BRB No. 00-0762

WILLIAM E. COLEMAN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 27, 2001
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
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, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Geoffrey K. Collver (Judith Kramer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Mark A. Reinhalter, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Program, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-1677) 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 welder and welding supervisor, was exposed to asbestos during the course of his employment with employer. Claimant retired in 1984, and was subsequently diagnosed with asbestosis. In his Decision and Order, the administrative law judge accepted the parties' stipulations concerning the nature and extent of claimant's permanent partial disability, claimant's average weekly wage, claimant's entitlement to medical benefits, and employer's liability for an attorney's fee. Thus, the only issue in dispute before the administrative law judge was employer's entitlement to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

In addressing employer's request for Section 8(f) relief, the administrative law judge found that employer had established that claimant suffered a pre-existing permanent partial disability, *i.e.*, chronic obstructive pulmonary disease (COPD), but that employer failed to demonstrate that this condition materially and substantially contributed to his current disability. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

Employer now appeals, challenging the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that the opinions of Drs. McCune and Ross are sufficient to establish the contribution element and that the administrative law judge erred in requiring specific numerical quantification in order to establish the contribution element. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's denial of Section 8(f) relief.

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;[1] and 3) that the ultimate permanent partial

[1]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*,

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. *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(CRT) (1995). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.* In the instant case, the administrative law judge found that employer did not establish the level of impairment that would ensue from claimant's asbestos-related disease alone.

Employer contends that the administrative law judge erred by failing to find that it established the contribution element. 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 disability 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 to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer's evidence did not establish the 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 percentage of current disability and to subtract from this the percentage of disability due to the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55(CRT). The court stated that without 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*

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934 F.2d 248, 24 BRBS 190(CRT)(4th Cir. 1990).

Harcum II, 131 F.3d 1079, 31 BRBS 164(CRT).

In seeking to reverse the administrative law judge's decision in the instant case, employer challenges the administrative law judge's finding that the opinions of Drs. McCune and Ross are insufficient to satisfy its burden of establishing that claimant's present disability is materially and substantially greater than that which would have resulted from claimant's asbestosis alone. Dr. McCune stated in relevant part that claimant's COPD materially and substantially contributed to his overall disability; in this regard, Dr. McCune opined that claimant's disability would be at least 25 percent less without his pre-existing COPD. *See* Emp. Ex. 4. Dr. Reid stated in relevant part that:

> I can state with reasonable medical certainty ... that if [claimant] had only asbestosis or asbestos-related lung disease, without any pre-existing smoking related lung disease, including COPD, his impairment rating would be significantly less and certainly in the Class I or Class II range rather than in Class III impairment under the AMA Guides.

Emp. Ex. 7.

We reject employer's assertion that the administrative law judge erred in concluding that employer did not meet its burden of establishing the contribution element. Dr. McCune opined that claimant's COPD materially and substantially contributed to his overall disability, and that claimant's disability would be at least 25 percent less without his pre-existing COPD. *See* Emp. Ex. 4. In *Carmines*, however, the court specifically stated it is not proper simply to calculate the claimant's current disability and subtract the disability that resulted from the pre-existing disability. *See Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT). As this is precisely the method utilized by Dr. McCune in the instant case, we affirm the administrative law judge's determination that McCune's opinion is insufficient to establish the contribution element. *See Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164(CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116(CRT).

Moreover, we affirm the administrative law judge's conclusion that the opinion of Dr. Ross also cannot meet employer's burden of proof. Dr. Ross opined that if he assumed that claimant has some impairment due to asbestos exposure, then his asbestos-related condition alone would result in a Class I or Class II impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1995)(AMA *Guides*).[2] The administrative law judge determined, *inter alia*, that the opinion of Dr. Ross

[2]According to Dr. Ross, claimant's total impairment was Class III, which is consistent with the parties' stipulation that claimant had a 40 percent impairment under Section

was deficient as evidence of contribution because he did not state a specific percentage of disability but, rather, stated his opinion in terms of classes or ranges under the AMA *Guides*. As employer asserts, this opinion may sufficiently quantify the degree of disability due to the work-related injury under the applicable legal standards, as the Class I - IV designations in the AMA *Guides* are accompanied by percentage impairment ratings.[3] However, we need not address this issue as the administrative law judge also rejected Dr. Ross's opinion for other reasons. He noted that the physician, who did not examine claimant, failed to identify the medical records on which he relied, and specifically found that Dr. Ross offered a hypothetical opinion which left considerable doubt as to whether he believed that claimant in fact suffers from an asbestos-related disease. *See* Decision and Order at 9-10. Thus, the administrative law judge ultimately did not credit Dr. Ross's opinion because it was hypothetical and was not based on clinical findings of his own or another named qualified physician. We affirm this determination, as the administrative law judge is entitled to evaluate the medical evidence and he gave a rational basis for rejecting Dr. Ross's opinion.

8(c)(23), 33 U.S.C. §908(c)(23). As a retiree, claimant's award falls under Section 8(c)(23) and is based solely on his medical impairment. *See* 33 U.S.C. §902(10).

[3]The *Guides* state that Class I equates to 0 percent impairment of the whole person, Class II is 10 percent through 25 percent, and Class III equals 26 percent through 50 percent. Class IV covers impairments above 50 percent. AMA *Guides* at 165. We note that while quantification is required, the Fourth Circuit has not limited the quantification to percentages of impairment. *Compare Harcum II*, 131 F.2d 1099, 31 BRBS 164(CRT)(vocational evidence sufficient to quantify).

Thus, the administrative law judge's finding that employer failed to establish that claimant's permanent partial disability is materially and substantially greater due to the contribution of his pre-existing COPD is supported by his weighing of the evidence.[4] Consequently, the administrative law judge's finding that employer is not entitled to Section 8(f) relief is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[4]That the Director did not introduce any evidence in this matter has no bearing on the outcome as employer bore the burden of establishing its entitlement to Section 8(f) relief. In *Carmines*, 138 F.3d at 142, 32 BRBS at 53(CRT), the court rejected the notion that a medical opinion must be accepted because it is "uncontradicted." 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), in support of its quantification argument is misplaced as this case is unpublished and was superseded by *Carmines*.

REGINA C. McGRANERY
Administrative Appeals Judge