BRB No. 00-0617

HARRY J. LONDON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 12, 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 Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

Kristin Dadey (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Mark Reinhalter, Senior Attorney), 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 (99-LHC-1543) of Administrative Law Judge Richard E. Huddleston 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 the 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).

The administrative law judge accepted the stipulations between employer and claimant, a retiree, entitling claimant to permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(23) for a 23 percent impairment due to asbestosis, caused at least in part, by his work for employer. Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing hypertension. The administrative law judge found that there is no basis for considering claimant's hypertension to be a pre-existing permanent partial disability, and that in any event, employer failed to establish that hypertension materially and substantially contributed to claimant's current disability. The administrative law judge therefore denied Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in concluding that it did not produce sufficient evidence to satisfy the elements necessary for Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

In order to establish its entitlement to Section 8(f) relief in this case, where claimant is entitled to permanent partial disability benefits for a post-retirement occupational disease, employer must show that claimant had a pre-existing permanent partial disability, that the current disability is not due solely to the subsequent injury, and that the current disability is materially and substantially greater due to the pre-existing disability than it would be from the occupational disease-related disability alone.[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 & 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). If claimant is being compensated pursuant to Section 8(c)(23), only those pre-existing conditions that contribute to the compensable impairment can form the basis for Section 8(f) relief. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989); *see also Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

[1]In the case of a post-retirement occupational disease, the Fourth Circuit has held that the manifest element of Section 8(f) relief is not applicable. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

Employer first contends that the administrative law judge erred in finding that claimant's hypertension is not a pre-existing permanent partial disability for purposes of Section 8(f) relief. The administrative law judge did not consider whether claimant's hypertension is, in fact, a serious, lasting, physical disability such that a cautious employer would have been motivated to discharge the employee because of an increased risk of compensation liability. *See, e.g., Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Rather, the administrative law judge found that employer did not establish that claimant's hypertension contributed to his compensable respiratory impairment, pursuant to *Adams*, 22 BRBS at 85, and thus did not constitute a pre-existing permanent partial disability.

We need not rule on the propriety of the finding that employer did not establish the pre-existing permanent partial disability element necessary for Section 8(f) relief, inasmuch as the administrative law judge's denial of Section 8(f) relief may be affirmed based on the administrative law judge's finding that employer did not establish the contribution element. Assuming, *arguendo,* that claimant's hypertension constitutes a serious, lasting, physical disability, the administrative law judge rationally determined that employer did not establish that hypertension materially and substantially contributed to claimant's compensable respiratory impairment.

Based on the results of claimant's April 1998 pulmonary function test, which revealed an FVC result of 67 percent of that predicted, Dr. Shaw stated in June 1998 that claimant has a 20 to 25 percent respiratory impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed.) (AMA *Guides*). Claimant and employer stipulated that claimant has a 23 percent respiratory impairment based on Dr. Shaw's June 1998 report. In September 1998, based on the same pulmonary function results, Dr. Shaw stated that claimant's respiratory impairment is 15 to 20 percent under the AMA *Guides.* In response to the inquiry concerning the contribution of claimant's hypertension to his respiratory impairment, Dr. Shaw responded that claimant's impairment would be at least 3 percent less if not for the hypertension. He based his opinion on a study published in 1995 in the journal Chest, showing that there is an approximate 3 percent decrease in FVC and FEV_1 values due to hypertension in otherwise healthy individuals.

The administrative law judge found Dr. Shaw's opinion insufficient to satisfy the contribution element on two bases. First, the administrative law judge found that Dr. Shaw did not attempt to describe the actual effect of claimant's hypertension on his pulmonary function, but merely relied on the minimum decrement found in the study reported in Chest. Second, the administrative law judge found that 3 percent of either a 15 to 20 percent impairment or a 20 to 25 percent impairment is not a "material and substantial" contribution to claimant's overall respiratory impairment. Decision and Order at 7.

Contrary to employer's contention, the administrative law judge is not required to accept the opinion of Dr. Shaw merely because it is uncontradicted. Rather, it is the role of the administrative law judge to determine the weight to be given to all medical evidence of record, based on factors such as whether the opinions are well-reasoned and/or are supported by objective information. *See generally Carmines*, 138 F.3d 134, 32 BRBS 48(CRT). Moreover, the administrative law judge rationally determined that Dr. Shaw's opinion regarding the effect of hypertension on claimant's respiratory function was not convincing in that Dr. Shaw made no attempt to determine the actual impairment claimant sustained due to his hypertension, and merely stated that claimant had at least the minimum impairment suggested by the clinical study. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994) (administrative law judge's inferences and credibility assessments are to be afforded deference). More significantly, the administrative law judge rationally determined that 3 percent of either of the two ranges of impairment does not establish that claimant's impairment is "materially and substantially" greater due to the hypertension.[2] *See Carmines*, 138 F.3d 134, 32 BRBS 48(CRT)*; Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884, 31 BRBS 141(CRT) (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc. [Ladner]*, 125 F.3d 303, 31 BRBS 146(CRT) (5th Cir. 1997). Inasmuch as the administrative law judge's decision is rational and supported by substantial evidence, and as employer has not raised any reversible error in the administrative law judge's

[2]As the Director correctly notes, Dr. Shaw did not state the degree of claimant's respiratory impairment due solely to asbestosis. The implication of Dr. Shaw's report is that the degree of impairment due to asbestosis may be arrived at by subtracting from the total impairment the supposed degree of impairment due to hypertension. This method was rejected by the Fourth Circuit in *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT).

consideration of Dr. Shaw's opinion, we 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

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge