

MACIE MIDYETTE)	
(Widow of SAMUEL MIDYETTE))	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 07/20/2011
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 on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2007-LHC-1077) 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. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). This case is before the Board for the second time.

Decedent was exposed to asbestos dust and fibers during the course of his work for employer from 1947 through 1952 and from 1955 through 1965. He was diagnosed with severe chronic obstructive pulmonary disease (COPD) and emphysema in June 1977. In January 1979, Dr. Carpenter opined that decedent had had extensive asbestosis since May 1977 which totally disabled him. Decedent suffered a heart attack in August 1979. On October 1, 1979, Dr. Carpenter opined that decedent was totally disabled due to his extensive arthritis, chronic heart condition, and chronic pulmonary condition. On July 21, 1999, decedent was diagnosed as suffering from lung cancer, and he underwent surgery. On February 11, 2001, decedent collapsed and died at home. The autopsy report stated that decedent had squamous cell carcinoma of the right lung and pulmonary asbestosis. Claimant, decedent’s widow, filed a claim for death benefits under the Act, 33 U.S.C. §909, and employer sought relief from liability for continuing death benefits pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his first decision, the administrative law judge found that claimant established her entitlement to death benefits pursuant to Section 9 of the Act, stating that there is “no doubt” that the COPD and asbestosis were work-related and that “[d]iminished lung capacity due to COPD and asbestosis could reasonably have been a substantially contributing factor in the fatal event.” Decision and Order at 10. The administrative law judge found, however, that employer is not entitled to Section 8(f) relief, as the evidence did not establish the existence of a pre-existing permanent partial disability. Employer filed a motion for reconsideration of the award of death benefits and the denial of Section 8(f) relief, which the administrative law judge denied. In reiterating his denial of Section 8(f) relief, the administrative law judge stated that decedent’s COPD and asbestosis were contributing factors in decedent’s death. As employer did not establish the existence of any non work-related permanent disabilities pre-existing the diagnosis of these conditions, the administrative law judge stated that the pre-existing permanent partial disability element of Section 8(f) was not satisfied.

Employer appealed, arguing that the administrative law judge’s analysis in denying its application for Section 8(f) relief was flawed. In response, the Director, Office of Workers’ Compensation Programs (the Director), agreed that the administrative law judge’s Section 8(f) analysis was faulty since, in contrast to the administrative law judge’s statements, a pre-existing permanent partial disability for this purpose need not be work-related. The Board agreed with the parties’ position, vacated the administrative law judge’s denial of Section 8(f), and remanded the case with explicit instructions as to

how the administrative law judge must reconsider this issue. *M.M. [Midyette] v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 09-0272 (Sep. 17, 2009) (unpub.). On remand, the administrative law judge again denied employer's request for Section 8(f) relief based on his finding that employer did not establish the requisite pre-existing permanent partial disability element. In particular, the administrative law judge rejected employer's assertions that decedent's COPD, asbestosis, and/or heart disease constituted pre-existing permanent partial disabilities. The administrative law judge also rejected employer's contention that decedent's lung cancer constituted a "second injury," either as an aggravation of his asbestosis or as a new discrete injury.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Employer contends that since the record establishes that decedent had pre-existing disabilities (heart disease, COPD, and asbestosis) that contributed to his death, as well as a second claimed injury, *i.e.*, lung cancer, which also contributed to his death, the administrative law judge should have granted its application for Section 8(f) relief. Employer maintains that decedent's lung cancer, which served as the basis of claimant's survivor's claim, did not alone cause decedent's death but rather was one of a combination of medical conditions, which included decedent's pre-existing heart disease, COPD, and asbestosis, that caused or hastened his death. In response, the Director contends that since decedent's death is, as the administrative law judge found, attributable to the natural progression or consequence of his pulmonary conditions, *i.e.*, his asbestosis, COPD, and lung cancer, and as the evidence establishes that all three of these conditions arose from the same period of work-related asbestos exposure, none of these conditions can constitute the "second injury" required for purposes of establishing employer's entitlement to Section 8(f) relief.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish entitlement to Section 8(f) relief in a case involving a post-retirement occupational disease, an employer need show only that an employee's pre-existing permanent partial disability pre-dated the manifestation of the occupational disease that constitutes the "second injury," and that the employee's death is not due solely to the subsequent work injury but was contributed to or hastened by the pre-existing disability.¹ 33 U.S.C. §908(f)(1); *Brown & Root, Inc. v.*

¹The Fourth Circuit has eliminated the manifest requirement in post-retirement occupational disease cases. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

Sain, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). Two or more separate injuries may arise from the same injurious exposure with an employer and the employer may be granted Section 8(f) relief if the criteria are satisfied. *See generally Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Patrick v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 274, 277 (1983). However, a condition alleged to be a pre-existing disability for Section 8(f) purposes must precede the injury on which the compensation claim is based. *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

The Board instructed the administrative law judge that on remand he must determine whether decedent's lung cancer was work-related and contributed to his death and whether decedent's work-related COPD and asbestosis caused or contributed to his death for purposes of Section 8(f) relief. The administrative law judge stated that it is undisputed that decedent's lung cancer was at least in part work-related. The administrative law judge then found, based on Dr. Donlan's analysis,² that decedent's lung cancer "contributed to his death by being a part of the cause of his diminished lung capacity in the month leading up to his death." Decision and Order on Remand at 5. The administrative law judge, however, found that decedent's lung cancer, like his COPD and asbestosis, arose from his work-related exposure to asbestos that ended in 1965, and thus, that the lung cancer did not constitute a second injury for purposes of Section 8(f) relief.³ In light of this, and finding that decedent's lung cancer was the natural progression of his asbestos exposure and asbestosis diagnosed in 1977, the administrative law judge concluded that decedent's COPD and asbestosis cannot serve as pre-existing permanent disabilities for purposes of Section 8(f) relief.

We cannot affirm the denial of Section 8(f) relief in this case as the administrative law judge applied an incorrect legal standard. The record establishes that decedent was diagnosed with severe COPD, emphysema, and extensive asbestosis in 1977 which

²Dr. Donlan opined that decedent's recurrent lung cancer, on top of his underlying medical conditions, contributed to his death. EX 7-20. The death certificate also listed carcinoma of the lung as a significant condition contributing to decedent's death. EX 7-12.

³Moreover, the administrative law judge found that it is unclear from the record whether either COPD or asbestosis pre-dated the other, as Dr. Carpenter's report dated July 1, 1977, and Dr. Moore's report dated September 24, 1979, simultaneously listed both conditions.

contributed to his total disability commencing in 1979.⁴ The record also establishes that decedent was not diagnosed as suffering from lung cancer until July 1999, and that his death was due at least in part to the cancer. EX 1-16/1-17. Thus, the record provides undisputed evidence that decedent's COPD and asbestosis, first diagnosed in 1977, pre-existed the work-related lung cancer, which was not diagnosed until almost 20 years later in 1999. *See Sain*, 162 F.3d 813, 32 BRBS 205(CRT). Contrary to the administrative law judge's conclusion, COPD and asbestosis can constitute pre-existing conditions for purposes of Section 8(f) relief. The fact that decedent's lung cancer may have arisen, in part, from his exposure to the same asbestos that contributed to the COPD and asbestosis, does not establish that this condition is not a "second injury." *Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Patrick*, 15 BRBS at 277. In this regard, the Fourth Circuit stated in *Sain*, that:

In the case of a latent occupational disease . . . , the time of 'injury' has repeatedly been defined as the time at which the claimant becomes aware of his disease and of the relationship between his disease, his employment, and a qualifying disability. *See, e.g., Harris v. Todd Pac. Shipyards Corp.*, 30 BRBS 5 , 9-10 (1996) (*en banc*) (specifically rejecting argument that time of injury in asbestos claim was time at which claimant was exposed to asbestos).

Sain, 162 F.3d at 816, 32 BRBS at 207(CRT).⁵ Thus, decedent's lung cancer, diagnosed in 1999, 20 years after the diagnoses of COPD and asbestosis, constitutes a "second injury." We, therefore, reverse the administrative law judge's finding that decedent's lung cancer was not a "second injury" for purposes of Section 8(f).

⁴Dr. Carpenter diagnosed decedent with disabling pulmonary emphysema and possible asbestos pneumonitis as of July 1, 1977. EX 1-6. Dr. Carpenter reiterated these findings, *i.e.*, decedent suffered from pulmonary emphysema, and added diagnoses of COPD and pulmonary asbestosis in his treatment notes spanning 1979-1981. EX 1-7 – 1-13. Dr. Carpenter opined, on October 1, 1979, that decedent was totally disabled as a result of a combination of his extensive arthritis, his chronic heart and pulmonary conditions. EX 1-7. Dr. Splan similarly opined, in 1983-84, that decedent had COPD and asbestosis. EX 1-14/15.

⁵We note that the Director cites no case law to support his contention that decedent's lung cancer cannot constitute a "second injury" for purposes of Section 8(f).

As the Board stated in its prior decision, the key components for determining employer's entitlement to Section 8(f) relief are: (1) whether decedent's lung cancer constituted a second injury, whether it was work-related, and whether it contributed to decedent's death; and, if so, (2) whether decedent had pre-existing disabilities which combined with his work-related lung cancer to cause or contribute to death. The administrative law judge found that the lung cancer contributed to death. This finding is supported by Dr. Donlan's opinion and the death certificate. See EX 7 at 12, 20; n. 2, *supra*. With regard to the pre-existing permanent partial disability element, the undisputed evidence of record establishes that decedent's COPD and asbestosis constituted "serious, lasting, physical conditions" as they contributed to his inability to work and, thus, are such that a cautious employer would be motivated to discharge the employee because of a greatly increased risk of compensation liability. See, e.g., *Devor v. Dep't of the Army*, 41 BRBS 77 (2007); *Smith v. Gulf Stevedoring Co.*, 22 BRBS 1 (1988). Moreover, as the administrative law judge noted, he found in his initial decision that decedent's "diminished lung capacity due to COPD and asbestosis could reasonably have been a substantially contributing factor in the fatal event." Decision and Order at 10. In this regard, the Final Autopsy Diagnosis written by Dr. O'Connor included, "squamous cell carcinoma of right upper lung lobe," "increased pulmonary asbestos burden," and "pulmonary asbestosis, grade 3B," as significant findings relating to decedent's death. Additionally, pathologist Dr. Maddox opined that based on the findings of an increased pulmonary asbestos burden and parenchymal asbestosis, asbestosis contributed to the development of decedent's lethal primary carcinoma of the lung. EX 8. Moreover, contribution is supported by Dr. Donlan's statement that if decedent "did not have COPD, heart disease, asbestosis, and just had the lung cancer he would not have died in 2001." EX 7 at 20. Thus, decedent's death was not due solely to the lung cancer and was contributed to or hastened by the pre-existing permanent partial disabilities, i.e., his COPD and asbestosis. See *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd on other grounds*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); see also *Sain*, 162 F.3d 813, 32 BRBS 205(CRT). This finding is sufficient to satisfy the contribution standard for purposes of Section 8(f) relief. *Id.*

Therefore, we reverse the administrative law judge's findings that decedent's COPD and asbestosis were not pre-existing permanent partial disabilities and that decedent's work-related lung cancer did not constitute a second injury for purposes of Section 8(f) relief, as those findings are not supported by the undisputed evidence of record and are not in accordance with law. We thus reverse the administrative law judge's denial of Section 8(f) relief, as the uncontradicted evidence establishes that: (1) decedent's death was due at least in part to his work-related lung cancer, which constitutes a second injury; and (2) that decedent's COPD and asbestosis, which pre-existed his work-related lung cancer by approximately 20 years, constituted serious

lasting physical conditions, which, as the administrative law judge found, contributed to decedent's death.⁶

Accordingly, the administrative law judge's Decision and Order on Remand denying Section 8(f) relief is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁶In light of this disposition, we need not address employer's contentions relating to its entitlement to Section 8(f) relief based on decedent's heart disease.