

HERBERT E. WINN)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: _____)
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 Granting Benefits to the Claimant and 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; 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer (98-LHC-1315) 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer from 1960 to 1986 as a helper, handyman, and machinist. During the course of his employment he was exposed to airborne asbestos dust and fibers. On April 18, 1997, claimant was diagnosed as having asbestosis. Employer and claimant stipulated that claimant sustained a 20 percent permanent impairment due to asbestosis, for which claimant is entitled to compensation and medical benefits under the Act. 33 U.S.C. §§907, 908(c)(23). The sole issue before the administrative law judge was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act. 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge summarized the relevant evidence of record, specifically noting the medical opinions of Drs. Reid, Donlon and Guardia. The administrative law judge found that, based on this evidence, employer failed to establish that claimant had a pre-existing permanent partial disability. In addition, the administrative law judge found that employer failed to establish that any pre-existing permanent partial disability contributed to claimant's current permanent partial disability due to work-related asbestosis.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance.

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; and 3) that the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone.¹ 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*

¹The United States Court of Appeals for the Forth Circuit, in whose jurisdiction this case arises, does not apply the manifest requirement in post-retirement occupational disease cases, such as the instant case. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991). Accordingly, the manifest element is inapplicable to this claim.

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).

Employer contends that, pursuant to *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989), and *Patrick v. Newport News Shipbuilding & Dry Dock Co.*, 15 BRBS 274 (1983)(Kalaris, J., dissenting), the administrative law judge was required to credit uncontradicted evidence of record establishing that claimant had pre-existing chronic obstructive pulmonary disease (COPD) which materially and substantially contributed to his current permanent partial disability. We disagree. It is employer's burden to establish, by a preponderance of the evidence, its entitlement to Section 8(f) relief. *See generally Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994); *see also Carmines*, 138 F.3d at 142, 32 BRBS at 53 (CRT). Moreover, employer's reliance on *Patrick* is misplaced as the Board's reversal of the denial of Section 8(f) relief in that case was based on a misapplication by the administrative law judge of the relevant law and not on the absence of contrary evidence. *Patrick*, 15 BRBS at 277. Similarly, *Donnell* addresses the administrative law judge's error in applying the wrong table in the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), and does not stand for the proposition forwarded by employer that the administrative law judge is required to credit interpretations of the tables in the AMA *Guides* because they are uncontradicted. *Donnell*, 22 BRBS 140.

We affirm the administrative law judge's finding that employer failed to establish that any pre-existing permanent partial disability contributed to claimant's current disability. To establish such contribution under Section 8(f) in cases of permanent partial disability, employer must show that the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). Moreover, the United States Court of Appeals for the Fourth Circuit specifically 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 final injury alone. *Carmines*, 138 F.3d at 143, 32 BRBS at 55 (CRT). Pursuant to *Carmines*, therefore, the opinion of Dr. Reid that if claimant had only asbestosis, and not COPD, his rating under the AMA *Guides* would be ten percent less, EX 5, and the opinion of Dr. Guardia that, had claimant not been a smoker, his disability would have been much less, EX 8, are legally insufficient to establish that claimant's alleged COPD contributed to his current pulmonary disability. *Carmines* also explicitly directs that the administrative law judge affirmatively examine the logic of a physician's conclusions and evaluate the evidence upon which his conclusions are based. *Carmines*, 138 F.3d at 140, 32 BRBS at 52 (CRT). Thus, the

administrative law judge acted within his discretion in finding insufficient the opinions of Drs. Donlon and Guardia on the basis that these opinions are lacking a foundation as employer failed to submit or specify the underlying data upon which their opinions are based.² In the absence of any other evidence of record addressing the contribution of a pre-existing permanent disability, such as deposition testimony, we hold that the administrative law judge properly concluded that employer failed to establish any contribution from claimant's alleged pre-existing COPD to his current permanent partial disability.³

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

²Dr. Donlon rated claimant's current pulmonary impairment at ten percent, the majority of which he opined is secondary to chronic bronchitis from cigarette smoking. EX 6. He stated his opinion was based on a 1997 pulmonary function test; this test was not submitted into evidence. Dr. Donlon further opined that claimant's pre-existing chronic bronchitis contributes to his overall impairment; specifically, he concluded that claimant's overall impairment would be four percent from asbestosis alone. EX 6, 7.

³Moreover, given our holding, it is not necessary to address employer's challenge to the administrative law judge's finding that employer failed to establish a pre-existing permanent partial disability.