BRB No. 04-0854

THOMAS H. PAYNTER	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/27/2005
	)	
	)	
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 and the Decision and Order on Remand of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Andrew J. Schultz (Howard M. 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order on Remand (2003-LHC-1286) of Administrative Law Judge Daniel A. Sarno, 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 was exposed to asbestos dust and fibers in the course of his work for employer from 1953 until his retirement in 1995. Following his retirement, claimant was diagnosed with asbestosis, and the parties ultimately agreed that he has a 55 percent permanent pulmonary impairment. In his Decision and Order, the administrative law judge found, in considering employer's request for Section 8(f) relief, 33 U.S.C. §908(f), that claimant suffered from a manifest pre-existing permanent partial disability, *i.e.*, hypertensive cardiovascular disease, but that employer did not establish that this condition materially and substantially contributed to claimant's present disability. Accordingly, the administrative law judge denied employer's claim for relief from the Special Fund.

Employer appealed the administrative law judge's denial of Section 8(f) relief, and the Board, by Order dated February 24, 2004, vacated the administrative law judge's Decision and Order, because it contained no finding regarding claimant's entitlement to benefits. *Paynter v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 04-0309 (Feb. 24, 2004) (unpub. Order). As the administrative law judge is procedurally barred from considering employer's entitlement to Section 8(f) relief where no award of benefits has been entered, *see Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999), the Board dismissed employer's appeal and remanded the case for further appropriate action. *Paynter*, slip op. at 1-2. On remand, the administrative law judge, based on the parties' stipulations, determined that claimant is entitled to an ongoing award of permanent partial disability and medical benefits. 33 U.S.C. §§907, 908(c)(23). In addition, the administrative law judge reaffirmed his prior decision with regard to the denial of Section 8(f) relief, and incorporated it by reference into his Decision and Order on Remand.

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, Foreman, and Shaw are insufficient to establish the element of contribution. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent 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 claimant is permanently partially disabled, as here, if it establishes: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest

to 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. 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 order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to satisfy this requirement, employer must quantify the level of the impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(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 whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *See also Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003). The Fourth Circuit further held, in *Carmines*, that simply subtracting the extent of disability that resulted from the pre-existing disability from the extent of the current disability is insufficient to establish that the claimant's disability is materially and substantially greater than that due to the subsequent injury alone. *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT).

In his decision, the administrative law judge determined that none of the medical opinions submitted by employer provides an adequate quantification of the level of impairment resulting from claimant's work-related injury alone, *i.e.*, his asbestosis. First, the administrative law judge properly found that Dr. Tornberg's report, which states "[i]f Mr. Paynter merely had asbestosis, his AMA rating, and hence his disability, would be at

[1]In a case such as the instant one involving a post-retirement occupational disease arising within the jurisdiction of the Fourth Circuit, an employer need not establish that a claimant's pre-existing disability was manifest. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

least 14% less," Employer's Exhibit (EX) 1, is insufficient to enable him to make an appropriate determination regarding contribution under *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT). Second, the administrative law judge found that while the reports of Dr. Foreman, dated July 19, 1999, and April 18, 2000, support the conclusion that claimant's current disability is a result of a combination of injuries,[2] they similarly do not quantify the level of impairment claimant would have suffered had he incurred only the work-related injury. Lastly, the administrative law judge determined that Dr. Shaw's opinions dated April 23, 2001, and July 16, 2001,[3] cannot support employer's request for Section 8(f) relief, because they too did not quantify the extent of claimant's permanent partial impairment which would have been caused by asbestosis alone.

As determined by the administrative law judge, the medical evidence presented by employer does not quantify the extent of claimant's permanent impairment from his work-related asbestosis alone. It therefore was not possible for the administrative law judge to make a determination as to whether claimant's pre-existing disability combined with the asbestosis to form a permanent partial disability materially and substantially greater than that which would have occurred due to the asbestosis alone. *Carmines*, 138 F.3d at 143, 32 BRBS at 55(CRT). Consequently, we affirm the administrative law judge's conclusion that the opinions of Drs. Tornberg, Foreman and Shaw cannot serve as a basis for Section 8(f) relief, as it is rational, supported by substantial evidence, and in accordance with law. *See generally Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT); *Harcum I*, 8 F.3d at 185-86, 27 BRBS at 130-131(CRT). The administrative law judge's denial of Section 8(f) relief is therefore affirmed. *Id.*

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[2]In his first report, dated July 19, 1999, Dr. Foreman noted an 11 percent pulmonary impairment based on pulmonary function studies, but he did not offer any opinion concerning the contribution of asbestosis to that impairment. EX 3. In his second opinion, dated April 18, 2000, Dr. Foreman noted that claimant's significant congestive heart failure contributed to the 11 percent impairment. As observed by the administrative law judge, Dr. Foreman stated that claimant "may well have some asbestos-related contribution to the impairment, but I believe it would be less than the 11 percent estimate and believe the fairest rating would require repeat Pulmonary Function Studies done when his cardiac status is compensated." EX 3.

[3]Dr. Shaw's report, dated April 23, 2001, consisted of chest x-rays showing pleural thickening, pleural plaques and fibrosis, and pulmonary function studies [PFS] indicating restrictive lung disease. EX 4. Although Dr. Shaw ruled out early asbestosis, he opined that claimant's restrictive lung disease was possibly caused by the pleural plaques and fibrosis. EX 4. In his second opinion, dated July 16, 2001, Dr. Shaw opined that the earlier PFS showed 55 percent impairment "at least partially secondary to asbestos related disease." EX 4.

Accordingly, the administrative law judge's Decision and Order and the Decision and Order on Remand are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge