

BRB No. 09-0851

JOHNNY R. WILSON)
(Widow of HERMAN T. WILSON, SR.))
)
Claimant-Petitioner)
)
v.)
)
BETHLEHEM STEEL CORPORATION) DATE ISSUED: 07/29/2010
)
and)
)
ST. PAUL TRAVELERS/ABERCROMBIE,)
SIMMONS & GILLETTE OF FLORIDA,)
INCORPORATED)
)
Employer/Carrier-Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Order Granting Respondents' Motion for Summary Decision and Denying Benefits to Claimant of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Johnny R. Wilson, Houston, Texas, *pro se*.

Bonnie J. Murdoch (Taylor, Day, Currie, Boyd & Johnson), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of legal counsel,¹ appeals the Order Granting Respondents' Motion for Summary Decision and Denying Benefits to Claimant (2009-LHC-00774) of Administrative Law Judge Russell D. Pulver 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). In an appeal by a claimant who is not represented by counsel, we will review the administrative law judge's findings of fact and conclusions of law to ascertain if they are supported by substantial evidence, are rational, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The decedent sustained a work-related neck injury on September 10, 1981. Employer paid decedent temporary total disability benefits from September 25, 1981 to April 30, 1983. The parties subsequently entered into stipulations, which were incorporated in a compensation order issued by the deputy commissioner on February 6, 1985. The parties agreed that decedent was entitled to permanent partial disability benefits commencing May 1, 1983, at the compensation rate of \$170 per week. Employer was awarded Section 8(f) relief, 33 U.S.C. §908(f), after it paid 104 weeks of permanent partial disability benefits.

Decedent died on March 4, 2008, from lymphoma, at the age of 88. In July 2008, claimant filed a claim seeking benefits pursuant to Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3) (1982) (repealed 1984). Specifically, claimant sought to enforce a letter written on October 24, 1983, by employer's workers' compensation administrator, Darrell Heggie, to claimant's then attorney stating that, upon the death of the employee, his widow would receive benefits at a rate of 75 percent of the benefits paid to the employee for permanent partial disability, pursuant to Section 8(d)(3). A copy of the letter was forwarded to decedent by his attorney on October 26, 1983. Thus, upon her husband's death, claimant sought benefits in the amount of \$127.50 per week (75% of \$170). Employer controverted the claim.

Employer filed a motion for summary decision with the administrative law judge. Employer first noted that claimant had not alleged that decedent's injury caused his death, and thus, benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, are precluded. Employer also averred that the Heggie letter merely recited the provisions of Section 8(d)(3) as they existed prior to the 1984 Amendments. As the 1984 Amendments eliminated this method of recovery, employer contended that claimant is not entitled to

¹ The son of claimant and decedent has filed pleadings in support of claimant's appeal.

any additional benefits. Employer also noted that neither the stipulations nor the compensation order provided for any benefits in the event of decedent's death. Claimant responded that the survivor's payment described in the Heggie letter was bargained-for compensation, in return for the stipulated compensation order. She contended that the intended widow's payment was an inducement for decedent's agreement to "settle" his claim.

The administrative law judge granted employer's motion for summary decision, finding that there were no genuine issues of material fact and that employer is entitled to a decision in its favor as a matter of law. The administrative law judge found that the 1984 Amendments eliminated survivors' rights to recover, pursuant to Section 8(d)(3), additional benefits in a case where an employee receiving unscheduled permanent partial disability benefits dies from unrelated causes. The administrative law judge found that Mr. Heggie's recitation in 1983 of the law in existence at that time is without legal consequence due to the enactment of subsequent legislation. He further found that, assuming the parties' stipulated compensation order constituted a settlement agreement, the regulation at 20 C.F.R. §702.241(g) specifically prohibits the settlement or compromise of the right to death benefits prior to the death of the employee. The administrative law judge found that decedent was legally precluded from bargaining for a right that did not exist at that time. He thus denied benefits. Claimant appeals the denial of benefits. Employer responds, urging affirmance.

At the time the Heggie letter was written in 1983, Section 8(d)(3) of the Act stated:

If an employee who was receiving compensation for permanent partial disability pursuant to subdivision (c)(21) of this section dies from causes other than the injury, his survivors shall receive death benefits as provided in section 909(b)-(g) of this title, except that the percentage figures therein shall be applied to the weekly compensation payable to the employee at the time of his death multiplied by 1.5, rather than to his average weekly wage.

33 U.S.C. §908(d)(3)(1982) (repealed 1984).² Thus, in stating in 1983 that decedent's

² In *Casteel v. St. Louis Shipbuilding & Steel Co.*, 6 BRBS 388 (1977), *aff'd*, 583 F.2d 876, 9 BRBS 730 (8th Cir. 1978), the Board held that in calculating benefits due under this provision the compensation rate is first multiplied by 1.5, and then the percentages of Section 9 are to be applied to the product. Section 9(b), 33 U.S.C. §909(b), states that a widow, with no eligible children, is to receive benefits of 50 percent of the decedent's wages. The parties agreed in 1983 that decedent had a loss of wage-earning capacity of \$255 per week. Two-thirds of this amount is \$170 per week.

widow would be entitled to benefits pursuant to this section, Mr. Heggie accurately reflected the law in effect at that time. *See Eckley v. Fibrex & Shipping Co., Inc.*, 21 BRBS 120 (1988). However, in 1984, the death benefits provisions of the Act were amended. After the 1972 Amendments, Section 9 permitted an award of death benefits where the employee was permanently totally disabled due to a work injury at the time of death, regardless of the cause of death. 33 U.S.C. §909 (1982) (amended 1984). The amended Act provides for death benefits only if the injury causes death.³ 33 U.S.C. §909 (2008); *Close v. Int'l Terminal Operations*, 26 BRBS 21 (1992). Consistent with this change, Section 8(d)(3) was repealed and former Section 8(d)(4) was renumbered as Section 8(d)(3). *Abercrumbia v. Chaparral Stevedores*, 22 BRBS 18 (1988), *aff'd on recon.*, 22 BRBS 18.4 (1989).

We affirm the administrative law judge's grant of employer's motion for summary decision. The administrative law judge properly found that there are no genuine issues of material fact requiring a formal hearing and that employer is entitled to a decision in its favor as a matter of law. *See, e.g., Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The 1984 Amendments repealed Section 8(d)(3) upon which claimant relies; the repeal applies to cases such as this one where the death occurred after the effective date of the 1984 Amendments, September 28, 1984. *See* Pub. L. No. 98-426, 98 Stat. 1639, 1655, §28(d); *Abercrumbia*, 22 BRBS at 18.3 n.2. Thus, when an employee who is permanently partially disabled due to an unscheduled work injury, such as the neck injury here, dies from causes unrelated to the injury, the survivors have no right to recover additional benefits after the date of death.⁴ Therefore, we affirm the administrative law judge's finding that claimant is not entitled to recover any additional benefits under the Act.

The administrative law judge also correctly found that Mr. Heggie's letter reciting the law as it existed in 1983 does not entitle claimant to benefits given the repeal of the applicable statutory provision. The administrative law judge rationally found that the letter was not any different than if decedent's lawyer had informed him of

Pursuant to Section 8(d)(3) as it existed prior to September 1984, the widow would have received benefits in the amount of \$170 times 1.5 divided by 50 percent, or \$127.50 per week.

³ Claimant has not asserted her entitlement to death benefits pursuant to Section 9.

⁴ Unpaid scheduled permanent partial disability benefits remain payable to the estate, to eligible survivors, or to the Special Fund, pursuant to Section 8(d) as amended in 1984. *Clemon v. ADDSCO Industries, Inc.*, 28 BRBS 104 (1994); *see* 33 U.S.C. §908(c)(1)-(20), (d).

the then-present state of the law. The Heggie letter stated only that the Act provided for a survivor's recovery of benefits, not that the parties agreed that employer or the Special Fund was bound to pay such benefits in the future. In addition, the administrative law judge properly found that decedent could not have "bargained" for payments to his widow during his lifetime, as such an agreement is not permitted by the Act.

The Board has previously rejected an analogous argument. In *Close*, 26 BRBS 21, the Board rejected a widow's claim to death benefits for a non-work-related death that occurred after the 1984 Amendments. The claimant argued that she was entitled to death benefits under the 1972 Act, which had provided for survivor's benefits where a permanently totally disabled employee died from causes unrelated to the work injury, because the decedent had relied on the more expansive Section 9 provisions of the 1972 Act when he entered into a third-party settlement agreement in 1982. The Board rejected this contention, stating that the right to death benefits had not arisen at the time of the third-party settlement; such a right does not vest until death occurs. *See, e.g., Travelers Insurance Corp. 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). Thus, the Board affirmed the administrative law judge's finding that the decedent had not bargained away any rights to which the widow otherwise would have been entitled. *Close*, 26 BRBS at 26.

Similarly, we affirm the administrative law judge's finding that neither the Heggie letter nor the deputy commissioner's compensation order binds employer or the Special Fund to pay benefits pursuant to Section 8(d). The compensation order issued by the deputy commissioner in 1985 does not indicate that the parties entered into a Section 8(i) settlement, but only that the parties stipulated to decedent's entitlement to permanent partial disability benefits. Prior to September 1984, claims for death benefits could not be settled pursuant to Section 8(i), 33 U. S.C. §908(i).⁵ *S.H. DuPuy v. Director, OWCP*,

⁵ The administrative law judge also relied on 20 C.F.R. §702.241(g), which states that:

An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence; settlement of disability compensation or medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivor's benefits.

This regulation was issued as an interim final rule in January 1985, and the deputy commissioner signed the consent order in February 1985. Pursuant to this regulation, any claim for death benefits cannot be settled prior to the employee's death. *See Cortner v. Chevron Int'l Oil Co., Inc.*, 22 BRBS 218 (1989).

519 F.2d 536, 2 BRBS 115 (7th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976). Assuming, *arguendo*, that the letter or stipulated compensation order reflects a compromised agreement, the unsigned agreement itself, as well as the compensation order, are silent as to the widow's entitlement to benefits. If benefits for the widow had been part of the bargaining process, the administrative law judge properly found that, as the employee's death had not yet occurred, no rights had vested in the widow as of the date the Act was amended in 1984 to eliminate the recovery claimed. *Close*, 26 BRBS at 26.

It is unfortunate that claimant was not aware of the change in law affecting a widow's right to benefits under the circumstances presented here. Nonetheless, given the repeal in 1984 of the section of the Act referenced in the Heggie letter, we must affirm the administrative law judge's denial of benefits as it is in accordance with law.⁶

Accordingly, the administrative law judge's Order Granting Respondents' Motion for Summary Decision and Denying Benefits to Claimant is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁶ In this regard, we note claimant's allegation that she was denied the "right" to view employer's entire file regarding decedent's claim for benefits. Given the statutory elimination of the right to recover under the circumstances presented here, nothing contained in employer's file could legally entitle claimant to benefits.