

RANDALL L. POUNDERS, SR.)	
)	
Claimant)	
)	
v.)	
)	DATE ISSUED: <u>July 28, 1999</u>
NEWPORT NEWS SHIPBUILDING)	
AND DRY DOCK COMPANY)	
)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

LuAnn B. Kressley (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 (97-LHC-1840) 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 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 and employer stipulated that claimant was exposed to asbestos dust and fibers during the course of his employment. After his retirement, he was diagnosed with asbestosis, and the parties agree he has a 15 percent permanent partial disability. 33 U.S.C. §908(c)(23). Employer applied for Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. The administrative law judge denied the relief, finding that employer failed to establish that claimant’s disability is materially and substantially greater because of his pre-existing pleural fibrosis/restrictive lung disease and hypertensive cardiovascular disease/diabetes. Employer appeals this decision, and the Director, Office of Workers’ Compensation Programs (the Director), responds, urging affirmance.

Employer contends the administrative law judge erred in concluding that it failed to satisfy the contribution element necessary for Section 8(f) relief. Section 8(f) shifts the liability to pay compensation for permanent disability or death 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 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. [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*, 514 U.S. 122, 29 BRBS 87 (CRT) (1995). In a case involving a post-retirement occupational disease arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, an employer need not establish that a claimant’s pre-existing disability was manifest. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991).

In this case, employer and the Director do not dispute the fact that claimant had a pre-existing disability. Medical records establish that claimant had both pleural fibrosis/restrictive lung disease and hypertensive cardiovascular disease/diabetes prior to the discovery of his asbestosis in 1997, and the administrative law judge so found. Decision and Order at 5. Thus, employer has established the first element necessary for relief from the Special Fund. As this post-retirement occupational disease case arises in the Fourth Circuit, employer need not establish that claimant’s pre-existing disability was manifest. *Harris*, 934 F.2d at 548, 24 BRBS at 190 (CRT). Consequently, the sole issue before the Board is

whether the administrative law judge properly determined that employer failed to satisfy the contribution element.

To satisfy the contribution element, employer relies on the opinion of Dr. Reid who stated that if claimant had only asbestosis, his impairment “rating would be at least 15% less.” Emp. Ex. 1. The administrative law judge determined that employer’s evidence is insufficient as it makes “no attempt to quantify Claimant’s disability with and without the alleged pre-existing disability so that [he] can determine whether Claimant’s ultimate disability is materially and substantially worse as a result of the pre-existing disability.” Decision and Order at 7. Under Fourth Circuit law, an employer may show that a pre-existing disability renders a claimant’s overall disability materially and substantially greater only by quantifying the disability that ensues from the work injury alone and comparing it to the pre-existing disability. Quantification may be established by medical or other evidence which demonstrates that a claimant’s ultimate disability is materially and substantially greater than the disability resulting from the work injury alone. *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131(CRT); *see also Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT) (degree of disability); *Harcum II*, 131 F.3d at 1082-1083, 31 BRBS at 166-167(CRT) (wage-earning capacity); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997) (degree of disability); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated in part on other grounds on recon.*, 32 BRBS 283 (1998) (vocational evidence); *Quan v. Marine Power & Equipment*, 31 BRBS 178 (1997) (wage-earning capacity). In this case, employer presented medical evidence to show that claimant is disabled to a greater degree because of his pre-existing disability. Although the administrative law judge is technically correct in stating that Dr. Reid’s statement does not contain two disability ratings for him to compare to determine whether claimant’s disability is materially and substantially worse because of the pre-existing condition, the record as a whole contains the information the administrative law judge needs to make the appropriate comparison.

Dr. Reid’s letter specifically stated that claimant’s overall 15 percent disability rating is based upon both his pre-existing and work-related conditions. Emp. Ex. 1. He then stated that if claimant suffered only from the work-related asbestosis, his disability rating would be “at least 15% less.” The administrative law judge accepted the parties’ stipulation and found that claimant has a 15 percent impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*. Decision and Order at 3. Calculation of the percent of impairment caused by the pre-existing disability, therefore, requires the mere computation of 15 percent of the 15 percent overall rating (15 percent of 15 percent equals 2.25 percent). Thus, claimant’s pre-existing disability, according to Dr. Reid, resulted in at least 2.25 percent impairment. Subtracting 2.25 percent from the overall 15 percent impairment results in an impairment rating for the asbestosis alone of 12.75 percent. Therefore, the administrative law judge had enough information to make the comparison

between claimant's disability with and without the pre-existing disability (15 percent versus 12.75 percent). Consequently, we vacate the administrative law judge's denial of Section 8(f) relief for failure to quantify the extent of disability, and we remand the case for him to consider whether these figures establish that claimant's overall disability is materially and substantially greater because of his pre-existing disability.

Accordingly, the administrative law judge's Decision and Order is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge