BRB No. 03-0624

ARCHIE T. SPIERS, JR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: May 7, 2004
	)	
	)	
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 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.

Joshua T. Gillelan II (Howard 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-1438) of Administrative Law Judge Daniel A. Sarno, Jr., awarding benefits to claimant and denying Section 8(f) relief, 33 U.S.C. §908(f), to employer 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 airborne asbestos dust and fibers in the course of his employment as a draftsman for employer between 1951 and 1954. On or about July 24, 1998, claimant was diagnosed with asbestos-related lung disease by Dr. Donlan, which, as employer concedes, was caused in part by his employment-related exposure to asbestos. Subsequently, Drs. Heyder and Shaw diagnosed claimant with asbestosis-related lung disease. Claimant and employer stipulated that claimant is entitled to an ongoing award of partial disability compensation for a 53 percent permanent pulmonary impairment at the rate of $147.65 per week from July 24, 1998, 33 U.S.C. §908(c)(23), and medical benefits under Section 7 of the Act, 33 U.S.C. §907. The parties further stipulated that counsel for claimant was entitled to an attorney's fee of $1,602. The administrative law judge accepted the parties' stipulations and thus the only issue remaining before the administrative law judge was whether employer was entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act.

The administrative law judge found that the parties had agreed that claimant's chronic obstructive pulmonary disease (COPD) constitutes a pre-existing permanent partial disability,[1] Decision and Order at 8, but he nonetheless, denied employer Section 8(f) relief, as employer was not able to establish the requisite element of contribution. Decision and Order at 9-11.

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. Donlan, Tornberg and Schwartz are insufficient to establish the element of contribution. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

After 104 weeks, Section 8(f) shifts the liability to pay compensation for permanent partial disability 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 retiree is permanently partially disabled, as here, if it affirmatively

[1] As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge found that claimant, a retiree, need not establish that his post-retirement occupational disease was manifest to employer prior to his work-related injury. Decision and Order at 8. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

establishes that claimant had a pre-existing permanent partial disability and that the ultimate permanent partial disability is not due solely to the work injury and 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 *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that in order to establish the contribution element, employer must quantify the level of impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-31(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 that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. The court stated that it is not enough to simply calculate the total current disability and to subtract from it the disability resulting from the pre-existing condition. *Carmines*, 138 F.3d at 142, 32 BRBS at 55(CRT).

In this case, employer challenges the administrative law judge's finding that the opinions of Drs. Donlan, Tornberg and Schwartz are insufficient to establish the contribution element. Dr. Tornberg opined that claimant's lung impairment, impairment rating, and disability are not caused by his asbestosis alone, but rather are materially and substantially contributed to by his COPD. Decision and Order at 10-11; Unnumbered Exhibit. Dr. Tornberg concluded that if claimant had only asbestosis, his disability rating would be at least 35 percent less. *Id.* The administrative law judge rationally rejected Dr. Tornberg's opinion as the physician relied upon the "subtraction method," *i.e.*, he merely subtracted the pre-existing level of impairment from claimant's current level of impairment, in reaching his conclusion. *See Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *see also Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *see also Carmines*, 138 F.3d at 142, 32 BRBS at 55(CRT).

Further, contrary to employer's assertion, we hold that the administrative law judge rationally concluded that Dr. Schwartz's opinion was not sufficient to meet the contribution element as the physician's opinion that claimant had a Class 3 impairment and that asbestos-related disease was a "substantial contributing factor" to the impairment lacks the quantification required to support a finding of contribution. *See Carmines*, 138 F.3d 134, 32 BRBS 48(CRT).

Lastly, we reject employer's assertion that the administrative law judge erred in rejecting Dr. Donlan's medical opinion. Dr. Donlan opined that if claimant did not suffer from COPD (along with his asbestosis), claimant's impairment would be a Class 2 rather than a Class 3 impairment.[2] Employer's Exhibit 10. The administrative law judge found that while Dr. Donlan's opinion sufficiently quantified claimant's disability in a manner which does not run afoul of *Carmines* and *Pounders*, Dr. Donlan provided no medical explanation or test supportive of his quantification of claimant's asbestos-related impairment absent the pre-existing COPD. Decision and Order at 10. Thus the administrative law judge rationally concluded that Dr. Donlan's opinion was not sufficient to establish contribution. *See Carmines*, 138 F.3d 134, 32 BRBS 48(CRT); *Winn*, 326 F.3d 427, 37 BRBS 29(CRT); *Pounders*, 326 F.3d 455, 37 BRBS 11(CRT). Consequently, we hold that the administrative law judge rationally determined that employer did not meet its burden of establishing the element of contribution, and we affirm the denial of Section 8(f) relief.

Accordingly, the administrative law judge's Decision and Order awarding claimant benefits and denying section 8(f) relief to employer is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[2] When this case was before the administrative law judge, the Director challenged the admission of the opinion of Dr. Donlan, Employer's Exhibit 10, arguing that employer failed to provide a proper rationale for requesting the administrative law judge to keep the record open beyond the hearing for admission of this exhibit. The administrative law judge rejected the Director's assertions, *see* Decision and Order at 4-5, and the issue is not raised before the Board.