BRB No. 99-0638

GEORGE T. BRASWELL	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
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 to the Employer of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Kristin Dadey (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samu

el J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Denying Section 8(f) Relief to the Employer (1998-LHC-728) of Administrative Law Judge Richard K. Malamphy 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 machinist, and employer stipulated that claimant was exposed to asbestos during the course of his employment with employer. Following his retirement, claimant was diagnosed with asbestosis, and the parties agree that he has a 15 percent permanent partial disability. 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. *See* Decision and Order at 2-4. 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.*, hypertensive cardiovascular disease and fibrillation, but that employer failed to establish 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 claimant 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; 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 a case 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).

In order to satisfy the contribution element, an employer must show by medical or other evidence that the ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the work-related injury alone. We affirm the administrative law judge's conclusion that this standard is not met in this case. Pursuant to the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, an employer may show that a preexisting disability renders a claimant's overall disability materially and substantially greater by quantifying the disability that ensues from the work injury alone and comparing it to the preexisting disability. *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); *Harcum II*, 131 F.3d at 1082-1083, 31 BRBS at 166-167 (CRT); *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155 (CRT) (1st Cir. 1997); *Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 118, *vacated in part on other grounds on recon.*, 32 BRBS 283 (1998); *Quan v. Marine Power & Equipment*, 31 BRBS 178 (1997), *aff'd sub nom. Marine Power & Equip. v. Dept. of Labor,* F.3d , 2000 WL 95994 (9th Cir. Jan. 31, 2000).

Employer argues on appeal that the administrative law judge erred in determining that the medical opinion of Dr. Reid, as supported by Drs. Dolan and Foreman, is insufficient to meet employer's burden to establish the contribution element. Dr. Reid, employer's in-house physician, opined that if claimant merely had asbestosis, and not hypertensive cardiovascular disease, claimant's AMA rating would be at least ten percent less; in support of this conclusion, Dr. Reid cited to an article in *Chest* magazine. *See* EX 1B. In support of Dr. Reid's opinion, employer additionally submitted into evidence letters from Drs. Donlan and Foreman; in each of these letters, the aforementioned physicians "check-marked" a box indicating that they were in agreement with Dr. Reid's conclusion. *See* EXS 3, 4.

In considering Dr. Reid's opinion, the administrative law judge found that this physician failed to supply any reliable evidence to support his calculation of claimant's disability; specifically, the administrative law judge found that Dr. Reid had only taken a generalized study and applied it to claimant. Pursuant to these findings, the administrative law judge concluded that Dr. Reid's opinion was conclusory and somewhat speculative and was, therefore, insufficient to establish the contribution element necessary for Section 8(f) relief to be granted. *See* Decision and Order at 7-9. Moreover, the administrative law judge gave no weight to the form letters of Drs. Donlan and Foreman, finding that these letters failed to

explain their respective reasons for agreeing with Dr. Reid's opinion.[1] *Id.* at 8.

Contrary to employer's argument, there is no requirement that the administrative law judge credit an uncontradicted medical opinion. *See Carmines*, 138 F.3d at 140-141, 32 BRBS at 52-53 (CRT)(wherein the court emphasized that an administrative law judge may not merely credulously accept a physician's assertions, but must examine the logic of the physician's conclusions and evaluate the evidence upon which those conclusions are based). Thus, the court's holding in *Carmines* requires the administrative law judge to determine whether there is a reasoned and documented basis for the medical opinion, and to evaluate such opinion in light of the evidence in the record considered as a whole. *See Carmines*, 138 F.3d at 140-141, 32 BRBS at 52 (CRT). In so doing, the administrative law judge may accept or reject all or any part of any testimony according to his judgment. *See Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, the administrative law judge's decision not to rely upon Dr. Reid's testimony, since that physician did not adequately document the reasoning for his conclusions, is within his discretion as the trier-of-fact. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962, *cert. denied*, 372 U.S. 954 (1963); *Heyde*, 306 F.Supp. at 1321. Consequently, the administrative law judge's determination that employer failed to establish that claimant's ultimate permanent partial disability is materially and substantially a greater is affirmed. *See Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I,* 8 F.3d at 175, 27 BRBS at 116

[1]The administrative law judge found a prior letter authored by Dr. Foreman to be more credible on this issue. Specifically, on October 30, 1997, Dr. Foreman, after examining claimant, opined that claimant's impairment was due entirely to his asbestos-related disease. *See* DX 1.

(CRT). We, therefore, affirm the administrative law judge's denial of Section 8(f) relief to employer.[2]

[2]We agree with the Director that, alternatively, the administrative law judge's decision may be affirmed since Dr. Reid's opinion is insufficient to establish contribution in light of the Fourth Circuit's decision in *Carmines.* In *Carmines*, the court specifically stated that it is not proper simply to calculate the claimant's current disability and subtract the disability that resulted from the pre-existing disability. *See Carmines,* 138 F.3d at 143, 32 BRBS at 55 (CRT). As this is precisely the method used by Dr. Reid in the instant case, his opinion is in conflict with the holding in *Carmines* and is thus insufficient to establish the contribution element.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge