

AVERY THOMAS)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>JUN 26, 2003</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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (01-LHC-1910) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer from 1956 to 1999 as a pipefitter. During the course of his employment he was exposed to airborne asbestos dust and fibers. On March 15, 1999, subsequent to his retirement, claimant was diagnosed as having asbestosis. Employer and claimant stipulated that claimant sustained a 10 percent permanent impairment due to asbestosis, for which claimant is entitled to compensation and medical benefits under the Act. 33 U.S.C. §§907, 908(c)(23). The sole issue before the administrative law judge was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The administrative law judge found that claimant was diagnosed with hypertensive cardiovascular disease in October 1997, but that employer failed to establish that this condition contributed to claimant's current permanent partial disability due to work-related asbestosis. The administrative law judge therefore denied employer's claim for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance. To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone.¹ 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); see also *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(CRT) (1995).

¹The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifest requirement in post-retirement occupational disease cases, such as the instant case. See, e.g., *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

We affirm the administrative law judge's finding that employer failed to establish that claimant's pre-existing hypertensive cardiovascular disease contributed to claimant's current pulmonary impairment.² To establish such contribution, the United States Court of Appeals for the Fourth Circuit held in *Carmines* that an employer must quantify the type and extent of the disability that the claimant would have suffered without the pre-existing condition. *Carmines*, 138 F.3d at 139, 32 BRBS at 53(CRT). The court specifically held that simply subtracting the extent of disability that resulted from the pre-existing disability from the extent of the current disability is insufficient to establish that the claimant's disability is materially and substantially greater than that due to the subsequent injury alone. *Id.*, 138 F.3d at 143, 32 BRBS at 55(CRT). Dr. Tornberg opined that claimant's hypertensive cardiovascular disease materially and substantially contributed to his present impairment and that, if claimant had only asbestosis, his rating under the American Medical Association *Guides to the Evaluation of Permanent Impairment* would be at least fourteen percent less. EX 2 at 4. Dr. Donlan stated only that asbestosis is a contributing factor to claimant's pulmonary impairment. EX 2 at 22. The administrative law judge properly found these opinions legally insufficient to establish that claimant's disability is not due solely to his asbestosis and that hypertension materially and substantially contributed to his current pulmonary disability, as neither quantifies the degree of impairment due solely to the subsequent injury. See *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT); see also *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427 (4th Cir. 2003). In the absence of any other evidence of record addressing the contribution of claimant's pre-existing permanent disability to claimant's current ten percent pulmonary impairment, we hold that the administrative law judge properly concluded that employer failed to establish the contribution element necessary for Section 8(f) relief.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

²The administrative law judge stated he need not determine if claimant's hypertensive cardiovascular disease constitutes a pre-existing permanent partial disability pursuant to Section 8(f) since he found that the contribution element was not satisfied.

REGINA C. McGRANERY
Administrative Appeals Judge