and substantially contributed to decedent's permanent partial disability due to asbestosis, then employer is entitled to Section 8(f) relief from continuing liability for disability compensation. If he determines that decedent had a pre-existing disability which contributed to decedent's death due in part to asbestosis, then employer is entitled to Section 8(f) relief from continuing liability for death benefits. If the administrative law judge determines that Section 8(f) applies to both claims, and if both the disability and the death arose from the occupational asbestosis, then employer is liable for only one 104-week period, and thereafter the Special Fund is liable for payments. *See generally Henry*, 21 BRBS at 331-332; *Graziano v. General Dynamics Corp.*, 14 BRBS 950 (1982), *aff'd sub nom. Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130 (CRT) (1st Cir. 1983); 33 U.S.C. §§908(f), 944.

The Director also contends the administrative law judge erred in ordering the Special Fund to pay decedent's funeral expenses. Funeral expenses are not considered to be "compensation" under Section 8(f), as that section is intended to limit employer's liability for periodic payments only. Thus, funeral expenses may not be assessed against the Special Fund. *Bingham*, 20 BRBS at 205; *see also Kahny v. Arrow Contractors of Jefferson, Inc.*, 15 BRBS 212 (1982), *aff'd mem. sub nom. Kahny v. Director, OWCP*, 729 F.2d 777 (5th Cir. 1984). Consequently, we modify the administrative law judge's order on reconsideration to reflect employer's liability for funeral expenses. 33 U.S.C. §909(a) (1988).

Accordingly, the administrative law judge's award of Section 8(f) relief is vacated, and the case is remanded for reconsideration of employer's entitlement to Section 8(f) relief in accordance with this decision. Additionally, that part of the Decision and Order on Reconsideration ordering the Special Fund to pay funeral expenses is modified to reflect employer's liability for said expenses. In all other respects, the Decision and Order and the Decision and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge