BRB No. 00-0386

LAURA G. DIGGS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Dec. 28, 2000
	)	
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 Denying Section 8(f) Relief of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Kristin Dadey (Henry L. Solano, Solicitor of Labor; Carol A. 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 (99-LHC-0884) 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 if they are rational, supported by substantial evidence, and in accordance with law. *OKeeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On June 18, 1990, claimant, a janitor, injured her right leg and right shoulder/arm/wrist in a work-related accident. In a Decision and Order dated August 20, 1999, the administrative law judge accepted the stipulations of claimant and employer regarding claimant's entitlement to various periods of temporary and permanent total disability benefits, 33 U.S.C. §908(a), (b), to an award under the schedule at Section 8(c)(2), 33 U.S.C. §908(c)(2), for a 30 percent impairment to her right lower extremity, and to continuing permanent partial disability benefits of $170.70 per week for a loss of wage-earning capacity due to the shoulder injury. 33 U.S.C. §908(c)(21). 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 shoulder and back conditions, as well as small airways obstruction. The administrative law judge did not accept the stipulations affecting employer's entitlement to Section 8(f) relief, and, following submission of exhibits and briefs on the issues concerning Section 8(f), issued a Decision and Order dated December 7, 1999, denying employer's claim for Section 8(f) relief. The administrative law judge specifically found that there was no basis for considering claimant's back condition and small airways obstruction to be pre-existing permanent partial disabilities, and that although the chronic shoulder injury was a manifest pre-existing disability, employer failed to establish that it 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 entitlement to Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant has a manifest pre-existing permanent partial disability, that the current disability is not due solely to the subsequent injury, and that the current injury is materially and substantially greater due to the pre-existing disability than it would be from the subsequent injury alone. *Director, OWCP v. Newport News & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 185-186, 27 BRBS 116, 130 (CRT)(4th Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995). Employer may establish the contribution element by "medical evidence or otherwise," *Director, OWCP v. Newport News & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997), but must quantify the level of the impairment that would ensue from the work-related injury alone, so that the administrative law judge has a basis for determining if the ultimate permanent partial disability is materially and substantially greater due to the contribution of the pre-existing disability. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 138-39, 32 BRBS 48, 50(CRT)(4th Cir. 1998).

Employer first contends the administrative law judge erred in finding that claimant's alleged small airways obstruction does not constitute a pre-existing permanent partial disability for purposes of Section 8(f). A pre-existing condition need not be economically disabling in order to constitute of pre-existing permanent partial disability for purposes of Section 8(f). Rather, the condition must be a "serious physical disability in fact [such] that a cautious employer would have been motivated to discharge the handicapped employee because

of a greatly increased risk of employment-related accident and compensation liability." *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513, 6 BRBS 399, 415 (D.C. Cir. 1977); *see also Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Hundley v. Newport News Shipbuilding & Drydock Co.*, 32 BRBS 254 (1998).

The administrative law judge found that employer did not establish that claimant's small airways disease constitutes a pre-existing permanent partial disability. The administrative law judge found that Dr. Reid's opinion that a cautious employer would not hire a worker for heavy manual labor with this condition is not entitled to any weight, as the opinion is unsubstantiated. The administrative law judge noted that the results of some of claimant's pulmonary function studies were greater than predicted, and that Dr. Reid's opinion therefore is undermined. As this finding is rational and supported by substantial evidence, we affirm the denial of Section 8(f) relief on the basis of claimant's small airways disease. *See Carmines*, 138 F.3d at 141, 32 BRBS at 53(CRT); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Employer next contends that the administrative law judge erred in finding that claimant's pre-existing low back condition is not a pre-existing permanent partial disability. The administrative law judge noted that both Dr. Reid and Dr. Stiles stated that claimant suffered from a pre-existing back disability. The administrative law judge rationally found that Dr. Stiles's opinion on this subject is conclusory. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); EX 6. The administrative law judge did not specifically discuss Dr. Reid's opinion on this issue, but stated that there is no supporting medical documentation of any separate low back injury or disability. Decision and Order at 6-7. Contrary to the administrative law judge's statement, the record contains clinic notes discussing back pain. Specifically, on April 1, 1986, claimant was noted to have low grade back pain, and on July 22, 1988, the clinic report states that claimant's "back has bothered her intermittently although not to any significant extent until some time in late May when it began to hurt more. She has been quite uncomfortable for the past 2 months, but she has been able to continue working." EX 4 at ex. 4. The diagnosis was "chronic lumbosacral strain." *Id.*

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[1]The administrative law judge stated that the Fourth Circuit's decision in *Carmines* requires that he determine if the opinions of *in-house* physicians are supported by medical data. Decision and Order at 7. Although the opinion at issue in *Carmines* was that of an in-house physician, employer correctly notes that the opinions of all physicians are subject to the same scrutiny. *See generally Carmines*, 138 F.3d at 140 n. 5, 32 BRBS at 52 n.5 (CRT). The administrative law judge, however, is not required to credit uncontradicted evidence. *Id.*, 138 F.3d at 142, 32 BRBS at 53(CRT).

Nevertheless, we hold that any error the administrative law judge may have committed with regard to this issue is harmless, as employer's evidence on the issue of the contribution of claimant's back condition to the ultimate permanent partial disability is legally insufficient to satisfy employer's burden. Dr. Reid states only that claimant's disability is "materially contributed to, and made materially and substantially worse by her pre-existing chronic shoulder and back disability and a small airway obstruction." EX 5. As the work injury was to claimant's shoulder and leg, this evidence fails to demonstrate that the back condition, by itself, materially and substantially contributed to claimant's current disability, and potentially establishes only a greater anatomic impairment, which is insufficient to meet employer's burden. *Harcum I,* 8 F.3d at 183-184, 27 BRBS at 127-128(CRT). Therefore, we affirm the administrative law judge's denial of Section 8(f) relief on the basis of a pre-existing back condition.

Lastly, employer contends that the administrative law judge erred in finding that the contribution element is not met with regard to claimant's pre-existing shoulder condition. Dr. Stiles's opinion is insufficient under *Harcum I* and *Carmines* to establish the contribution element. Dr. Stiles states that claimant presently has a 15 percent shoulder impairment, and that the impairment was "markedly" contributed to by the pre-existing shoulder disability. EX 6. He does not, however, state what impairment results from the work injury alone. *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT)*; Harcum I*, 8 F.3d at 175, 27 BRBS 116(CRT).

Dr. Reid stated that the work injury was minor, and that, if claimant's shoulder had been "normal," the injury would have resolved with no disability. He stated further that the injury was substantially worsened by the pre-existing shoulder injury. EX 5. The administrative law judge stated that the "quantification" requirement of *Harcum* and *Carmines* requires more than a statement that an injury is "minor." He inferred, however, that Dr. Reid was stating that the disability resulting from the work injury is zero percent, and found this opinion unsupported by the parties' stipulations that claimant is economically disabled following the work injury. Thus, he concluded that employer has failed to show that the "ultimate permanent partial disability is due to both the work-related injury and the pre-existing partial disability." Decision and Order at 8, quoting *Harcum I*, 8 F.3d at 182, 27 BRBS at 125 (CRT). Inasmuch as employer has not raised any reversible error in the administrative law judge's consideration of the evidence in this case, and as the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law, the denial of Section 8(f) relief is affirmed. *See generally Farrell v. Norfolk Shipbuilding & Dry Dock Co.*, 32 BRBS 118, 120, *vacated on other grounds on recon.*, 32 BRBS 282 (1998).

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[2]We reject employer's reliance on the Fourth Circuit's decision in *Director, OWCP v. Newport New Shipbuilding & Dry Dock Co. [Parkman]*, 122 F.3d 1060 (4th Cir. 1997), inasmuch as it is an unpublished decision, and the Fourth Circuit has published opinions addressing the issue at hand. *See* U.S. Ct. of App. 4th Cir. Rule 36(c).

Accordingly, the administrative law judge's Decision and Order Denying Section 8(f) relief is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge