

MILTON L. STACEY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING & DRY	)	
DOCK COMPANY	)	
	)	DATE ISSUED: <u>Jan. 30, 2004</u>
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 L. Leland, Administrative Law Judge, United States Department of Labor.

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

Kathleen H. Kim (Howard 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits to Claimant and Denying Section 8(f) Relief to Employer (2002-LHC-1236) of Administrative Law Judge Daniel L. Leland 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 pipe coverer between 1954 and 1957. He was exposed to asbestos in this employment. In 1999, after claimant’s retirement, Dr. Kane diagnosed him with asbestosis, chronic obstructive pulmonary disease, and hypertension. Claimant and employer stipulated that claimant is entitled to compensation for a 50 percent permanent pulmonary impairment at the rate of \$213.08 per week from October 14, 1999 and continuing. 33 U.S.C. §908(c)(23). Claimant and employer also stipulated that claimant is entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge accepted the parties’ stipulations and 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 hypertensive cardiovascular disease and chronic obstructive pulmonary disease (COPD) constitute pre-existing permanent partial disabilities. Next, the administrative law judge found that claimant, a retiree, need not establish in this Fourth Circuit case, that his 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) (4<sup>th</sup> Cir. 1991). Nonetheless, the administrative law judge denied employer Section 8(f) relief, finding it 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 the administrative law judge 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 opinions of Drs. Tornberg and Donlan are 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 partial 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)(4<sup>th</sup> Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4<sup>th</sup> Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT) (4<sup>th</sup> Cir. 1993), *aff'd*, 514 U.S. 122, 29 BRBS 87(CRT) (1995). In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to establish the contribution element, employer must quantify the level of impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-31(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 that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. The court stated that it is not enough to simply calculate the total current disability and to subtract from it the disability resulting from the pre-existing condition. *Carmines*, 138 F.3d at 142, 32 BRBS at 55(CRT).

In this case, employer challenges the administrative law judge's finding that the opinions of Drs. Tornberg and Donlan are insufficient to establish the contribution element. Dr. Tornberg opined that claimant's lung impairment, impairment rating, and disability are not caused by his asbestosis alone, but rather are materially and substantially contributed to, and materially and substantially caused by, his pre-existing hypertensive cardiovascular disease and COPD. Decision and Order at 6; EX 1. Dr. Tornberg concluded that if claimant merely had asbestosis, his disability would be at least 10 percent less. *Id.* In considering whether to credit Dr. Tornberg's opinion, the administrative law judge noted that the doctor referenced a journal article for the proposition that hypertension reduces FEV<sub>1</sub> and FVC levels, which increases the impairment rating, and that COPD significantly reduces FEV<sub>1</sub> and FVC values. The administrative law judge rationally rejected Dr. Tornberg's opinion for three reasons. Decision and Order at 6-7. First, Dr. Tornberg's report does not address the extent and seriousness of claimant's asbestosis or the degree of disability it would have caused alone, as required by *Harcum I*. Second, Dr. Tornberg's references to hypertension and COPD generally reducing FEV<sub>1</sub> and FVC values do not describe the actual effect, if any, of the hypertension and COPD specifically suffered by claimant herein on his pulmonary impairment. Third, Dr. Tornberg does not explain how he determined that claimant's disability would be ten percent less if he had only asbestosis. In this regard, the administrative law judge reiterated that the Fourth Circuit made it clear in *Carmines* that it is not proper to simply calculate the current disability and to subtract this disability from the pre-existing injury. *Carmines*, 138 F.3d at 142, 32 BRBS at 55(CRT). We

affirm the administrative law judge's finding as it is rational, supported by substantial evidence, and in accordance with law. *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4<sup>th</sup> Cir. 2003); *see also Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT)(4<sup>th</sup> Cir. 2003).

Next, the administrative law judge found that Dr. Donlan's opinion also is insufficient to establish the contribution element. Dr. Donlan opined that claimant is 50 percent impaired, that his asbestos-related disease is a "contributing factor" to his impairment, and that if claimant had "not been a cigarette smoker and had an element of chronic obstructive lung disease that his impairment would be about 10 percent less." EX 7. In rejecting Dr. Donlan's opinion, the administrative law judge properly found first that Dr. Donlan's letters do not address the extent and seriousness of claimant's asbestosis or the degree of disability it would have caused alone. Second, the administrative law judge rationally found that Dr. Donlan did not explain how he determined that claimant's disability would be ten percent less if he had only asbestosis. The administrative law judge again stated that the above type of "subtraction" evidence was specifically rejected in *Carmines*. Thus, the administrative law judge concluded that it cannot be determined from Dr. Donlan's opinion if claimant's level of impairment is materially and substantially greater due to his hypertensive cardiovascular disease and COPD than it would be due to his asbestosis alone. As the administrative law judge's rejection of Dr. Donlan's opinion is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that Dr. Donlan's opinion is insufficient to establish contribution. *Winn*, 326 F.3d 427, 37 BRBS 29(CRT); *Pounders*, 326 F.3d 455, 37 BRBS 11(CRT). Consequently, we hold that the administrative law judge rationally determined that employer did not meet its burden to establish the element of contribution and we affirm the denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits to Claimant and Denying Section 8(f) Relief to Employer is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge