BRB No. 05-0111

JOHN B. ELLIOTT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 10/06/2005
	)	
	)	
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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, 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 (04-LHC-0812) of Administrative Law Judge Daniel A. Sarno, 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 as a pipefitter from 1951 until his voluntary retirement in 1995. He was exposed to asbestos dust and fibers in this employment. On February 25, 1986, Dr. Fairman diagnosed claimant with chronic obstructive pulmonary disease (COPD), resulting from cigarette smoking. EX 3 at 5-7. Claimant and employer stipulated that claimant was diagnosed with asbestosis on February 25, 2001, that claimant is suffering from a 55 percent pulmonary impairment; that claimant is entitled to compensation at the rate of $171.20 per week from February 26, 2001, and continuing, 33 U.S.C. §908(c)(23); and that claimant is entitled to receive medical treatment under Section 7 of the Act, 33 U.S.C. §907. Thus, the only issue remaining before the administrative law judge was whether employer was entitled 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 the Director, Office of Workers' Compensation Programs (the Director), conceded that claimant's COPD constitutes a pre-existing permanent partial disability. Next, the administrative law judge found that employer need not establish in this case that arises within the jurisdiction of the Fourth Circuit that claimant's post-retirement occupational disease was manifest to employer prior to his work-related injury. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). Nonetheless, the administrative law judge denied Section 8(f) relief, finding that employer did not establish that claimant's ultimate permanent partial disability is not due solely to his asbestosis and is materially and substantially greater than the disability that would have resulted from the asbestosis alone. Therefore, the administrative law judge found that employer failed to establish the element of contribution and denied employer's claim for Section 8(f) relief.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that the administrative law judge erred in finding that the opinion of Dr. Donlan is insufficient to establish the element of contribution. The Director responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from an employer to the Special Fund established in Section 44 of the Act, 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a retiree is permanently partially disabled, as here, if it affirmatively establishes that claimant had a pre-existing permanent partial disability and that the ultimate permanent partial disability is not due solely to the work injury and 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*, 514 U.S. 122, 29 BRBS 87(CRT) (1995); *Harris*, 934 F.2d 548, 24 BRBS 190(CRT).

In this case, employer challenges the administrative law judge's finding that the opinion of Dr. Donlan is insufficient to establish the contribution element. Specifically, employer contends that the administrative law judge erred in finding that Dr. Donlan's January 15, 2004, opinion is conclusory and lacking in medical support. Employer also contends that the administrative law judge erred in finding that Dr. Donlan used a subtraction method to determine claimant's impairment due to asbestosis, which runs afoul of the Fourth Circuit's holding in *Carmines.* Employer notes that Dr. Donlan physically examined claimant and conducted pulmonary function tests, and based on these results, offered a well-reasoned opinion as to "hypothetically" what claimant's level of impairment would be due to the work injury alone. Employer's contentions have merit.

Dr. Donlan performed a pulmonary examination of claimant on July 19, 2001. He took a complete medical history, examined claimant, interpreted a recent x-ray, and administered pulmonary function studies. Dr. Donlan stated that claimant had asbestos-related pleural plaques, pulmonary asbestosis, and COPD. Dr. Donlan stated that claimant has "significant obstructive impairment on pulmonary function testing." EX 4 at 3-5. Dr. Donlan's report contains a contemporaneous explanation of the pulmonary function studies results at 6-11. Dr. Donlan stated on July 10, 2001, that claimant has a 55 percent pulmonary impairment, *id.* at 12, and that two-thirds of this impairment is due to COPD. *Id*.

Subsequently, employer asked Dr. Donlan to apportion claimant's impairment between his asbestosis and his COPD. Dr. Donlan stated that if claimant had only asbestosis, it is probable that he would have a 15-20 percent impairment. Dr. Donlan stated that if claimant did not have COPD, the FEV_1, FVC, and diffusing capacity results on the pulmonary function studies likely would be significantly higher. Dr. Donlan stated that the greater part of claimant's current impairment is due to the COPD, as the major abnormalties on his pulmonary function studies results are obstructive in nature, particularly the FEV_1 and FEV_1/FVC ratio. EX 4 at 1.

The administrative law judge found that this opinion is "conclusory and lacking in evidentiary support" because it is "impossible to either discern the logic of Dr. Donlan's [sic] conclusions . . . or to evaluate the evidence upon which such conclusion are based." Decision and Order at 9. As support for rejecting Dr. Donlan's opinion, the

administrative law judge quoted *Carmines*, stating that he must not "merely credulously accept the assertion of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." Decision and Order at 9, quoting *Carmines*, 138 F.3d at 140, 32 BRBS at 52(CRT).

We cannot affirm this finding, as the administrative law judge rejected Dr. Donlan's opinion for improper reasons. The fact that Dr. Donlan first gave a percentage of impairment for the asbestosis alone three years after his examination of claimant cannot be a basis for rejecting his opinion. A successful claim for Section 8(f) relief *requires* apportionment of a claimant's disability, whereas apportionment is *forbidden* under the aggravation rule when addressing the merits of claimant's claim for benefits. Compare *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991) *with Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT). Contrary to the administrative law judge's statement that he is required to "assume" that Dr. Donlan relied on his prior examination of claimant, Dr. Donlan's 2004 letter specifically states that his opinion is based on his 2001 records of claimant's examination and the pulmonary function study results. EX 4.1. He explained how the pulmonary function study results support his conclusion regarding the percentage of impairment due to COPD and that due to asbestosis. *Id.* Thus, his opinion is adequately documented. In addition, Dr. Donlan's opinion does not rely on the "subtraction method" prohibited by *Carmines*.[1] Dr. Donlan provided both his opinion regarding what claimant's impairment would be from the asbestosis alone, 15-20 percent, as well as the extent due to his pre-existing COPD without the asbestosis, 45-50 percent. *Id.*

The administrative law judge also erred in rejecting Dr. Donlan's opinion by reference to Dr. Freeman. The fact that Dr. Donlan did not review Dr. Freeman's opinion does not detract from his opinion. Dr. Freeman opined that based on the results of his 2000 pulmonary function study, claimant had a 40 percent respiratory impairment. Dr. Freeman stated only that claimant's asbestos-related lung disease contributes to the impairment. EX 1.21. This opinion does not invalidate Dr. Donlan's later opinion that claimant has a greater overall impairment or his reasons for how he apportioned the impairment between claimant's two diseases. *See generally Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 12 BRBS 344 (5th Cir. 1980).

[1] In *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the court explained 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. Then the court stated that it is not enough to simply calculate the total current disability and to subtract it from the disability resulting from the pre-existing condition. *Carmines*, 138 F.3d at 142, 32 BRBS at 55(CRT).

Consequently, we hold that the administrative law judge erred in rejecting Dr. Donlan's opinion. It is the type of evidence sufficient to establish Section 8(f) relief, *see Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449, 37 BRBS 69(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 37 BRBS 17(CRT), and the administrative law judge did not provide any valid bases for rejecting the opinion, *see Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, ___ BRBS ___, BRB No. 04-742 (June 21, 2005). Thus, we vacate the administrative law judge's denial of Section 8(f) relief and we remand this case to the administrative law judge to determine whether employer established that claimant's pre-existing COPD resulted in an ultimate impairment that is materially and substantially greater than the disability resulting from claimant's asbestosis alone.

Accordingly, the administrative law judge's Decision and Order denying Section 8(f) relief is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, 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

_____
REGINA C. McGRANERY
Administrative Appeals Judge