BRB No. 01-0769

WALTER A. WILKERSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 20, 2002
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Peter B. Silvain, Jr., (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., 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, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (00-LHC-2978) of Administrative Law Judge Fletcher E. Campbell, 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 (1965); 33 U.S.C. §921(b)(3).

Claimant, an outside machinist, was exposed to airborne asbestos dust and fibers for approximately 35 years during the course of his employment with employer. Claimant retired in 1991, and he was diagnosed with asbestosis in 1997.

In his Decision and Order, the administrative law judge accepted the stipulations between employer and claimant entitling claimant to permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(23), for a 10 percent work-related impairment. 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 failed to demonstrate that claimant's pre-existing hypertension materially or substantially contributed to his present disability. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief, arguing that the administrative law judge erred in failing to find that it satisfied the contribution element of Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, employer must affirmatively 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;[1] 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.*

[1]In a case involving a post-retirement occupational disease arising within the jurisdiction of the Fourth Circuit, as in the instant case, an employer need not establish that a claimant's pre-existing disability was manifest. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991).

Newport News Shipbuilding & Dry Dock Co. [Harcum I], 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id*.

Employer contends that the administrative law judge erred by failing to find that it established the contribution element. In order to establish the contribution element for Section 8(f) relief in a case where claimant is allegedly permanently partially disabled,[2] employer must establish that claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed this standard in several cases. In *Harcum I*, 8 F.3d 175, 27 BRBS 116 (CRT), the Fourth Circuit held that in order to establish contribution in a permanent partial disability case, employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work injury alone. The court stated that a showing of this kind requires quantification of the level of the disability that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131 (CRT). Subsequently, in *Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT), the Fourth Circuit applied the *Harcum I* holding in the context of an employer's seeking Section 8(f) relief for a permanent partial disability award to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of disability claimant would have suffered from the asbestosis alone, specifically holding that employer failed to meet its burden to quantify the disability that claimant would have suffered absent any pre-existing conditions. The court held that it is not proper simply to calculate the current disability and to subtract from this the disability that resulted from the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55 (CRT). The court stated that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Id.; see also Harcum II*, 131 F.3d 1079, 31 BRBS 164 (CRT).

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[2]In the instant case, the administrative law judge found that employer had demonstrated that claimant suffered from hypertension as early as 1992; the administrative law judge did not, however, address the issue of whether this condition constituted a permanent partial disability since he denied employer's request for Section 8(f) relief on other grounds. *See* Decision and Order at 5.

We reject employer's assertion that the administrative law judge erred in concluding that employer did not meet its burden of establishing the contribution element. In the instant case, the administrative law judge properly held that the opinions of Drs. Tornberg and Donlan are legally insufficient to establish the contribution element as they do not quantify the disability that would ensue from the current work injury alone in accordance with the Fourth Circuit's decisions in *Harcum* and *Carmines*. Specifically, the administrative law judge found Dr. Tornberg's opinion insufficient to meet employer's burden in two respects. First, Dr. Tornberg's conclusion that claimant's hypertension would produce a three percent disability rating was based upon a study published in a medical journal showing that there is an approximate three percent decrease in FEV1 and FVC values due to hypertension and did not describe the actual effect, if any, that claimant's hypertension would have on his pulmonary function. Moreover, as the administrative law judge found, this method of quantification was rejected by the Fourth Circuit in *Carmines,* 138 F.3d 134, 32 BRBS 48(CRT), which stated that it is not proper to simply calculate claimant's current disability and subtract the disability that resulted from the pre-existing disability. Next, the administrative law judge concluded that Dr. Tornberg's failure to give more than a conclusory statement or give support for his opinion rendered his quantification opinion inadequate. *See* Decision and Order at 6.

Moreover, we affirm the administrative law judge's conclusion that the opinion of Dr. Donlan also cannot meet employer's burden of proof on this issue. The administrative law judge determined, *inter alia*, that Dr. Donlan provided no medical explanation for his change in opinion regarding claimant's impairment, and that as Dr. Donlan did not adequately quantify the level of impairment caused by claimant's second injury, his opinion could not establish that claimant's pre-existing injury materially and substantially contributed to his overall impairment. *See* Decision and Order at 6. Accordingly, as the administrative law judge properly held that the opinions of Drs. Tornberg and Donlan are legally insufficient to establish that claimant's permanent partial disability is materially and substantially greater due to the contribution of his pre-existing hypertension, we affirm this finding. Consequently, the administrative law judge's finding that employer is not entitled to Section 8(f) relief is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge