BRB No. 00-0887

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| DIMITRA LOGARA (widow of STAVROS LOGARA) | ) | |
| Claimant-Petitioner | ) | |
| v. | ) | |
| JACKSON ENGINEERING COMPANY | ) | DATE ISSUED: June 4, 2001 |
| and | ) | |
| CIGNA INSURANCE COMPANY | ) | |
| Employer/Carrier-Respondents | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Decision and Order Denying Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Ralph J. Mellusi (Tabak & Mellusi), New York, New York, for claimant.

Keith L. Flicker and Robert N. Dengler (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order Denying Motion for Reconsideration (99-LHC-1627) of Administrative Law Judge Paul H. Teitler 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent, Stavros Logara, a naturalized United States citizen, suffered a work-related back injury on April 21, 1980, and received total disability compensation from April 23 to June 25, 1980. Mr. Logara died on June 25, 1980, as a result of complications from the injury, and was survived by his widow Dimitra Logara (claimant) and two dependent children. Employer accepted claimant's claim for death benefits, and paid appropriate widow's and survivor's benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, with corresponding cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f). A citizen of Greece, claimant returned to Greece with her children in December 1981, and has resided there since that time.

In January 1999, employer notified the district director that it wished to assert its right to have claimant's death benefits commuted to one-half of all future installments of compensation due pursuant to Section 9(g) of the Act, 33 U.S.C. §909(g). The district director calculated claimant's future installments of compensation to total $283,191.03, one-half of which is $141,595.51. Claimant contested the district director's calculation, and asserted that Section 9(g) is unconstitutional.

In his Decision and Order, the administrative law judge rejected the commutation calculations of economist Dr. Andrew Verzilli, as Dr. Verzilli applied a range of estimates of future increases in the National Average Weekly Wage. By contrast, the administrative law judge found that the district director's calculations in commuting claimant's future compensation, which applied a flat five percent discount factor, were reasonable and not an abuse of discretionary function. The administrative law judge further found that Section 9(g) is constitutional. Accordingly, the administrative law judge concluded that claimant is not entitled to an award of compensation exceeding $141,595.51. In a Decision and Order Denying Motion for Reconsideration, the administrative law judge rejected the commutation calculations contained in a supplemental report by Dr. Verzilli, and again found that the district director's calculations were reasonable.

On appeal, claimant contends that Section 9(g) violates the national treatment

provision of the Treaty of Friendship, Commerce and Navigation (FCN Treaty) between the United States and Greece. Claimant further avers that Section 9(g) is unconstitutional; assuming Section 9(g) is constitutional, claimant contends that it was improperly applied to claimant due to the doctrine of laches. Lastly, claimant contends that the commutation method applied by the district director was improper. Employer responds, urging affirmance of the administrative law judge's decisions. Specifically, employer points out that claimant did not allege that Section 9(g) violates the FCN Treaty before the administrative law judge, implying that this issue should not be considered by the Board. Employer further avers that the FCN Treaty does not prohibit the application of Section 9(g), and that Section 9(g) is not inconsistent with any constitutional provision. Claimant has filed a reply brief, arguing that although the issue of whether Section 9(g) violates the FCN Treaty with Greece was not raised before the administrative law judge, the Board should consider this issue as it concerns a question of law.

At the outset, it is noted that claimant did not raise before the administrative law judge the issue of whether Section 9(g) violates a treaty between the United States and Greece. Generally, a party may not raise a new issue on appeal. *See Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27, 32 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). Nonetheless, the issue raised by claimant concerns purely a question of law, and under such circumstances it is appropriate for the Board to address the issue. *See generally Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.,* No. 90-4135 (5th Cir. March 5, 1991); *see also Martinez v. Mathews*, 544 F.2d 1233 (5th Cir. 1976). Section 9(g) of the Act is a commutation provision that affects only death benefits payable to alien non-residents. Section 9(g) provides:

> Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, *and except that the Secretary may, at [her] option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Secretary.*

33 U.S.C. §909(g)(emphasis added); *see also* 20 C.F.R. §702.142.[1] As Section 9(g)

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[1]Section 702.142, 20 C.F.R. §702.142, implements Section 9(g) of the Act. This regulation states:

(a) Pursuant to section 9(g) of the Act, 33 U.S.C. 909(g), compensation paid to aliens not residents, or about to become nonresidents, of the United States or Canada shall be in the same amount as provided for residents except that dependents in any foreign country shall be limited to surviving spouse and child or children, or if there be no surviving spouse or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of 1 year prior to the date of injury, and except that the Director, OWCP, may, at his option, or upon the application of the insurance carrier he shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted

distinguishes between residents of the United States and alien non-residents, claimant asserts that it violates the U.S.-Greece FCN Treaty. Treaties of friendship, commerce and navigation have been made in order to strengthen friendly relations between two countries,

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amount of such future installments of compensation as determined by the Director.

(b) Applications for commutation under this section shall be made in writing to the district director having jurisdiction, and forwarded by the district director to the Director, for final action.

(c) Applications for commutations shall be made effective, if approved by the Director, on the date received by the district director, or on a later date if shown to be appropriate on the application.

(d) Commutations shall not be made with respect to a person journeying abroad for a visit who has previously declared an intention to return and has stated a time for returning, nor shall any commutation be made except upon the basis of a compensation order fixing the right of the beneficiary to compensation.

and provide for the protection of citizens of one country residing in the territory of another. Specifically, Article XI of the U.S.-Greece FCN Treaty provides:

> 1. Nationals of Greece shall be accorded within the territories of the United States of America, and reciprocally nationals of the United States of America shall be accorded within the territories of Greece, national treatment in the application of laws and regulations that establish a pecuniary compensation, or other benefit or service on account of disease, injury or death arising out of and in the course of employment, or due to the nature of employment.
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> 2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of Greece shall be accorded within the territories of the United States of America, and reciprocally nationals of the United States of America shall be accorded within the territories of Greece, national treatment in the application of laws and regulations establishing systems of compulsory insurance, under which benefits are paid without individual test of financial need: (a) against loss of wages or earnings due to old age, unemployment, sickness or disability, or (b) against loss of financial support due to the death of father, husband, or other person on whom such support had depended.

Treaty of Friendship, Commerce, Navigation between the United States and Greece, Aug. 3, 1951 (FCN Treaty), art. XI, 5 U.S.T. 1829, 1853. Article XXIV of the FCN Treaty defines national treatment as that treatment which is "accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party." *Id.*, art. XXIV, 5 U.S.T. at 1907; *see generally Vagenas v. Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir.), *cert. denied*, 510 U.S. 947 (1993).

Under the Supremacy Clause of the United States Constitution, duly-ratified treaties are equal in stature to enacted federal statutes, and are subordinate only to the Constitution.[2] U.S. CONST. art. VI, §2; *see Reid v. Covert*, 354 U.S. 1, 16-17 (1957). Generally, treaties and statutes should, wherever possible, be read to be compatible. *See* David P. Stewart, Address Before the United States Department of Labor Seminar on International Treaties and Constitutional Systems of the United States, Mexico and Canada (Dec. 4, 1997) *in* 22 Md. J. Int'l L. & Trade 221, 228-229 (1998-1999). Where a conflict between a treaty and federal

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[2]Article VI of the Constitution states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ." U.S. CONST. art. VI, §2.

statute is irreconcilable, the dates of enactment of the treaty and statute become dispositive; a subsequently enacted statute will overrule a previous inconsistent treaty provision, and *vice versa*. This is known as the "latter in time" rule. *See Reid*, 354 U.S. at 18.

The question of whether a treaty is binding internationally is separate from the issue of whether the treaty is legally effective in domestic courts. It is possible for the United States to be bound by an international treaty, but the treaty in question may not have any legal effect domestically. *See* Stewart, 22 Md. J. Int'l L. & Trade at 228. Thus, the issue in the instant case is whether the FCN Treaty is "self-executing." A self-executing treaty is defined as a treaty that may be enforced in United States courts without implementing legislation, and conversely, a non-self-executing treaty is one that may not be enforced in the courts without implementing legislation. *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995). In general, treaties of friendship, commerce and navigation have been held to be self-executing treaties, as the texts of these treaties directly affect the rights and liabilities of individuals before the court without contemplation of future acts of Congress. *See, e.g., Asakura v. City of Seattle*, 265 U.S. 332 (1924).[3] As the national treatment provisions contained in Articles XI and XXIV of the FCN Treaty do not contemplate any further action on the part of Congress, it can be safely assumed that the FCN Treaty is considered self-executing.

Thus, the issue is whether Section 9(g) contravenes the provisions of Article XI of the FCN Treaty. The Supreme Court has held that interpretation of a treaty should begin with the text of the treaty itself; if the language is clear, the plain meaning of the text will control. The treaty's text will not control "if application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its

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[3]In the seminal case of *Asakura v. City of Seattle,* the plaintiff, a Japanese national, asserted that a Seattle city ordinance which restricted pawn broker licenses to citizens of the United States violated the treaty of friendship, commerce and navigation between the United States and Japan. Holding that the treaty operated of itself without the aid of any legislation, and was to be applied and given authoritative effect by the courts, the Supreme Court struck down the Seattle ordinance as being inconsistent with the treaty's provisions on national treatment. *Asakura*, 265 U.S. at 341-344.

signatories." *Maximov v. United States*, 373 U.S. 49, 54 (1963); *see also United States v. Stuart*, 489 U.S. 353, 365-366 (1989); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982).

It is clear that Section 9(g) provides for treatment of alien non-residents that is less favorable than treatment provided to residents of the United States, including alien residents; the Secretary is not authorized to commute future payments of death benefits to residents as she can for alien non-residents. The issue is whether the United States, pursuant to the FCN Treaty, has an obligation to provide national treatment to claimant, a Greek national residing in Greece since 1981. Article XI of the FCN Treaty provides that nationals of Greece shall be accorded national treatment "within the territories of the United States," with regard to pecuniary compensation for injury or death arising out of employment. FCN Treaty, art. XI. The plain meaning of the text appears to refer to nationals of Greece residing within the territories of the United States. Since claimant returned to Greece in 1981 and has resided there since that time, it appears that the obligation for national treatment with regard to compensation under the Longshore Act does not apply to claimant.

Claimant relies, however, on *Mizugami v. Sharin West Overseas, Inc.*, 81 N.Y.2d 363 (1993), wherein the New York Court of Appeals held that a non-resident Japanese national was to be treated in the same manner as a United States citizen pursuant to a treaty of friendship, commerce and navigation between the United States and Japan, irrespective of a provision of the New York State workers' compensation law. In *Mizugami*, the mother of an employee who was killed while working for his employer filed a claim for death benefits under the New York State workers' compensation scheme. Under New York law, a surviving parent who is an alien non-resident is required to prove dependency for one year prior to the date of death to qualify for death benefits. *See* N.Y. WORKERS' COMP. LAW §17 (McKinney 1993). The statute applicable to United States citizens requires proof of dependency only as of the date of death. *Id.*, §16. The treaty between the United States and Japan provides that "[n]ationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation, or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment." "National treatment" is defined as "treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . of such Party." *Mizugami*, 81 N.Y.2d at 366. The court held that the term "within the territories of the other Party" modified "application of laws and regulations," not the term "nationals of either Party," such that national treatment must be accorded with respect to the application of all laws and regulations *effective* in the territories of the party required to grant such treatment. Thus, the court held that the treaty accords protection to Japanese nationals who do not reside in the United States. *Id.*; *see also Iannone v. Raddory Constr. Corp.*, 141 N.Y.S.2d 311 (N.Y. App. Div.1955), *aff'd,* 1 N.Y.2d 671 (1956) (same as to treaty between

the United States and Italy, based on language of the treaty). The court arrived at this conclusion as resident aliens in the United States already are guaranteed equal protection by the Constitution, and thus to do so in a treaty would make the protection superfluous. *Mizugami,* 81 N.Y.2d at 368-369. As further support for her contention, claimant points out that the New York State workers' compensation law had a commutation provision for non-resident aliens almost identical to that contained in Section 9(g) of the Act, but this was repealed in 1985 in light of the numerous friendship, commerce and navigation treaties the United States signed with other countries. *See* N.Y. WORKERS' COMP. LAW §17 (McKinney 1993)(commutation provision repealed 1985).

In response, employer asserts that the U.S.-Japan treaty in *Mizugami* is distinguishable from the U.S.-Greece FCN Treaty. Employer remarks that unlike the U.S.-Japan treaty, the FCN Treaty at issue here states that "[n]ationals of Greece shall be accorded within the territories of the United States" national treatment "in the application of" United States workers' compensation laws. Therefore, according to employer, since the term "within the territories of the United States" directly follows the term "nationals of Greece," the latter term modifies "nationals of Greece," not the term "in the application of the laws."

Although both parties make cogent arguments, we find employer's interpretation to better comport with the method of interpreting treaties applied by United States courts, *i.e.,* the plain meaning of the text is controlling. *See Stuart*, 489 U.S. at 365-366. Based on the juxtaposition of the clauses, the plain meaning of Article XI of the FCN Treaty applies to Greek nationals that reside within the United States. The language of the FCN Treaty at issue here thus distinguishes this case from *Mizugami*, in that the phrase "within the territories of the United States" directly follows the term "nationals of Greece." Furthermore, the protection of Greek nationals residing within the United States comports with the objective of friendship, commerce and navigation treaties in general, which is to, *inter alia*, strengthen peace between countries by providing for the protection of citizens of one country while residing in the territory of another. *See Asakura*, 265 U.S. at 341.

Moreover, even if Section 9(g) is incompatible with the FCN Treaty, we hold that it is the controlling provision under the "latter in time" rule. Claimant asserts that since the FCN Treaty came into force in 1954,[4] subsequent to the enactment of Section 9(g) in 1927, the treaty should apply. Employer responds by asserting that since the Longshore Act has been amended subsequent to 1954, most recently in 1984, without altering the language of Section 9(g), the provisions of that subsection should apply. Inasmuch as Congress has amended the Act after the FCN treaty went into effect in 1954 without amending Section 9(g), rules of statutory interpretation require that we give effect to Section 9(g) as written, despite any

[4]While the FCN Treaty was signed in 1951, it was ratified by the Senate and entered into force in 1954.

potential inconsistencies between that subsection and the FCN Treaty. When Congress reenacts a law, it is presumed to be aware of existing law, including treaties. *See Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319, 15 BRBS 62, 77(CRT) (1983); *Sohappy v. Hodel*, 911 F.2d 1312, 1317-19 (9th Cir. 1990). This view is further supported by the fact that another commutation provision, former Section 14(j) of the Act, 33 U.S.C. §914(j)(repealed 1984), which allowed the Secretary of Labor to discharge the liability of an employer for disability compensation by payment of a lump sum equal to the present value of future compensation payments, was repealed by virtue of the 1984 Amendments.[5] The fact that Congress chose not to repeal or amend Section 9(g) in 1984 while eliminating another commutation provision evidences congressional intent for that commutation provision to stand despite existing United States treaty obligations. Accordingly, we hold that Section 9(g) of the Act is not inconsistent with the FCN Treaty.

We next address claimant's contention that Section 9(g) is unconstitutional. Claimant contends that by providing disparate treatment for alien non-residents as opposed to resident aliens and United States citizens, Section 9(g) violates the Due Process clause of the Fifth Amendment of the Constitution, and the Equal Protection clause of the Fourteenth Amendment.[6] In so arguing, claimant relies principally on a Kansas state court decision, *Jurado v. Popejoy Constr. Co.*, 853 P.2d 669 (Kan. 1993), which concerned a Kansas

[5]Former Section 14(j) allowed a claimant to receive benefits as a lump sum instead of in installment payments if the district director, with the Secretary's approval, determined that commutation was in the interest of justice. This subsection was repealed by Section 13(b) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639.

[6]Claimant argues that where the federal government creates a classification that, if it were made by a state, would violate the Fourteenth Amendment's Equal Protection clause, such a classification would violate the Fifth Amendment's Due Process clause. *See* Claimant's Brief at 7.

workers' compensation provision which limited the amount of death benefits alien non-resident survivors could receive to $750 while all other dependents, including alien residents such as the decedent, could receive up to $200,000. The state court struck down the provision, holding that the employee's survivor's rights were derivative of the employee's rights, and therefore, the issue of whether the provision passed constitutional scrutiny involved consideration of the employee's rights. In this regard, the court determined that alienage-based classification was subject to strict scrutiny, and held that the state did not have a compelling interest in providing disparate treatment for employees with non-resident alien dependents. *Id*. at 676-678.

We are not persuaded that the Kansas decision mandates the result advocated by claimant. In contrast to that decision, it is well settled under the Longshore Act that the right to claim death benefits is separate and distinct from the right to claim disability benefits. *See Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 10 BRBS 531 (1st Cir. 1979); *Todd Shipyards Corp. v. Witthuhn*, 596 F.2d 899, 10 BRBS 517 (9th Cir. 1979); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 8 BRBS 464 (3d Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *Close v. Int'l Terminal Operations*, 26 BRBS 21 (1992). The Act sets forth two separate and distinct classes of claimants who may have a right to benefits, *i.e.*, injured employees who seek disability benefits and the spouses and dependents of injured employees who, as a result of the employees' work-related deaths, seek death benefits. *See* 33 U.S.C. §§908, 909 (1994). In interpreting offset rights under Section 33(f) of the Act, 33 U.S.C. §933(f), the Supreme Court held that the right to death benefits does not arise, or vest, prior to the death of the employee. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5 (CRT)(1997). Indeed, two other state courts have expressly rejected the approach taken by the Kansas court in *Jurado*, holding that a survivor's rights to death benefits arises upon the death of the employee, not the injury of the employee, and confers a new and independent right to compensation. *See Jarabe v. Industrial Commission*, 666 N.E.2d 1 (Ill. 1996), *cert. denied*, 519 U.S. 930 (1996)(non-resident alien survivor lacked standing to challenge on constitutional grounds a state provision limiting death benefits to alien non-residents); *Barge-Wagener Constr. Co. v. Morales*, 429 S.E.2d 671 (Ga. 1993), *cert. denied*, 510 U.S. 1003 (1993)(non-resident alien dependents cannot rely on the constitutional status of the decedent). Thus, we reject claimant's contention that her right to claim death benefits under the Act entitles her to rely on decedent's status as a naturalized citizen in order to avoid application of Section 9(g).

As decedent's status as a naturalized United States citizen does not alter claimant's status as an alien non-resident for purposes of her claim for death benefits, it is clear that claimant's challenge to Section 9(g) on constitutional grounds must fail. While there is no question that Section 9(g) creates disparate treatment for alien non-residents, and therefore constitutes a classification based on alienage, this classification does not violate either the

Due Process clause of the Fifth Amendment or the Equal Protection clause of the Fourteenth Amendment. Rather, the Constitution provides for a hierarchy of differing protections to aliens. The seminal case on this issue is *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In that case, a Mexican citizen and resident was arrested in Mexico and turned over to American authorities; thereafter, U.S. Drug Enforcement Administration agents searched his Mexican residence without a warrant and seized certain documents. The Supreme Court held that Fourth Amendment protections did not apply to the search and seizure by United States agents of property located in a foreign country owned by a non-resident alien. While the Court acknowledged that aliens enjoy certain constitutional rights, these rights only apply to aliens when they come within the territory of the United States and develop a substantial connection to this country, and do not apply to aliens outside the territory of the United States. *Id*. at 270-271. The teaching of *Verdugo-Urquidez* is that aliens outside the borders of the United States are subject to their own nations' laws and cannot invoke constitutional protections reserved for citizens and residents of the United States. *See Morales*, 429 S.E.2d at 673.

Similarly, the Supreme Court has recognized that all aliens are not placed in a single homogeneous legal classification and that distinctions within the class of aliens allowing benefits to some aliens but not to others may be permissible. In *Mathews v. Diaz*, 426 U.S. 67 (1976), resident aliens challenged the constitutionality of a Social Security provision which denied certain Medicare insurance coverage to aliens unless they had been admitted for permanent residency and could establish five years of residence. The Court upheld the provision, recognizing that Congress has no constitutional duty to provide all aliens with medical insurance, and it was reasonable for Congress to make an alien's eligibility dependent on both the character or duration of his residence. Thus, the Court held that the residence and duration statutory classification for aliens did not deprive the plaintiffs of liberty or property without due process of law. *Id*. at 82-84. Accordingly, based on *Verdugo-Urquidez* and *Mathews*, we reject claimant's constitutional arguments.[7]

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[7]In *Calloway v. Hanson*, 295 F.Supp.1182 (D. Haw. 1969), the court denied the request of a non-resident alien to enjoin the district director from enforcing a commutation order made pursuant to a provision of the Defense Base Act that is virtually identical to Section 9(g). 42 U.S.C. §1652(b). The court did not discuss the constitutionality of the provision, and therefore this case provides little precedential value.

Arguing in the alternative, claimant contends that even if Section 9(g) is constitutional, employer violated the doctrine of laches by requesting commutation approximately 18 years after the payment of death benefits commenced. We reject this argument. The doctrine of laches is an equitable defense barring litigation of a claim that the plaintiff neglectfully or by omission failed to file in a prompt manner, if the lapse of time resulted in prejudice to the other party.[8] *See generally* *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991). The doctrine of laches clearly does not apply to the instant case as the issue here does not concern the filing of an action. In this regard, neither Section 9(g) nor Section 702.142 contains a provision fixing the time in which employer may request commutation. Moreover, the delay in commutation of claimant's death benefits not only did not cause her prejudice, but actually benefitted her, as she received ongoing periodic benefits for 18 years. An earlier commutation in all likelihood would have resulted in less compensation. Thus, claimant's contention does not have merit.

Having upheld the validity of Section 9(g) as it applies to claimant, we next address her contention that the district director did not properly compute the amount of benefits to which she is entitled under the commutation provision. In commuting claimant's death benefits, the district director applied the following method of calculation:

Claimant/Widow, Age 63

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|---|---|
| Life Expectancy: | 20.4 years |
| Compensation Rate: | $437.00 per week |
| Annual Amount: | $22,724.00 |
| Discount Rate: | 5 percent |
| Discount Factor: | 12.4622 |
| Total Commuted Value: | 12.4622 x $22,724 = $283,191.03 |
| One-Half Commuted Value: | $141,595.51 |

Cl. Ex. C. The five percent discount rate appears to take into account the present value of the money, as a lump sum allows claimant to collect interest on the money over time. At the hearing before the administrative law judge, claimant tendered Dr. Andrew Verzilli as an expert in economics. Dr. Verzilli testified that he estimated that the $22,724.00 would grow at three percent per year, then discounted that increased figure at a five percent interest rate,

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[8]As it pertains to the filing of claims for benefits under the Act, the Board has held that the doctrine of laches does not apply in view of the specific statutes of limitations provided in the Act. *See* 33 U.S.C. §§908(c)(13)(D), 912, 913; *see, e.g., Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989)

the Treasury bill rate, based upon a high liquidity, little risk investment, and calculated a total figure of $386,676.00. Pursuant to Section 9(g), one-half of that amount is $184,330.00, $42,734.49 more than the $141,595.51 tendered by the Secretary of Labor. *See* Tr. at 27-28.

In his initial decision, the administrative law judge found that the district director did not account for adjustments under Section 10(f) of the Act, but rather, simply utilized a five percent discount rate. The administrative law judge determined that this method was more reasonable than Dr. Verzilli's estimation, since Dr. Verzilli conceded that his three percent growth rate was an estimation, while the district director's method of applying a five percent discount rate eliminated the guess work in attempting to determine the likely future increases in the National Average Weekly Wage. Thus, the administrative law judge found that the district director's method of calculation was reasonable and not an abuse of discretionary function, and he accepted the $141,595.51 commutation figure. *See* Decision and Order at 6.

On reconsideration, the administrative law judge considered Dr. Verzilli's revised report, which replaced the three percent estimated growth figure with the average increase in the National Average Weekly Wage from either 1982 to 1998 or 1985 to 1998, which is 3.27 percent or 2.97 percent respectively. This method yields total values of $371,341.00 and $361,849.00, respectively. Nevertheless, the administrative law judge found that Dr. Verzilli's method of calculation was not more reasonable than the district director's method, as he failed to compare the relationship between the average discount rate with the increase in wages to arrive at a true net discount rate. *See* Decision and Order Denying Motion for Reconsideration at 4-5. Thus, the administrative law judge affirmed his initial decision.

On appeal, claimant contends that the administrative law judge erred in adopting the district director's method of calculating the amount of commuted death benefits, as the district director failed to take into account adjustments under Section 10(f) of the Act. Employer responds, arguing that in calculating claimant's commuted amount of death benefits under Section 9(g), the district director exercised a discretionary function vested solely in the Secretary of Labor, and that the administrative law judge properly found that the method of calculation was reasonable.

Both contentions have merit and bring to light tension between Section 9(g) and Section 10(f). Section 9(g) of the Act and Section 702.142 of the regulations provide the Secretary of Labor, through her designee, the district director, a great deal of discretion by stating that future installments of death benefits to non-resident aliens may be commuted "as determined by the Secretary." 33 U.S.C. §909(g); *see also* 20 C.F.R. §702.142(a) ("as determined by the Director"). However, Section 10(f) of the Act states that cost-of-living adjustments "shall be" made for permanent total disability compensation and death benefits. Specifically, Section 10(f) provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter *shall be* increased by the lesser of–
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>> (1) a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or
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>> (2) 5 per centum.

33 U.S.C. §910(f)(1994) (emphasis added). The express language of Section 10(f) mandates

that cost-of-living adjustments be made in order to minimize the effects of inflation on awarded benefits. *See generally Donovan v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 2, 5 (1997). In commuting claimant's benefits, the district director determined, and the administrative law judge agreed, that attempting to ascertain future increases in the National Average Weekly Wage would involve uncertain estimation, and therefore, eliminated such adjustments from the calculation. The problem here is two-fold. First, by allowing the district director to apply a five percent discount rate without accounting for Section 10(f) adjustments, the administrative law judge apparently confused the purpose of each application; in fact, the purpose of each is separate and distinct. Section 10(f) adjustments account for the effect of inflation in order to equalize the purchasing power of a claimant's payments over time. *See* H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698 (describing Section 10(f) as a provision "for upgrading benefits in future years for cases of permanent total disability or death benefits"). By contrast, the five percent discount rate should be applied after the Section 10(f) adjustment is made to decrease the amount of the lump sum in order to account for the present value of the lump sum, taking into account that a claimant will earn interest on the sum over time. Second, by allowing the district director to eliminate Section 10(f) adjustments from the commutation calculation, the administrative law judge in effect read Section 10(f) out of the Act. *See Donovan*, 31 BRBS at 5 (Section 9(e) of the Act cannot be read so as to exclude the application of Section 10(f) to death benefits). While it may be difficult to determine the value of future increases in the National Average Weekly Wage, it is not reasonable to assume that such increases will never occur in the future. Moreover, Section 9(g) and Section 702.142(a) state that prior to commutation the compensation payable to an alien non-resident under Section 9 should be the same as that provided for residents. This language supports the interpretation that Section 10(f) adjustments should be taken into account when calculating commuted death benefits under Section 9(g), as these adjustments apply to awards of death benefits. In sum, Section 9(g) gives a great deal of discretion to the district director, as the Secretary's designee, to determine the amount of a commutation of benefits; however, this discretion does not permit Section 10(f) to be read out of the Act.

As the district director's calculation of claimant's commuted death benefits did not account for future Section 10(f) adjustments, we vacate the administrative law judge's determination that the district director's Section 9(g) commutation calculation is reasonable. The case is remanded to the administrative law judge to direct the district director to account for Section 10(f) adjustments in the calculation of claimant's commuted death benefits, noting that the language of Section 9(g) allows the district director discretion in determining the value of the future Section 10(f) adjustments.

Accordingly, we affirm the application of Section 9(g) to claimant. The calculation of the commuted benefits, however, is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P.  SMITH
Administrative Appeals Judge

NANCY S.  DOLDER
Administrative Appeals Judge