

BRB No. 00-1129

RICHARD L. GRIGGS, SR.)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>July 26, 2001</u>
AND DRY DOCK COMPANY)	
)	
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 of Daniel L. Sarno, Jr. , Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Laura J. Stomski (Howard M. Radzely, Acting Solicitor of Labor; Carol A. 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-2036) of Administrative Law Judge Daniel L. Sarno, 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). 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 91965); 33 U.S.C. §921(b)(3).

Claimant was employed by employer as a pipefitter from 1948-1949, and from 1951 until his retirement in 1979. Claimant and employer stipulated that claimant was exposed to asbestos during the course of this employment. Following his retirement, claimant was diagnosed with asbestosis, and the parties agreed that he has a 40 percent permanent pulmonary impairment. In his Decision and Order, the administrative law judge accepted the stipulations of the parties as to the nature and extent of claimant's disability, claimant's average weekly wage, claimant's entitlement to medical benefits, and employer's liability for an attorney's fee. *See* Decision and Order at 2-3. Thus, the only issue in dispute before the administrative law judge was employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In addressing employer's request for Section 8(f) relief, the administrative law judge found that employer established that claimant suffered from a pre-existing permanent partial disability, *i.e.*, chronic obstructive pulmonary disease (COPD), but that employer failed to establish that this condition materially and substantially contributed to claimant's present disability. Accordingly, the administrative law judge denied employer's claim for relief from the Special Fund.

On appeal, employer argues that the administrative law judge erred in finding that the contribution element necessary for relief under Section 8(f) is not satisfied in this case. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and that it materially and substantially exceeds the disability that would have resulted from the work-related injury alone. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT)(1995). In a case such as the instant one involving a post-retirement occupational disease arising within the jurisdiction of the Fourth Circuit, an employer need not establish that a claimant's pre-existing disability was manifest. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

In order to establish the contribution element, an employer must show by medical or other evidence that the ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. Pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, employer must show that a pre-existing disability renders a claimant's overall disability materially and substantially greater by quantifying the disability that ensues from the work injury alone and

comparing it to the pre-existing disability. *Harcum I*, 8 F.3d at 185-86, 27 BRBS at 130-131(CRT); *see also Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT); *Harcum II*, 131 F.3d at 1082-83, 31 BRBS at 166-67(CRT); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated in part on other grounds on recon.*, 32 BRBS 283 (1998).

We affirm the administrative law judge's denial of Section 8(f) relief. Contrary to employer's contention, the administrative law judge properly found that Dr. Reid's opinion is insufficient to establish the contribution element, as he does not state the degree of impairment resulting from asbestosis alone. In *Carmines*, the Fourth Circuit held that "[i]t is not proper simply to calculate the current disability and subtract the disability that resulted from the pre-existing injury." *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT). In this case, Dr. Reid stated that claimant's COPD materially and substantially contributed to claimant's lung impairment and to his reduced pulmonary function test results. He also stated, "If [claimant] merely had asbestosis, his disability would be at least 10 percent less." EX 1. As the administrative law judge properly found that this opinion contravenes *Carmines* as it does not state the degree of impairment due to asbestosis alone, we affirm his finding that it is insufficient to establish the contribution element.

Employer also contends that the administrative law judge erred in failing to separately discuss the opinion of Dr. Foreman. The administrative law judge does set forth Dr. Foreman's opinion in his review of the medical evidence, *see* Decision and Order at 4, but provides no separate discussion of it in addressing Section 8(f) relief. Inasmuch as this opinion, however, is insufficient as a matter of law to establish the contribution element, the administrative law judge committed no error in this regard. Dr. Foreman stated that claimant's pulmonary function test results were probably influenced more by claimant's smoking history and possibly by pneumonia than by his asbestos-related pleural plaques. EX 2. This opinion also does not quantify the level of impairment due solely to claimant's asbestosis, and thus cannot serve as a basis for Section 8(f) relief. *See generally Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT); *Harcum I*, 8 F.3d at 185-86, 27 BRBS at 130-131(CRT). We, therefore, affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge