BRB No. 00-1181

JESSE M. MARLOWE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Sept. 14, 2001
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

Kristen Dadey (Howard M. Radzely, Acting 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-1885) of Administrative Law Judge Richard E. Huddleston 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).

The administrative law judge accepted the stipulations between employer and claimant, a retiree, entitling claimant to permanent partial disability compensation pursuant to 33 U.S.C. §908(c)(23) for a 16 percent impairment due to asbestosis, caused at least in part, by his work for employer.[1] Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing hypertension. The administrative law judge found that claimant's hypertension was not a pre-existing permanent partial disability and that, in any event, employer failed to establish that hypertension materially and substantially contributed to claimant's current disability. The administrative law judge therefore denied Section 8(f) relief.

On appeal, employer contends that the administrative law judge erred in concluding that it did not produce sufficient evidence to satisfy the elements necessary for Section 8(f) relief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision.

[1]Claimant was employed by this employer between 1952 and 1986, EX 1, during which time he was exposed to airborne asbestos dust and fibers.

In order to establish its entitlement to Section 8(f) relief in this case, where claimant is entitled to permanent partial disability benefits for a post-retirement occupational disease, employer must show that claimant had a pre-existing permanent partial disability, that the current disability is not due solely to the subsequent injury, and that the current disability is materially and substantially greater due to the pre-existing disability than it would be from the occupational disease-related disability alone.[2] *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 & 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). If claimant is being compensated pursuant to Section 8(c)(23), only those pre-existing conditions that contribute to the compensable impairment can form the basis for Section 8(f) relief. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989); *see also Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44 (1995).

Employer first contends that the administrative law judge erred in finding that claimant's hypertension is not a pre-existing permanent partial disability for purposes of Section 8(f) relief. The administrative law judge did not consider whether claimant's hypertension is, in fact, a serious, lasting, physical disability such that a cautious employer would have been motivated to discharge the employee because of an increased risk of compensation liability. *See, e.g., Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 32 BRBS 8(CRT) (6th Cir. 1998); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). We need not, however, rule on the propriety of the finding that employer did not establish the pre-existing permanent partial disability element necessary for Section 8(f) relief, inasmuch as the administrative law judge's denial of Section 8(f) relief may be affirmed based on the administrative law judge's finding that employer did not establish the contribution element. Assuming, *arguendo,* that claimant's

[2]In the case of a post-retirement occupational disease, the Fourth Circuit has held that the manifest element of Section 8(f) relief is not applicable. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

hypertension constitutes a serious, lasting, physical disability, the administrative law judge rationally determined that employer did not establish that hypertension materially and substantially contributed to claimant's compensable respiratory impairment.

In order to establish the contribution element for Section 8(f) relief in a case where claimant is permanently partially disabled, employer must establish that 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. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed this standard in several cases. In *Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT), the Fourth Circuit held that in order to establish contribution in a permanent partial disability case, employer must show by medical evidence or otherwise that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work injury alone. The court stated that a showing of this kind requires quantification of the level of the disability that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). Subsequently, in *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT), the Fourth Circuit applied the *Harcum I* holding in the context of an employer's seeking Section 8(f) relief for a permanent partial disability award to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of disability claimant would have suffered from the asbestosis alone, specifically holding that employer failed to meet its burden to quantify the disability that claimant would have suffered absent any pre-existing conditions. The court held that it is not proper simply to calculate the current disability and to subtract from this the disability that resulted from the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55(CRT). The court stated 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. *Id.; see also Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT).

In the instant case, in seeking to reverse the administrative law judge's denial of its request for relief pursuant to Section 8(f), employer challenges the administrative law judge's finding that the opinions of Drs. McCune, Donlon, Edwards and Foreman are insufficient to satisfy its burden of establishing that claimant's present disability is materially and substantially greater than that which would have resulted from claimant's asbestosis alone. Dr. McCune stated in relevant part that claimant's hypertension materially and substantially contributed to his overall disability; in this regard, Dr. McCune opined that claimant's disability would be at least 5 percent less without his pre-existing hypertension. *See* Emp.Ex.

6. Dr. Donlon stated that it was his opinion that claimant's disability is not related to asbestosis alone but also to his pre-existing hypertensive cardiovascular disease. *See* Emp. Ex. 7. Upon review of claimant's records, Dr. Edwards concluded that hypertension accounts for approximately 5 percent of claimant's disability.[3] *See* Emp. Ex. 5. Finally, Dr. Foreman, without quantifying claimant's impairment, if any, opined that claimant suffered from pulmonary asbestosis.[4] *See* Emp. Ex. 3. We agree with the administrative law judge that none of these opinions is sufficient to meet employer's burden of establishing the contribution element.

Although, as employer contends, the administrative law judge mischaracterized Dr. McCune's opinion,[5] this error is harmless as the administrative law judge properly characterized his opinion as insufficient to meet employer's burden. Neither the opinion of Dr. McCune nor Dr. Edwards, both of whom state that claimant's hypertension materially and substantially contributed to his overall disability which would be 5 percent less without his pre-existing hypertension, are sufficient to satisfy employer's burden as 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 utilized by these physicians in the instant case, these opinions are insufficient to establish the contribution element. *See Carmines*, 138 F. 3d 134, 32 BRBS 48(CRT); *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT). Moreover, neither the opinions of Drs. Donlon or Foreman offer the necessary quantification of claimant's impairment as a result of either his asbestosis or hypertension.

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[3]Dr. Edwards, without addressing any degree of disability attributable to claimant's asbestosis, concluded that claimant's current impairment of the whole man was the result of several problems including hypertension (5%), gouty arthritis (7%), benign prostatic hypertrophy (5%), osteoarthritis (10%), and gastroesophageal reflux (2%). Emp. Ex. 5

[4]Contrary to employer's characterization of Dr. Foreman's report that claimant needed only periodic surveillance examinations for his asbestosis and immediate investigation into additional medical treatment for his hypertension, Brief at 8, Dr. Foreman merely suggests that claimant discuss with his regular physician other medications available for the treatment of hypertension. Emp. Ex. 3.

[5]The administrative law judge rejected the report of Dr. McCune because he is not identified as the author, he never examined claimant, and he appears to restate the opinions of other physicians without documentation or citation to the medical record. *See* Decision and Order. at 5. Dr. McCune's signature appears on the document clearly identifying him as the physician rendering this opinion; moreover, he cites to nine exhibits upon which he bases his opinion.

Thus, none of the opinions offered into evidence by employer are sufficient to meet its burden of establishing the contribution element necessary for Section 8(f) relief. We therefore affirm the administrative law judge's conclusion that employer has not provided a basis for determining whether claimant's ultimate permanent partial disability is materially and substantially greater than would have ensued from his asbestosis alone. *Id.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge