BRB No. 00-0481

MEREDITH WOOLARD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING DRY AND DOCK COMPANY	)	DATE ISSUED: Jan. 30, 2001
	)	
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.

Gary R. West (Patten, Wornom, Hatten & Diamonstein), Newport News, Virginia, for claimant.

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

Laura Stomski (Judith E. Kramer, 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 and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-0774) 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, a machinist, was exposed to asbestos during his employment with employer from 1967 to 1970. He was diagnosed with lung cancer on May 28, 1996, more than one year after he voluntarily retired. Claimant's right lung was removed on June 3, 1996. The administrative law judge awarded claimant permanent partial disability benefits for a 51 percent respiratory impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), finding that claimant's asbestos exposure at the shipyard contributed to his lung cancer. The administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), as the contribution element was not established.

On appeal, employer challenges the administrative law judge's award of permanent partial disability benefits and his denial of Section 8(f) relief. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief.

Employer first challenges the administrative law judge's award of benefits and contends that the administrative law judge erred in crediting Dr. Maddox's opinion over those of Drs. Churg and Hutchins to find that claimant has asbestosis and thus, that his asbestos exposure at the shipyard was a contributing factor to his lung cancer. Once, as here, the administrative law judge finds invocation and rebuttal of the Section 20(a) presumption, 33 U.S.C. §920(a), all relevant evidence must be weighed to determine if a causal relationship between claimant's lung cancer and asbestos exposure at the shipyard has been established, with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997)*; see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

We affirm the administrative law judge's finding, based on the opinion of Dr. Maddox, that claimant's work-related asbestos exposure contributed to the development of his lung cancer. Dr. Maddox, a board-certified pathologist with a subspecialty in hematology, diagnosed claimant with mild asbestosis and opined that claimant's asbestosis and smoking contributed to his lung cancer. Cl. Exs. 7, 8, 10, 15. Dr. Churg, a board-certified pathologist

[1]Claimant smoked one and one-half packs per day from age 15 to at least July

and professor of pathology at the University of British Columbia, opined that claimant does not have asbestosis, that his asbestos exposure played no role in his lung cancer, and that claimant has a purely cigarette smoke-induced lung cancer. Emp. Exs. 8, 13, 15. Dr. Hutchins, a professor of pathology and Director of Autopsy Pathology at The Johns Hopkins University also opined that claimant does not have asbestosis, and attributed claimant's lung cancer entirely to his heavy cigarette smoking and not to his asbestos exposure. Emp. Exs. 9, 14.

Realizing that the determination of whether claimant's work-related asbestos exposure contributed to his lung cancer requires that claimant have asbestosis, based on the conservative viewpoint shared by all medical experts of record, *see* Decision and Order at 7 n.7, the administrative law judge discussed and weighed the evidence to determine whether the evidence establishes that claimant has asbestosis. The administrative law judge acknowledged that a diagnosis of asbestosis requires discrete foci of fibrosis in the walls of the respiratory bronchioles and asbestos bodies based on the CAP-NIOSH criteria, which all experts accepted as authoritative. Although all experts agreed that claimant had fibrosis and asbestos bodies in his lung tissue, the administrative law judge pointed out that the experts disagreed as to the meaning and number of the asbestos bodies. Dr. Maddox, one of a few recognized fiber counters in the United States, used the method of counting fibers to find that claimant has asbestosis; however, this method was criticized by both Drs. Churg and Hutchins, who opined that claimant did not have sufficient numbers of asbestos bodies to indicate asbestosis. Moreover, Dr. Churg stated that the accuracy of Dr. Maddox's test results could not be determined since any diagnostic laboratory always supplies its reference ranges and Dr. Maddox was unwilling or unable to produce range values for his laboratory.

The administrative law judge compared Dr. Hutchins's count of 63 asbestos bodies per gram of wet lung tissue, a count not indicative of asbestosis, to Dr. Maddox's count of between 7,700 and 12,000 asbestos bodies, numbers which are sufficient to indicate asbestosis, and concluded that the two different counts could be explained by the difference in microscopic techniques used by the two physicians. While the record was clear that Dr. Maddox used both electron and light microscopy for his counts, the record was unclear as to which technique Dr. Hutchins used. Decision and Order at 11 n. 10. The administrative law

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22, 1998. Decision and Order at 4; Emp. Ex. 1 at 1; Cl. Ex. 1 at m-p.

[2]The parties stipulated that claimant did not have asbestosis that could be diagnosed on the basis of any clinical examination. Decision and Order at 4; Tr. at 7.

[3]CAP-NIOSH stands for "College of American Pathologists and the National Institute for Occupational Safety and Health." A committee sponsored by these two organizations established standards for the diagnosis and grading of asbestosis. Cl. Ex. 11; Emp. Ex. 14 at Appendix 1. Dr. Churg was on this committee. Decision and Order at 5 n. 5.

judge found that Dr. Maddox's fiber count should be accorded greater weight, concluding that in a case such as this involving mild asbestosis, electron microscopy is the preferred method for examining a lung slide for asbestos bodies, that Dr. Maddox's laboratory techniques are better delineated in the record than those of Dr. Hutchins, and that Dr. Maddox used a broader range of microscopic techniques than did Dr. Hutchins.

The administrative law judge then addressed Dr. Churg's criticism that Dr. Maddox did not have reference ranges for his laboratory. The administrative law judge concluded that Dr. Maddox's laboratory techniques were valid in that Drs. Maddox's results in some instances were independently examined by a different laboratory with similar results in the final fiber counts. Thus, the administrative law judge concluded that Dr. Maddox's opinion is entitled to greater weight since Dr. Maddox's reports provide greater indicia of reliability compared to the contrary medical evidence of record and because the criticism against Dr. Maddox by Drs. Hutchins and Churg lacks merit. Consequently, the administrative law judge found a causal nexus between claimant's lung cancer and his occupational asbestos exposure.

It is well-established that the administrative law judge is entitled to weigh the medical evidence of record and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table). In the instant case, the administrative law judge thoroughly weighed the evidence of record, and provided a rational basis for relying on the opinion of Dr. Maddox over those of the other physicians of record. *See Parks*, 32 BRBS at 94. Based on Dr. Maddox's opinion, therefore, we affirm the administrative law judge's conclusion that claimant has asbestosis which contributed to or caused his lung cancer, as this conclusion is supported by substantial evidence. *See Calbeck*, 306 F.2d 693; *Todd Shipyards Corp.*, 300 F.2d 741; *Parks*, 32 BRBS 90; Decision and Order at 6-13; Cl. Exs. 7, 8, 10, 15. Thus, we affirm the administrative law judge's award of benefits for a 51 percent disability based on the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995) at 5/162, 164. *See* Decision and Order at 16 n. 12.

Employer next contends that the administrative law judge erred in denying it Section 8(f) relief. 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

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[4]Employer states in its brief that the administrative law judge erred by awarding benefits for a 51 percent disability after finding that claimant did not submit any evidence as to the degree of his permanent impairment. *See* Emp. Br. at 5. As employer does not challenge the administrative law judge's decision to take official notice of the AMA *Guides*, we affirm his award based on the *Guides'* criteria.

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 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.*

In order to establish the contribution element for Section 8(f) relief in a case where claimant is permanently partially disabled, 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 impairment 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 under Section 8(c)(23) for a claimant with 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 percentage 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). Additionally, in cases like the instant one involving Section 8(f) relief where benefits are awarded pursuant to

[5]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifestation requirement in cases such as the case at bar where the worker suffers from a post-retirement occupational disease. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991).

Section 8(c)(23), only those pre-existing disabilities which played a part in claimant's compensable impairment under Section 8(c)(23) can properly serve as the basis for Section 8(f) relief. *See Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 53, 31 BRBS 155, 160-161 (CRT)(1st Cir. 1997); *Beckner v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB No. 00-0370 (Dec. 21, 2000); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

In the instant case, the administrative law judge properly held that the opinions of Drs. Reid and Ross are legally insufficient to establish the contribution element since they do not quantify claimant's level of impairment resulting from the work injury alone. *Carmines*, 138 F.3d at 140, 32 BRBS at 52 (CRT); *Harcum II*, 131 F.3d 1079, 31 BRBS 164 (CRT); *Harcum I*, 8 F.3d 175, 27 BRBS 116 (CRT); Decision and Order at 14-16; Emp. Exs. 11, 12. In addressing the issue of whether claimant's 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 injury alone, Dr. Reid, employer's in-house physician, stated,

> Mr. Woolard('s) lung impairment, AMA rating and disability are not caused by his lung cancer alone, but rather his lung impairment, AMA rating, and disability are materially and substantially contributed to, and materially and substantially caused by his pre-existing (chronic obstructive pulmonary disease) COPD. The COPD significantly reduce(s) both the FEV1 and FVC values. Indeed, the May 24, 1996 pulmonary functions tests show an AMA permanent disability of at least 20% from the COPD alone. If Mr. Woolard merely had lung cancer, his disability would be at least 20% less.

Emp. Ex. 11. In addressing the same issue, Dr. Ross, professor of medicine at Vanderbilt University Medical Center, stated that both of the following statements are accurate: (1) The contribution of smoking and chronic obstructive pulmonary disease (COPD) to claimant's present disability is material and substantial, and (2) If claimant had only lung cancer, his claimed disability would be materially and substantially less. Emp. Ex. 12. Because claimant was diagnosed with early emphysema in 1989, about seven years before he was diagnosed with lung cancer, Dr. Ross stated that, claimant "had material and substantial impairment of his pulmonary function at least 7 years before the impairment due to the lung cancer was added on." *Id.* Dr. Ross further commented on claimant's condition after his right pneumonectomy in 1996, noted that claimant's remaining left lung was emphysematous, and stated,

> If the remaining lung were a normal lung, therefore, his claimed disability would be materially and substantially less. That is to say that if he had only a pneumonectomy due to the lung cancer and did not have emphysema in the remaining lung, his claimed disability would be materially and substantially less.

Id. As the administrative law judge properly found that the opinions of Drs. Reid and Ross are insufficient to establish the contribution element under *Carmines*, we affirm his denial of Section 8(f) relief. *See Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT); Decision and Order at 14-16; Emp. Exs. 11, 12.

Accordingly, the administrative law judge's Decision and Order awarding claimant permanent partial disability benefits and denying employer Section 8(f) relief is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]Contrary to employer's argument, the opinions of Drs. Maddox, Churg, Hutchins, and Weiss are insufficient to establish the contribution element as they do not quantify the extent of claimant's disability from his lung cancer alone. Moreover, employer's reliance on *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Parkman]*, 122 F.3d 1060 (table), 32 BRBS 6 (CRT)(4th Cir. 1997)(unpublished), is misplaced as this case is unpublished and was superseded by *Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT).