

BRB No. 91-1035

GRADY E. HAMILTON, SR. )  
(Deceased) )  
BENJAMIN JACK HAMILTON )  
(Executor) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
INGALLS SHIPBUILDING, )  
INCORPORATED )  
 )  
Self-Insured )  
Employer-Respondent ) DATE ISSUED: \_\_\_\_\_  
 )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, )  
UNITED STATES DEPARTMENT )  
OF LABOR )  
 )  
Respondent ) DECISION and ORDER  
 ) on REMAND

On remand from the United States Court of Appeals for the Fifth Circuit.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer.

Mark Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

This case is on remand from the United States Court of Appeals for the Fifth Circuit. The court summarily reversed the Board and remanded the case for reconsideration in light of the decision of the Supreme Court of the United States in *Bath Iron Works Corp. v. Director, OWCP*, U.S. \_\_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993). In the original proceedings before the Board, claimant appealed the Decision and Order and the Decision and Order Denying Claimant's Motion for Reconsideration (89-LHC-2610) of Administrative Law Judge James W. Kerr, Jr. 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).

Decedent was a sheet metal worker at employer's facility from 1942 until 1945 and again from 1951 until his retirement in 1972. On February 13, 1987, he underwent an audiological evaluation which revealed a 43.8 percent binaural impairment. Cl. Ex. 2. Based on those results, on February 27, 1987, he filed a claim for disability benefits under the Act. Decedent underwent a second evaluation on July 9, 1987, the results of which indicated a 47 percent binaural impairment. Cl. Ex. 10. Due to causes unrelated to his hearing loss, decedent died on October 26, 1989, prior to the adjudication of this claim. Thereafter, decedent's son, as executor of the estate, moved to be substituted as claimant herein.<sup>1</sup> Cl. Ex. 22.

A hearing was held on July 26, 1990, wherein claimant and employer disputed the nature and extent of decedent's disability and entitlement to benefits, as well as the entitlement to a Section 14(e), 33 U.S.C. §914(e), penalty and an attorney's fee. Decision and Order at 1-2. Claimant and employer stipulated, *inter alia*, that: the date of injury is February 13, 1987; decedent was exposed to noise which could have caused a work-related hearing loss; decedent was retired at the time of his injury; the applicable average weekly wage is \$302.66; and employer has not paid any compensation but has accepted liability for medical benefits. Decision and Order at 2. Based on decedent's status as a retiree, the administrative law judge averaged the results of the two audiograms, converted decedent's 45.4 percent binaural impairment to a 16 percent impairment of the whole person, and found that employer is liable for permanent partial disability compensation from February 13, 1987 to the October 26, 1989 date of death. 33 U.S.C. §908(c)(23) (1988); Decision and Order at 3. He also found employer liable for a Section 14(e) penalty and interest. However, as decedent left no statutory survivors, and an award for disability was not made prior to decedent's death, the administrative law judge concluded that decedent's estate is not entitled to benefits; therefore, he ordered employer to pay the accrued benefits to the Special Fund pursuant to Section 8(d)(3) of the Act, 33 U.S.C. §908(d)(3) (1988). Decision and Order at 3-5. The administrative law judge also denied claimant's counsel an attorney's fee and claimant's motion for reconsideration. Decision and Order at 4; Order at 1.

Thereafter, claimant appealed the administrative law judge's decision concerning the denial of benefits to the estate and denial of an attorney's fee to claimant's counsel. The Director, Office of Workers' Compensation Programs (the Director), responded to both arguments, urging affirmance of

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<sup>1</sup>Decedent was a widower with no minor children as of the date of his death. Cl. Ex. 22.

the former decision and reversal of the latter. Employer urged the Board to affirm the award to the Special Fund and did not address the denial of the attorney's fee.

After analyzing the applicability of Section 8(d), 33 U.S.C. §908(d) (1988), to benefits awarded under Section 8(c)(23), the Board reversed the award of accrued benefits to the Special Fund and awarded them to decedent's estate. *Hamilton v. Ingalls Shipbuilding, Inc.*, 26 BRBS 114 (1992), *rev'd mem. sub nom. Director, OWCP v. Ingalls Shipbuilding, Inc. (Hamilton)*, No. 93-4054 (5th Cir. 1993). The Board concluded that permanent partial disability benefits awarded under Section 8(c)(23), like benefits awarded pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), are excluded by the provisions of Section 8(d)(3) because they are unscheduled benefits which abate upon the death of the recipient. *Hamilton*, 26 BRBS at 122. Further, the Board reversed the administrative law judge's denial of an attorney's fee and remanded the case for him to consider the fee petition and any objections. *Id.* The Director appealed the case to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit granted the Director's petition for summary reversal and remanded the case to the Board for reconsideration in light of the Supreme Court's holding in *Bath Iron Works Corp. v. Director, OWCP*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993).

Initially, we agree with the Director that, in light of *Bath Iron Works*, compensation for decedent's hearing loss must be calculated pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13) (1988). We therefore vacate the administrative law judge's award of benefits under Section 8(c)(23) and, as neither the administrative law judge's finding that decedent sustained a 45.4 percent binaural impairment nor his acceptance of the stipulated average weekly wage of \$302.66 is challenged on appeal, we modify the award to reflect employer's liability for 90.8 weeks (45.4 percent of 200 weeks) of permanent partial disability benefits, based upon the stipulated average weekly wage, pursuant to Section 8(c)(13) of the Act. *Bath Iron Works*, \_\_\_ U.S. at \_\_\_, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Because our analysis of the proper recipient of the administrative law judge's award was predicated on the application of Section 8(c)(23), we must address the Section 8(d) issues raised by claimant. Claimant contends the administrative law judge erred in applying Section 8(d)(3) to this case and in awarding benefits to the Special Fund instead of to decedent's estate, as all benefits accrued prior to decedent's death. Employer and the Director disagree with claimant's position, and they contend the plain language of Section 8(d)(3) compels its application in this case. Section 8(d) of the Act provides for the disbursement of a deceased employee's scheduled disability benefits in the event he dies prior to the payment of benefits for reasons unassociated with his work-related injury. If the employee dies leaving statutory survivors, as enumerated in Section 8(d)(1), 33 U.S.C. §908(d)(1), his unpaid scheduled benefits are distributed accordingly; however, if he dies without statutory survivors, his benefits are paid to the Special Fund pursuant to Section 8(d)(3). The Board has recently interpreted Section 8(d) and held that an employee has a vested interest in benefits which accrue during his lifetime and, after he dies, his estate is entitled to the accrued benefits, regardless of when an award is entered. *Clemon v. ADDSCO Industries*, \_\_\_ BRBS \_\_\_, BRB No. 91-1801 (April 19, 1994); *Wood v. Ingalls Shipbuilding, Inc.*, \_\_\_ BRBS \_\_\_, BRB No. 92-2532

(March 18, 1994). *See generally Alabama Dry Dock & Shipbuilding Corp. v. Director, OWCP*, 804 F.2d 1558, 19 BRBS 61 (CRT) (11th Cir. 1986); *Turner v. Christian Heurich Brewing Co.*, 169 F.2d 681 (D.C. Cir. 1948); *Wilson v. Vecco Concrete Construction Co.*, 16 BRBS 22 (1983). In accordance with this holding, the Board additionally held that the term "unpaid" in Section 8(d) means "unaccrued," and that, upon the death of an employee, his unaccrued scheduled permanent partial disability benefits go either to his statutory survivors, determined on the date of his death, or to the Special Fund upon his death without survivors.<sup>2</sup> *Clemon*, slip op. at 8-10; *Wood*, slip op. at 9-11.

In the instant case, because decedent retired in 1972, it is uncontroverted that the entire 90.8 weeks of benefits due decedent for his hearing loss claim accrued prior to his death in 1989. 33 U.S.C. §908(c)(13) (1988); *Bath Iron Works*, \_\_\_ U.S. at \_\_\_, 113 S.Ct. at 699-700, 26 BRBS at 154 (CRT); *Moore*, 27 BRBS at 79. Consequently, for the reasons set forth in *Clemon* and *Wood*, we reverse the administrative law judge's award of the accrued benefits to the Special Fund, and we modify the award to reflect that decedent's estate is entitled to the accrued scheduled permanent partial disability benefits. *Clemon*, slip op. at 8; *Wood*, slip op. at 9.

Claimant next contends the administrative law judge erred in denying counsel an attorney's fee. Because claimant's counsel has successfully prosecuted this case, we reaffirm the Board's conclusion that counsel is entitled to an attorney's fee payable by employer. *See* 33 U.S.C. §928(a); *Hamilton*, 26 BRBS at 122; *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992); *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990). Therefore, for the reasons set forth in *Hamilton*, 26 BRBS at 122, we reverse the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee and remand the case for consideration of counsel's fee petition.

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<sup>2</sup>The Board specifically reserved this question in its first decision in *Hamilton*. *See Hamilton*, 26 BRBS at 121 n.4.

Accordingly, the administrative law judge's Decision and Order and Order Denying Claimant's Motion for Reconsideration are reversed insofar as they award benefits to the Special Fund, and the award is modified to reflect employer's liability for benefits pursuant to Section 8(c)(13), payable to decedent's estate. Further, the administrative law judge's denial of an attorney's fee is reversed, and the case is remanded for consideration of counsel's fee petition and any objections thereto. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge