BRB No. 90-0643

SHIRLEY MASON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	DATE ISSUED:
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Michael S. Hertzig (Thomas S. Williamson, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits (88-LHC-1443) of Administrative Law Judge Richard K. Malamphy 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 if they 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).

During the course of his employment with employer from 1941 to 1945, and from 1951 until his voluntary retirement in 1980, claimant was exposed to asbestos. Claimant was diagnosed as suffering from asbestosis in May 1985; prior to this diagnosis, claimant suffered from hypertension as early as 1974, and suffered a myocardial infarction in April 1982. On August 29, 1985, claimant filed a claim for compensation under the Act.

In his Decision and Order, the administrative law judge awarded claimant disability benefits for a twenty-five percent permanent partial disability caused by claimant's work-related asbestosis. *See* 33 U.S.C. §908(c)(23)(1988). Additionally, he found that employer was entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), based on claimant's pre-existing hypertension and myocardial infarction.

On appeal, the Director challenges the administrative law judge's finding that employer is entitled to Section 8(f) relief. Employer responds, urging affirmance.

Section 8(f) of the Act shifts liability to pay compensation for permanent disability and/or death after 104 weeks from an employer to the Special Fund. Section 8(f) is applicable if employer establishes that: 1) the employee had an existing permanent partial disability prior to the employment injury; 2) the disability was manifest to employer prior to the employment injury; and 3) the current disability or death is not due solely to the most recent injury. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd*, 115 S.Ct. 1278 (1995). The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the present case arises, has, however, eliminated the manifest requirement of Section 8(f) in post-retirement occupational disease cases. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991). Thus, in the instant case, employer, in order to establish entitlement to Section 8(f) relief, need only establish that claimant has an existing permanent partial disability that combined with the work injury and contributed to the resulting permanent total disability. *See id.*, 934 F.2d at 553, 24 BRBS at 200 (CRT); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993). In his decision, the administrative law judge awarded Section 8(f) relief to employer based upon a finding that claimant's hypertension and prior myocardial infarction constituted pre-existing permanent partial disabilities, and that the contribution element necessary for Section 8(f) relief had been met "in view of the testimony by Drs. Fairman and Harmon." *See* Decision and Order at 7-8.

We agree with the Director that the administrative law judge's findings regarding the applicability of Section 8(f) are unsupported by substantial evidence in the record. Although it is uncontested that claimant was treated for hypertension since 1974 and suffered a myocardial infarction in 1982, the mere existence of prior conditions is insufficient to establish a pre-existing disability for Section 8(f) relief since they must produce some serious, lasting physical problem. *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991). In the instant case, there is no evidence of record that claimant suffered any pre-existing disability from either condition; rather, subsequent to the diagnosis of

hypertension in 1974, claimant worked another six years in his regular employment before retiring for reasons unrelated to any medical condition. Moreover, there is no medical opinion in the record indicating that claimant suffered any impairment as a result of his 1982 myocardial infarction.

Regarding the contribution element, the United States Court of Appeals for the Fourth Circuit has noted that when an employee is permanently partially disabled, Section 8(f) provides that employer must make the additional showing that the employee's ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone. *Harcum*, 8 F.3d at 185, 27 BRBS at 130 (CRT); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995); 33 U.S.C. §908(f)(1). The court stated that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. The court also stated that employer must then present evidence of the type and extent of disability that the employee would suffer if not previously disabled when injured by the same work-related injury. *Id.*

In the present case, the physicians upon whom the administrative law judge summarily relied in finding that the contribution element had been satisfied, Drs. Fairman and Harmon, opined that claimant had no pulmonary condition. Specifically, Dr. Fairman opined that claimant has neither asbestosis nor a permanent partial pulmonary disability. *See* EX 5. Similarly, Dr. Harmon opined that the medical records available to him do not support a diagnosis of asbestosis and that, if such a diagnosis were to be made, claimant exhibited no evidence of pulmonary impairment or disability.[1] *See* EX 7. These opinions are insufficient to establish the contribution element under the criteria set forth in *Harcum.* We therefore reverse the administrative law judge's award of Section 8(f) relief.

[1]Dr. Harmon additionally stated that if, by law, claimant is determined to have some level of permanent disability resulting from an occupational lung disease, it would then be his opinion that this disability is contributed to and made materially worse by his pre-existing heart disease and myocardial infarction. *See* EX. 7. This alternative diagnosis is insufficient to satisfy employer's burden of establishing contribution. *See Harcum*, 8 F.3d at 185, 27 BRBS at 130 (CRT).

Accordingly, the administrative law judge's finding that employer is entitled to relief under Section 8(f) is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge