

RHETA DEMARTINO)	
(Widow of LOUIS J. DEMARTINO))	
)	
Claimant)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: 03/27/2006
)	
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 Denying Special Fund Relief and the Order Granting Reconsideration and Affirming Denial of Special Fund Relief of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (Murphy and Beane), New London, Connecticut, for self-insured employer.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Special Fund Relief and the Order Granting Reconsideration and Affirming Denial of Special Fund Relief (2002-LHC-319, 320) of Administrative Law Judge Colleen A. Geraghty 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).

This case is before the Board for the second time. To recapitulate, decedent was exposed to asbestos during his employment with employer. He left employer's shipyard in 1990, worked elsewhere for employer, and thereafter stopped working on January 24, 1994. Decedent died on February 3, 1996. The cause of his death was listed as bilateral pneumonia due to or as a consequence of "end stage asbestosis." CX 1. The parties agreed that employer is liable for permanent total disability compensation from the decedent's last day of work through the date of his death, and for death benefits to claimant thereafter.

In his Decision and Order, Administrative Law Judge DiNardi awarded decedent and claimant the benefits to which the parties had agreed. Citing to the parties' joint statement of stipulations, which did not address employer's request for Section 8(f) relief, 33 U.S.C. §908(f), the administrative law judge found that that issue had been withdrawn by employer and, therefore, he did not consider it. Employer filed a timely motion for reconsideration, requesting that the administrative law judge reconsider his finding that employer withdrew its claim for Section 8(f) relief. The administrative law judge denied employer's motion. Employer appealed, challenging the administrative law judge's finding that it withdrew its claim for Section 8(f) relief.

The Board held that the administrative law judge erred in finding that employer had withdrawn its request for Section 8(f) relief. *DeMartino v. Electric Boat Corp.*, BRB No. 03-0179 (Oct. 30, 2003) (unpublished). Employer had not formally requested that its petition for Section 8(f) relief be withdrawn. The Board held that the absence of any reference to the Section 8(f) issue in the parties' stipulations cannot support a finding that employer wished to withdraw that issue from consideration and that the fact that no brief addressing this issue was filed by employer does not equate to its withdrawal. The Board stated that employer informed the administrative law judge that it was seeking relief pursuant to Section 8(f), it argued the issue at the formal hearing, it submitted evidence in support of its assertions, and it forwarded its exhibits to the Director, Office of Workers' Compensation Programs (the Director), pursuant to the administrative law judge's instructions. Thus, the Board vacated the administrative law judge's dismissal of employer's Section 8(f) claim and remanded the case for the administrative law judge to

consider on the merits employer's claim for Section 8(f) relief.

On remand, the case was reassigned to Administrative Law Judge Geraghty due to the retirement of Judge DiNardi. In her decision, the administrative law judge rejected the Director's contention that employer failed to submit a timely and fully documented Section 8(f) application. The administrative law judge found that the Director did not timely raise this defense to the liability of the Special Fund. *See* 33 U.S.C. §908(f)(3). The administrative law judge, however, rejected employer's application on its merits. The administrative law judge found that employer established that decedent had pre-existing chronic obstructive pulmonary disease (COPD) due to smoking, and work-related asbestosis, which was first diagnosed in 1970. The administrative law judge found that decedent's COPD was manifest to employer at the time decedent developed debilitating asbestosis, but that employer failed to show that COPD contributed to decedent's death. Thus, she rejected this claim for Section 8(f) relief on the award of death benefits. Decision and Order at 10-12. The administrative law judge also rejected employer's claim for Section 8(f) relief on the disability and death claims based on decedent's continued exposure to asbestos at work after 1970, which employer asserted was a second work injury that aggravated decedent's pre-1970 condition resulting in increased disability and contributing to death. *Id.* at 7-9.

On reconsideration, the administrative law judge rejected employer's contention that Judge DiNardi's finding that decedent's death was due to a combination of his pre-existing COPD and work-related asbestosis required her to find employer entitled to Section 8(f) relief for claimant's death benefits. The administrative law judge found that Judge DiNardi made this finding in the context of determining the cause of death. The administrative law judge found that, for purposes of establishing entitlement to Section 8(f) relief, employer also must show that decedent's asbestosis alone would not have caused death, and that employer failed to submit evidence addressing this issue. The administrative law judge also reviewed the evidence and rejected employer's contention that she had erred in finding that decedent was not exposed to asbestos in the course of his employment with employer after 1970. Order on Reconsideration at 5-7. Finally, the administrative law judge rejected employer's argument that she reopen the case and issue an order joining to the case the successors to Insurance Company of North America, which insured employer prior to its becoming self-insured in 1974. The administrative law judge stated that employer may file for modification if it believes it is not the responsible employer/carrier. *See* 33 U.S.C. §922.

On appeal, employer argues the administrative law judge erred by finding that decedent was not exposed to asbestos at work after 1970 and by not evaluating its application for Section 8(f) relief on this basis. The Director responds, urging affirmance of the denial of Section 8(f) relief.

Section 8(f) shifts liability to pay compensation for permanent total disability and/or death from the employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §944, after 104 weeks, if the employer establishes the following three prerequisites: 1) the injured employee had a pre-existing permanent partial disability; 2) the pre-existing disability was manifest to employer; and 3) the permanent total disability or death is not due solely to the subsequent work-related injury. See 33 U.S.C. §908(f)(1); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2^d Cir. 1992); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2^d Cir. 1992); *Dominey v. Arco Oil & Gas Co.*, 30 BRBS 134 (1996).

Employer contends that decedent's deposition testimony in a third-party lawsuit against asbestos manufacturing companies and Dr. Godor's October 1987 medical report are substantial evidence of decedent's exposure to asbestos at employer's facility after 1970. Employer argues that this alleged exposure contributed to decedent's permanent total disability and death. A work-related aggravation of a pre-existing disability can constitute a second injury for purposes of Section 8(f). *Director, OWCP v. General Dynamics Corp.*, 705 F.2d 562, 15 BRBS 130(CRT) (2^d Cir. 1983). If, however, a decedent's disability and death are due to the natural progression of the initial work injury, employer is not entitled to Section 8(f) relief. *Director, OWCP v. Cooper Associates*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979). Thus, employer must show that decedent had asbestos exposure after 1970 that aggravated his pre-existing asbestosis and/or COPD. See *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988); *Director, OWCP v. Potomac Electric Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979).

In her decision, the administrative law judge found that decedent was exposed to asbestos from 1957 to 1959 as an outside machinist. He worked in the Production Planning Department beginning in November 1959. Decedent testified on deposition that he was exposed to asbestos from 1961 to 1965 because the department shared the office building with ladders, who worked with asbestos material. CX 5 at 60-65.¹ Decedent's department relocated to a former elementary school from 1965 to 1970, where there was no asbestos exposure. *Id.* at 65-66. Decedent stated he may also have been exposed to asbestos from 1965 to 1970 during the five to ten percent of his work day spent on board ships under construction. *Id.* at 66-67. Decedent stated that he was not exposed to asbestos at his various office locations after 1970. *Id.* at 67-72. Decedent assumed additional responsibility for material control from 1974 to 1977; he stated these duties may have exposed him to asbestos when he traveled to employer's warehouses where asbestos materials were stored. *Id.* at 69-70. The administrative law judge rejected this

¹ This deposition was taken on April 5, 1990, in connection with decedent's civil action against Owens-Corning Fiberglas Corporation *et al.* CX 5.

statement as evidence of possible asbestos exposure because it is lacking in detail as to where asbestos material was stored, the conditions under which the material was stored, the air quality at these warehouses, and the frequency of decedent's visits. Decision and Order at 9. The administrative law judge found no evidence of asbestos exposure after 1977. The administrative law judge rejected Dr. Godar's opinion that decedent's asbestos exposure after 1970 contributed to his disability due to asbestosis and COPD, *see* EX 5 at 6, finding that decedent's deposition testimony does not support Dr. Godar's assumption that decedent was exposed to asbestos after 1970.

On reconsideration, the administrative law judge addressed decedent's deposition testimony that his job entailed working five to ten percent of the time on board ships and submarines from 1961 to 1990. CX 5 at 58, 66. The administrative law judge found that this testimony related solely to the period from 1965 to 1970. Order on Reconsideration at 7; *see* CX 5 at 66-67. The administrative law judge relied on decedent's testimony that he did not think employer used asbestos from 1979 to 1981 when it constructed Trident submarines to find that employer did not use asbestos in ship construction after 1979. *Id.*; *see* CX 5 at 71. The administrative law judge also rejected employer's contention that it is "common knowledge" that employer used asbestos in ship construction from 1970 to 1979 on the basis that she is precluded from considering facts not offered into evidence. The administrative law judge concluded that, in the absence of specific evidence of asbestos exposure from 1970 to 1979, decedent's general statement that he was exposed to asbestos on his tours through ships is insufficient to establish that decedent was exposed to asbestos during the five to ten percent of the time he was on board ships from 1970 to 1979. Order on Reconsideration at 7. The administrative law judge also found that employer failed to establish that decedent was exposed to asbestos when he visited employer's warehouses where asbestos was stored. *Id.* at 6. Accordingly, the administrative law judge again concluded that employer failed to establish that decedent was exposed to asbestos after 1970 and that decedent sustained a "second injury" for purposes of Section 8(f) relief.

The Board is not empowered to reweigh the evidence, *see generally Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2^d Cir. 1999); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993), and the administrative law judge's findings of fact must be affirmed if they are rational and supported by substantial evidence. *See Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997). In this case, the administrative law judge rationally concluded that, in the absence of any direct testimony or other such evidence of asbestos exposure at employer's facility from 1970 to 1977, employer failed to establish that decedent was exposed to asbestos after 1970. The administrative law judge's finding that decedent did not explicitly testify he was exposed to asbestos after 1970 is supported by the record. *See* CX 5 at 65-67. The administrative law judge rationally rejected Dr. Godor's opinion as to the

contribution of decedent's asbestos exposure after 1970 to his overall condition, since it rested on an assumption concerning the degree of decedent's asbestos exposure after 1970 that is not supported by other record evidence.² See generally *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Contrary to employer's contention, the administrative law judge was not required to infer exposure after 1970 based on Dr. Godar's records. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, that employer stipulated to its liability as a self-insurer and to an average weekly wage based on asbestos exposure after 1970 did not require the administrative law judge to find exposure after 1970 in the claim for Section 8(f) relief. See *Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985). Accordingly, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that decedent's pre-existing asbestosis and COPD were aggravated by work-related asbestos exposure after 1970. See *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994). The administrative law judge's denial of Section 8(f) relief is therefore affirmed. *Jacksonville Shipyards*, 851 F.2d 1314, 21 BRBS 150(CRT).

² Dr. Godar stated in his 1987 report that decedent had "very limited exposure to asbestos since the mid 1970's." He also stated, "it is true that his continued employment after . . . August 1970 probably has contributed to a more permanent and significant limitation of function . . . than if he had not had further exposure following the 1970 abnormality." RX 5. In his 1994 report, Dr. Godar stated that since 1977, decedent "had much less exposure to the submarine environment." RX 4.

Accordingly, the administrative law judge's Decision and Order Denying Special Fund Relief and the Order Granting Reconsideration and Affirming Denial of Special Fund Relief are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge