BRB No. 00-1171

ARTHUR W. AVERY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Aug. 22, 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 Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Hugh B. McCormick, III (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

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

Andrew D. Auerbach (Howard M. Radzely, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), 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 Granting Benefits to the Claimant and Denying

Section 8(f) Relief to the Employer (2000-LHC-0445) of Administrative Law Judge Richard K. Malamphy 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 if they 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 worked as a machinist at employer's shipyard from 1960 until 1995, where he was exposed to asbestos. The administrative law judge found that claimant presented sufficient evidence to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), based on uncontested evidence of claimant's work-related asbestos exposure and the opinion of Dr. Scutero that claimant suffers from asbestosis. The administrative law judge found, however, that the opinion of Dr. Donlan that claimant does not suffer from asbestosis established rebuttal of the Section 20(a) presumption. On weighing the evidence as a whole, the administrative law judge credited Dr. Scutero's opinion over that of Dr. Donlan. The administrative law judge therefore awarded claimant continuing permanent partial disability benefits for a 20 percent respiratory impairment. *See* 33 U.S.C. §908(c)(23). Finally, the administrative law judge denied employer's request for relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that claimant has asbestosis based on Dr. Scutero's opinion. Moreover, employer contends that claimant is not entitled to benefits for his respiratory impairment, as he is totally disabled due to other conditions. Alternatively, employer challenges the administrative law judge's denial of Section 8(f) relief. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Benefits Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

In order to establish a *prima facie* case, it is claimant's burden to prove the existence of an injury or harm and that a work-related accident occurred or working conditions existed which could have caused the harm. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Where claimant has established his *prima facie* case, Section 20(a) of the Act, 33 U.S.C. §920(a), provides him with a presumption that his condition is causally related to his employment; the burden then shifts to employer to rebut the presumption by producing substantial evidence that claimant condition was neither caused, contributed to, or aggravated by his employment. *See American Grain Trimmers, Inc. v. Director, OWCP,* 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied,* 120 S.Ct. 1239 (2000); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). If the administrative law judge finds the Section 20(a) presumption rebutted, it drops from the case. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge must then weigh all the evidence and resolve the issue of causation on the record as a whole with claimant bearing the burden of persuasion. *Id.; see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In weighing the evidence as a whole, the administrative law judge gave less weight to Dr. Donlan's opinion that claimant does not have asbestosis than to Dr. Scutero's opinion that claimant does have asbestosis. The administrative law judge found that Dr. Donlan did not explain his opinion, whereas Dr. Scutero based his finding on claimant's history of asbestos exposure, chest x-ray, and decreased diffusion capacity on his pulmonary function studies. Employer contends that this finding is in error, and that, moreover, Dr. Scutero's opinion cannot be credited because it does not conform to "accepted" methods of diagnosing asbestosis.

We reject employer's contentions. Although employer attempts to explain, in its brief to the Board, the basis for Dr. Donlan's finding that claimant does not have asbestosis, *see* Emp. brief. at 6, the administrative law judge was entitled to find that the doctor's opinion, on its face, does not explain why claimant does not have asbestosis. *See* EX 1;[1] *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Furthermore, the administrative law judge was not required to accept employer's evidence as to the "accepted" method of diagnosing asbestosis, *see* EX 7, in view of the fact that claimant put in different treatises conflicting with employer's evidence. *See* CXS 9, 10. As the administrative law judge is entitled to determine the weight to be accorded to the medical opinions of record, and as the administrative law judge's crediting of Dr. Scutero's opinion is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant has asbestosis, and a 20 percent respiratory impairment due, in part, to asbestosis. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

We also reject employer's contention that claimant is not entitled to disability benefits for his respiratory impairment pursuant to Section 8(c)(23) because he is totally disabled due to other medical conditions. This contention is spurious, as there is absolutely no evidence of record that claimant is receiving total disability benefits under the Act, or any other workers' compensation act, for work-related injuries. *See generally Rupert v. Todd Shipyards Corp.,* 239 F.2d 273 (9th Cir. 1956); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). Absent a total disability award under the Act for another injury, claimant is entitled to be compensated under the Act based on the degree of his lung impairment. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(i).

[1]Dr. Donlan's opinion states that claimant's chest x-ray show predominately pleural abnormalities. Claimant's pulmonary function results show obstructive impairment with normal diffusion capacity. Dr. Donlan concludes that claimant has asbestos-related pleural plaques and not asbestosis. He further states that claimant's shortness of breath is primarily related to obstructive lung disease. EX 1.

Lastly, we address employer's contention that the administrative law judge erred in finding that it is not entitled to relief from continuing compensation liability pursuant to Section 8(f). Employer is entitled to Section 8(f) relief in a case, such as this, where the claimant is permanently partially disabled, if it establishes: 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;[2] and 3) that the ultimate permanent partial 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. 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. [HarcumII]*, 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). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

The administrative law judge found that claimant's diabetes and hypertension constitute pre-existing permanent partial disabilities, but that employer failed to establish that these conditions materially and substantially contribute to claimant's 20 percent respiratory impairment. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has addressed the contribution 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 impairment that would ensue from the work 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 on a permanent partial disability award to a claimant with work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of impairment claimant would have suffered from the asbestosis alone. The court held that it is

[2]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifest requirement in cases such as the one at bar where the worker suffers from a post-retirement occupational disease. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 248, 24 BRBS 190(CRT) (4th Cir. 1990).

not proper simply to calculate the current disability and to subtract from this disability that which resulted from 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 Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT).

The administrative law judge found that Dr. Reid's opinion is insufficient to satisfy the contribution element, as Dr. Reid did not quantify the level of impairment due solely to claimant's asbestosis. Dr. Reid stated that, according to a leading medical journal, hypertension causes a three percent drop in FEV_1 and FVC pulmonary function results, and each one percent drop in these results, on average, causes a one percent increase in impairment as calculated under the American Medical Association *Guides to the Evaluation of Permanent Impairment.* Dr. Reid concluded, therefore, that claimant's hypertension caused at least a 10 percent impairment, and that if it were not for the hypertension, claimant's respiratory impairment would be 10 percent less. EX 2.

We affirm the administrative law judge's rejection of this evidence. As the administrative law judge correctly found, Dr. Reid does not quantify the level of impairment due to the asbestosis alone. *See Harcum I*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). Moreover, the Fourth Circuit in *Carmines*, 138 F.3d at 143, 32 BRBS at 54-55 (CRT), stated that it is insufficient for purposes of the contribution element simply to calculate the current disability and to subtract from this disability that which resulted from the pre-existing disability, which is what employer suggests the administrative law judge do with Dr. Reid's opinion in the instant case.[3] Thus, as the administrative law judge's finding that the contribution element is not satisfied is rational, supported by substantial evidence and in accordance with law, we affirm the administrative law judge's denial of Section 8(f) relief.

Accordingly, we affirm the administrative law judge's Decision and Order Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer.

SO ORDERED.

[3]Employer suggests that Dr. Reid "clearly stated" that claimant's impairment rating due to asbestosis alone is 18 percent. Emp. brief at 15. Dr. Reid states that claimant's current impairment would be 10 percent less due to hypertension. Twenty percent reduced by 10 percent is indeed 18 percent, but no where in his report does Dr. Reid refer to any degree of impairment due to claimant's work-related asbestosis. Thus, employer's method of calculating claimant's impairment is inconsistent with *Carmines.*

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge