

DANIEL A. KROHN)	
(Executor of the estate of)	
LLOYD A. KROHN))	
)	
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

Appeal of the Decision and Order Awarding Benefits of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

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

Mark A. Reinhalter (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.

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order Awarding Benefits (89-LHC-2149) of Administrative Law Judge A.A. Simpson, Jr., 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).¹ We must affirm the administrative law judge's findings of fact and conclusions of law if they

¹Claimant, decedent's adult son, is the sole beneficiary and executor of decedent's estate. Cl. Ex. 21.

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).

During the course of his employment with employer, decedent was exposed to workplace noise. On November 17, 1986, he sought permission from employer to undergo an audiological evaluation, which he underwent on December 11, 1986. The results of the evaluation revealed a 7.81 percent binaural impairment. Cl. Exs. 1-2. On March 27, 1987, simultaneous with his claim for compensation, decedent sent employer a copy of Dr. Stanfield's March 9, 1987 report of the December 1986 evaluation. Cl. Exs. 3-4. On April 30, 1987, decedent requested reimbursement for the cost of the audiometric evaluation. On June 6, 1987, prior to the adjudication of his claim, decedent died from cardiovascular disease. Cl. Exs. 8, 19.

At the formal hearing, the parties stipulated, *inter alia*, that: the date of injury is December 11, 1986; the applicable average weekly wage is \$455.15; decedent sustained a 7.81 percent binaural impairment; and employer had not paid medical expenses or disability benefits as of the date of the hearing. Tr. at 3. The administrative law judge accepted the stipulations and found that had decedent lived he would have been entitled to 15.62 weeks of compensation pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13) (1988); however, based on his finding that Section 8(d)(3), 33 U.S.C. §908(d)(3) (1988), applies to this case, the administrative law judge ordered employer to pay the compensation owed to the Special Fund. Decision and Order at 1-3. Additionally, the administrative law judge concluded that, as the initial reporting requirements of Section 7(d)(2), 33 U.S.C. §907(d)(2) (1988), were not satisfied, decedent's estate is not entitled to reimbursement for the cost of the 1986 audiometric evaluation. After concluding there was no successful prosecution of the claim, the administrative law judge determined that claimant's counsel is not entitled to an attorney's fee pursuant to Section 28 of the Act, 33 U.S.C. §928. Decision and Order at 4. Claimant appeals the award of benefits to the Special Fund, the denial of medical expenses, and the denial of an attorney's fee. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the award to the Special Fund and reversal of the denial of an attorney's fee. Employer has not responded to this appeal.

Claimant first contends the administrative law judge erred in awarding decedent's benefits to the Special Fund. In response, the Director argues that, as decedent died without statutory survivors,² the plain language of Section 8(d)(3) mandates payment of the award to the Special Fund. 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*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994). See generally *Alabama Dry Dock & Shipbuilding Corp.*, 804 F.2d 1558, 19

²Decedent was divorced and had no minor children as of the date of his death. Emp. Ex. 4 at 7-8.

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). 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. *Clemon*, 28 BRBS at 112-113; *Wood*, 28 BRBS 36-38.

In the instant case, because decedent became aware of his injury on December 11, 1986, and died on June 6, 1987, it is uncontroverted that the entire 15.62 weeks of benefits due decedent for his hearing loss claim accrued prior to his death. 33 U.S.C. §908(c)(13) (1988); *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). 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 decedent's estate's entitlement to the accrued scheduled permanent partial disability benefits. *Clemon*, 28 BRBS at 112; *Wood*, 28 BRBS at 36.

Claimant next contends the administrative law judge erred in failing to order employer to pay for the cost of decedent's 1986 audiometric evaluation. Specifically, claimant argues that the failure to comply with the initial reporting requirements of Section 7(d)(2) should be excused in the interests of justice because decedent substantially complied with the requirements, employer was not prejudiced by the delay, and the treatment was necessary. Section 7 of the Act generally describes an employer's duty to provide medical services and to pay for costs necessitated by its employees' work-related injuries, its rights regarding control of those services, and the Secretary's duty to oversee them. 33 U.S.C. §907. Section 7(d) of the Act identifies the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant. 33 U.S.C. §907(d). Section 7(d)(2) of the Act states:

No claim for medical or surgical treatment shall be valid and enforceable against such employer unless, within ten days following the first treatment, the physician giving such treatment furnishes to the employer and the deputy commissioner a report of such injury or treatment, on a form prescribed by the Secretary. The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

33 U.S.C. §907(d)(2) (1988). Thus, under Section 7(d)(2), an employer is not liable for medical expenses unless, within 10 days following the first treatment, the physician rendering such treatment provides the employer with a report of that treatment. Further, in the interest of justice, the Secretary may excuse the failure to comply with the provisions of this section. 33 U.S.C. §907(d)(2) (1988); *see generally Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 826 (1986); *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), *aff'd in pertinent part*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991). The Board has recently adopted the Director's interpretation that, under Section 7(d)(2) and its

implementing regulation, Section 702.422(b), 20 C.F.R. §702.422(b)(1994),³ the Secretary's authority to determine whether "the interest of justice" warrants excusing the failure to comply with the provisions of Section 7(d)(2) is delegated solely to the Director and her delegates, the district directors. *Toyer v. Bethlehem Steel Corp.*, ___ BRBS ___, BRB No. 90-989 (Nov. 14, 1994) (McGranery, J., dissenting); *see also* 33 U.S.C. §939(a); 20 C.F.R. §701.201. Therefore, the Board held, in deference to the Director's position, that the district director, and not the administrative law judge, has the authority to determine whether non-compliance with Section 7(d)(2) should be excused. *Toyer*, slip op. at 6.

In this case, decedent requested authorization to undergo an audiological evaluation on November 17, 1986, underwent the evaluation on December 11, 1986, sent employer a copy of the medical report on March 27, 1987, and requested reimbursement of the costs on April 30, 1987. The administrative law judge found that the record is silent as to whether the reporting requirements of Section 7(d)(2) had been met, although he noted that the March 1987 report constitutes the only evidence on this matter. He then concluded that decedent failed to satisfy the Section 7(d)(2) requirements and that claimant established no good cause for such failure. Consequently, he determined that the issue of whether employer refused decedent treatment following the request for the evaluation in this case is moot.⁴ Decision and Order at 4.

The burden of compliance with the requirements of Section 7(d) is on the employee. *See Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). Despite claimant's acknowledgment of the apparent three-month delay in filing the report with employer, he contends the administrative law judge should have excused decedent's failure to file a timely report in the interest of justice. We conclude, consistent with the Board's holding in *Toyer*, that the case must be remanded to the district director for consideration of the matter, as the authority to excuse untimely filing is a discretionary decision which rests with the district director and there is no evidence that the district director considered this issue. *Toyer*, slip op. at 6. Thus, we vacate the

³Section 702.422(b) provides:

For good cause shown, the *Director* may excuse the failure to comply with the reporting requirements of the Act and further, may make an award for the reasonable value of such medical care.

20 C.F.R. §702.422(b) (1994) (emphasis added).

⁴Section 7(d) also requires a claimant to request his employer's authorization for medical services performed by any physician, including the claimant's initial choice. 33 U.S.C. §907(d)(1); *Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299, 301 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). Where a claimant requests but is denied authorization, he need no longer seek it; however, he must establish the need for the treatment in order to receive it at his employer's expense. *Maguire*, 25 BRBS at 301; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

administrative law judge's denial of medical expenses and remand the case to the district director for a decision as to whether the delayed reporting should be excused under the terms of Section 7(d)(2) of the Act and Section 702.422(b) of the regulations.⁵

Finally, claimant contends the administrative law judge erred in denying counsel an attorney's fee. Because claimant's counsel successfully prosecuted this case by establishing employer's liability for decedent's benefits, he is entitled to an attorney's fee payable by employer. See 33 U.S.C. §928(a); *Kinnes v. General Dynamics Corp.*, 25 BRBS 311 (1992); *Kaczmarek v. I.T.O. Corp. of Baltimore, Inc.*, 23 BRBS 376 (1990). Therefore, we reverse the administrative law judge's finding that claimant's counsel is not entitled to an attorney's fee, and we remand the case to the administrative law judge for consideration of counsel's fee petition. See, e.g., *Hamilton v. Ingalls Shipbuilding, Inc.*, 28 BRBS 125, 128 (1994) (Decision on Remand).

Accordingly, the administrative law judge's award of benefits to the Special Fund, his denial of medical expenses, and his denial of an attorney's fee are reversed. The award of benefits is modified to reflect that benefits are payable to decedent's estate. The case is remanded to the district director for consideration of whether the delay in filing an initial medical report should be excused. Moreover, the case is remanded to the administrative law judge for consideration of the fee petition and any objections thereto. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

⁵In *Toyer*, the Board noted the potential difficulty of granting this power to the district director only, *i.e.*, the bifurcation of the medical benefits issue. See *Toyer*, slip op. at 7. In the present case, claimant concedes that the report was not filed in a timely manner. If the district director finds that the delay is not excused, then the issue is resolved, subject to an appeal to the Board, and employer is not liable for reimbursement of the cost of the initial audiogram. If, however, the district director excuses the delayed filing, then an administrative law judge must determine whether employer refused treatment and whether decedent complied with Section 7(d)(1). See 33 U.S.C. §907(d)(1); n.4, *supra*.

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

Although I concur with my colleagues' decisions to reverse the award of benefits to the Special Fund and the denial of an attorney's fee, and to modify the administrative law judge's decision to award decedent's accrued hearing loss benefits to decedent's estate, as well as to remand the case to the administrative law judge for further consideration of the fee petition, I respectfully dissent from their decision to remand the case to the district director for a decision as to whether decedent's estate is entitled to reimbursement for the cost of decedent's 1986 audiometric evaluation. I would vacate that portion of the administrative law judge's Decision and Order and remand the case for him to consider fully and explain whether the failure to comply with the requirements of Section 7(d)(2) should be excused.

As I discussed fully in my dissenting opinion in *Toyer v. Bethlehem Steel Corp.*, ___ BRBS ___, BRB No. 90-989 (Nov. 14, 1994) (McGranery, J., dissenting), the parties have a right to a hearing before an administrative law judge on a contested issue arising under Section 7(d)(2). This is true for several reasons: first, because the question affects substantial rights, *see* 33 U.S.C. §919(c); second, because only an administrative law judge has authority under the Act to make factual findings, *see Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 179, 27 BRBS 116, 121 (CRT) (4th Cir. 1993), *cert. granted*, 63 U.S.L.W. 3255 (U.S. Sept. 23, 1994) (No. 93-1783); and finally, because only an administrative law judge can create a record in accordance with the Administrative Procedure Act, 5 U.S.C. §554, and it is the record which is the subject of review by the Benefits Review Board, 33 U.S.C. §921(b)(3). *See Pearce v. Director, OWCP*, 647 F.2d 716, 13 BRBS 241 (7th Cir. 1981) (the Benefits Review Board has no authority under the Act to review decisions of deputy commissioners, now called district directors), *see also Lukman v. Director, OWCP*, 896 F.2d 1248, 13 BLR 2-232 (10th Cir. 1990); *Pyro Mining Co. v. Slaton*, 879 F.2d 187, 12 BLR 2-328 (6th Cir. 1989).

Although the majority asserts that on remand the issue to be determined is whether the failure to file timely is in the *interest of justice*, the majority does not make clear the nature of the administrative law judge's error. The administrative law judge determined that the delay would not be excused because claimant failed to show good cause for his lateness. The former standard is derived from the statute, Section 7(d)(2),⁶ the latter from the statute's implementing regulation, 20 C.F.R. §702.422.⁷ Although Section 7(d)(2) provides that an employer is not required to reimburse

⁶33 U.S.C. §907(d)(2) provides in relevant part:

The Secretary may excuse the failure to furnish such report within the ten-day period whenever he finds it to be in the interest of justice to do so.

⁷20 C.F.R. §702.422(b) provides:

For good cause shown, the Director may excuse the failure to comply with the reporting requirements of the Act and further, may make an award for the reasonable value of

an employee for medical expenses unless, within 10 days following the first treatment, the physician giving such treatment provides the employer with a report of the treatment, that Section also explicitly authorizes the Secretary to excuse the failure to furnish such report within the ten-day period "whenever he finds it to be in the interest of justice to do so." In contrast, the implementing regulation for Section 7(d)(2), 20 C.F.R. §702.422, authorizes the Director to excuse late filing, where "good cause [has been] shown."

In view of claimant's failure to attempt to justify decedent's late reporting, it would appear that the administrative law judge was correct in finding no good cause shown. But that does not end the inquiry because the statute's mandate, which must be obeyed, decrees a determination of whether the late reporting should be excused in the interest in justice. 33 U.S.C. §907(d)(2) (1988); see *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT) (5th Cir. 1986), cert. denied, 479 U.S. 826 (1986); see also *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), aff'd in part and rev'd in part sub nom. *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13 (CRT) (9th Cir. 1991). In *Roger's Terminal*, the Fifth Circuit noted that an administrative law judge may excuse late reporting for good cause shown, but went on to apply the statutory standard, "in the interest of justice." Because the record in *Roger's Terminal* established that claimant had substantially complied with the regulations, that employer had actual knowledge of the injury and treatment, and that employer was not prejudiced by the minimal delay involved in the case, the court held that the delay must be excused. The limitations of an administrative law judge's authority in acting under Section 7(d)(2) were also demonstrated in *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1993). The United States Court of Appeals for the District of Columbia Circuit held in *Shahady* that the administrative law judge had abused his discretion in refusing to excuse the report-filing lapse where medical services were otherwise reimbursable due to the employer's refusal to provide necessary further treatment. Here again, the court was applying the statutory, not the regulatory, standard.

In the case at bar, claimant identifies several factors which would militate in favor of excusing his late filing "in the interest of justice." Specifically, claimant contends that decedent requested authorization but received no response, and he substantially complied with the Act so that the medical expenses are "otherwise reimbursable." These actions, according to claimant, imparted actual knowledge of the treatment to employer. Moreover, claimant avers that employer suffered no prejudice from the time lapse between the evaluation and receipt of the report, as decedent could not file a claim until the report indicating a hearing impairment had been issued. In light of the courts' decisions in *Roger's Terminal* and *Shahady*, there appears to be some merit to claimant's argument. Accordingly, I would remand the case to the administrative law judge to discuss all of the relevant facts and to determine whether claimant's late filing should be excused in the interest of justice. 33 U.S.C. §907(d)(2).

such medical care.

REGINA C. McGRANERY
Administrative Appeals Judge