BRB No. 98-1386

MAYO F. SMITH	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 6, 1999
	)	
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 & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Janet R. Dunlop (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Relief (97-LHC-1161) 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 shipfitter, was exposed to asbestos for over twenty years during the course of his employment with employer. Claimant was diagnosed with pulmonary asbestosis in August 1996, and he retired in 1997. DXS 8, 9. In his Decision and Order, the administrative law judge accepted the stipulations of the parties as to the nature and extent of claimant's permanent partial disability, claimant's average weekly wage for compensation purposes, claimant's entitlement to medical benefits, and employer's liability for an attorney's fee of $1,500. Decision at 2-3. 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 from a pre-existing permanent partial disability, *i.e.*, chronic obstructive pulmonary disease (COPD) and coronary artery disease, but that employer failed to demonstrate that those conditions materially or substantially contributed to claimant's present disability. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

On appeal, employer argues that the administrative law judge erred in finding that it failed to establish that claimant's pre-existing conditions combined with his asbestosis, resulting in a greater level of overall impairment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's conclusion that employer failed to establish the contribution element necessary for relief under Section 8(f).

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 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 order to satisfy the contribution element, an 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-related injury alone.

> A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Harcum I, 8 F.3d at 185, 27 BRBS at 131 (CRT).

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[1]The United States Court of Appeals for the Fourth Circuit, in 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*, 934 F.2d 248, 24 BRBS 190 (CRT)(4th Cir. 1990).

In the instant case, there are only two medical opinions of record addressing the potential relationship between claimant's pre-existing conditions and his present disability. In seeking to reverse the administrative law judge's decision, employer challenges the administrative law judge's decision to credit the testimony of Dr. Scutero rather than the testimony of Dr. Reid. Specifically, employer asserts that the testimony of Dr. Reid is sufficient 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. Reid, employer's in-house physician, stated that claimant's lung impairment and resultant disability rating were not solely caused by his asbestosis but were materially and significantly caused and/or contributed to by his COPD and hypertensive cardiovascular disease. EX 7. In contrast, Dr. Scutero, who is board certified in pulmonary and internal medicine, opined that neither of claimant's pre-existing conditions changed the level of claimant's disability to any significant degree. DX 6-1. In reaching their opposing conclusions, both Drs. Reid and Scutero cited an article in *Chest* magazine.[2] Dr. Reid opined that the article supported his conclusion that claimant's hypertension and heart disease increased his breathing impairment, EX 7, while Dr. Scutero, citing not only to the article at issue but to subsequent editorials addressing the findings contained within that article, stated that it supported his conclusion that any increase in claimant's impairment is minimal. DX 6.

After review of the record, we hold that the decision of the administrative law judge is rational, supported by substantial evidence in the record, and is in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe,* 380 U.S. at 359. In his decision, the administrative law judge credited and relied upon the opinion of Dr. Scutero, finding Dr. Scutero to be better qualified based on his Board-certification as a pulmonary specialist, and his opinion to be better reasoned and documented as concerns the *Chest* article. Citing the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994), the administrative law judge thus found that employer had not carried its burden of establishing the contribution element, and that therefore employer's request for Section 8(f) relief must be denied.

We reject employer's argument that the administrative law judge erred by relying on the findings of Dr. Scutero because his opinion addressed only whether claimant's pre-existing conditions contributed to claimant's asbestos disease,

[2]*See* Enright, *et al*, Reduced Vital Capacity in Elderly Persons with Hypertension, Coronary Heart Disease, or Left Ventricular Disease, 107 *Chest* 28 (Jan. 1, 1995).

whereas Dr. Reid found they substantially and materially contributed to claimant's breathing impairment. Contrary to employer's assertion, however, Dr. Scutero also addressed the relationship between claimant's prior conditions and his overall breathing impairment, as he stated that:

> it is my opinion with a reasonable degree of medical certainty that [claimant]...has a 50 percent impairment of his **respiratory system** that is caused in whole or in significant part by his asbestosis.

DX 6-2 (emphasis added). The administrative law judge's decision to rely upon this testimony is within his discretion as the trier-of-fact. *Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963); *Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). Thus, as the administrative law judge rationally credited evidence that claimant's present condition is not materially and substantially greater than that

which would have resulted from his asbestosis alone, the administrative law judge's conclusion that the contribution element of Section 8(f) has not been met must be affirmed.[3]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[3]We thus need not address the Director's contention that the administrative law judge erred in finding that employer carried its burden of establishing that claimant suffered from an existing disability prior to the diagnosis of asbestosis.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge