BRB No. 05-0602

CECIL BENTLEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	DATE ISSUED: 04/19/2006
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.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-2446) 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 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 was employed by employer as a stocker in 1955 and returned to work as a pipefitter from 1967 until his retirement in 1994. During this second period of employment, he was exposed to airborne asbestos dust and fibers; he was diagnosed as suffering with asbestosis on July 30, 1990. Claimant and employer stipulated that claimant is entitled to permanent partial disability benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for a 30 percent respiratory impairment commencing July 25, 2002. EX 1. Subsequently, employer sought relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge denied such relief. He found that although the Director concedes that claimant's chronic bronchitis and heart disease constitute manifest, pre-existing permanent partial disabilities, employer failed to establish the third element for relief, contribution. Employer appeals the administrative law judge's denial of relief under Section 8(f). The Director responds, urging affirmance. Employer filed a reply brief.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from 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 claimant is permanently partially disabled if it establishes that the claimant had a manifest, pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury, and is "materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd* 514 U.S. 122, 29 BRBS 87(CRT) (1995); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998). In *Harcum*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, employer must quantify 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). 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 whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003).

Employer contends that it is entitled to Section 8(f) relief based upon claimant's pre-existing heart disease and chronic obstructive pulmonary disease. Claimant suffered two myocardial infarctions in 1985, and was subsequently diagnosed with Class II coronary disease. EX 2 at 19. Claimant also has been diagnosed with chronic bronchitis/chronic obstructive pulmonary disease (COPD). EX 2 at 34.

The administrative law judge found that none of the medical opinions was sufficient to establish the contribution element. Dr. Apostles stated that based on claimant's pulmonary function study results, which demonstrates both restrictive and obstructive components, claimant's pre-existing heart disease and COPD contribute to his overall respiratory disability. EX 2 at 3-5. He stated that the pre-existing conditions are a "substantial cause" of claimant's present functional impairment. Dr. Apostles stated that claimant's impairment due to asbestosis alone is 17 percent, based on Dr. David Foreman's opinion of the results of claimant's June 1999 pulmonary function studies. The administrative law judge discounted Dr. Apostles's opinion on the ground that Dr. Foreman stated claimant had a 17 percent disability due to his entire respiratory condition, and not due only to asbestosis. EX 2 at 32; Decision and Order at 8, n.2.

The administrative law judge found that Dr. Jeffrey Forman's opinion regarding the results of claimant's July 2002 pulmonary function studies are insufficient to establish the contribution element, as he did not establish the degree of respiratory impairment due solely to asbestosis. Dr. Forman stated claimant has a moderate obstructive and a moderate restrictive ventilatory defect, and that an asbestos-related disease contributes to the impairment.[1] EX 2 at 34. Contrary to employer's argument on appeal, Dr. Forman did not delineate the extent of claimant's impairment due to each component.

Dr. Donlan stated that if claimant had only asbestosis, his respiratory impairment would be 15 percent. He stated that claimant has a history of heart disease and angina, which could affect claimant's pulmonary function. EX 3. The administrative law judge found this report insufficient to establish the contribution element because it does not establish the degree of claimant's overall impairment or state that the heart disease materially and substantially contributes to claimant's overall impairment.[2] The

[1] Dr. Forman stated claimant's FEV results would place him in the Class II range (10-25% impairment), his FEV_1 results would place him in the Class III range (26 to 50% impairment), and his DLCO results would place him in the Class III range. EX 2 at 34.

[2] The Director correctly notes that the private parties' stipulation that claimant has a 30 percent respiratory impairment is not binding upon the Special Fund in the claim for Section 8(f) relief. *See Brady v. J. Young & Co.*, 17 BRBS 46, *aff'd on recon.*, 18 BRBS 167 (1985). The parties' stipulation is based on the 2002 pulmonary function results. *See* n. 1, *supra;* EX 1.

administrative law judge rationally found that the medical opinions submitted by employer either fail to adequately quantify the level of impairment resulting from claimant's work-related injury alone or to explain how the work-related component compares to claimant's overall respiratory impairment. The fact that the physicians stated that claimant's pre-existing conditions contribute to the overall impairment is insufficient to meet employer's burden. *Carmines*, 138 F.3d 134, 32 BRBS 38(CRT). Consequently, we affirm the administrative law judge's conclusion that the opinions cannot serve as a basis for Section 8(f) relief as it is rational, supported by substantial evidence, and in accordance with law. *See id.*; *Harcum*, 8 F.3d at 185-86, 27 BRBS at 130-131(CRT). The administrative law judge's denial of Section 8(f) relief is therefore affirmed. *Pounders*, 326 F.3d 455, 37 BRBS 11(CRT); *Winn*, 326 F.3d 427, 37 BRBS 29(CRT).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge