

BRB No. 01-0199

HELEN R. BYRD	)	
(Widow of JAMES C. BYRD)	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>Sept. 26, 2001</u>
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.

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

Julia Mankata (Howard M. Radzely, Acting Solicitor of Labor; Carol 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits to the Claimant and Denying Section 8(f) Relief to the Employer (2000-LHC-1182) 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant's spouse (the decedent) was exposed to asbestos during the course of his employment with employer as a welder. Decedent retired in 1991, and was subsequently diagnosed with asbestosis and lung cancer. Decedent passed away on February 16, 1999. Claimant thereafter sought permanent partial disability and death benefits under the Act, while employer sought relief pursuant to Section 8(f). *See* 33 U.S.C. §§908(c)(23), 908(f), 909. In his Decision and Order, the administrative law judge accepted the parties' stipulations concerning the nature and extent of decedent's disability and death; accordingly, the administrative law judge awarded the permanent partial disability and death benefits sought by claimant. In addressing employer's request for Section 8(f) relief, the administrative law judge found that employer established that claimant suffered from a pre-existing permanent partial disability, *i.e.*, hypertensive cardiovascular disease, but that employer failed to demonstrate that this condition contributed to the decedent's disability or death. Accordingly, the administrative law judge denied employer's request for relief from the Special Fund.

Employer now appeals, arguing that the administrative law judge erred in denying it relief under Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's decision.

Section 8(f) limits employer's liability for compensation to the first 104 weeks of permanent disability or of death benefits; additional compensation is paid from the Special Fund. *See* 33 U.S.C. §944; *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd*, 243 F.3d 179, 35 BRBS 12(CRT)(4<sup>th</sup> Cir. 2001). Where employer claims Section 8(f) relief and the case involves two separate claims, as in this case which presents a claim for partial disability, 33 U.S.C. §908(c)(23), and a claim for death benefits, 33 U.S.C. §909, employer's entitlement to relief must be separately evaluated with regard to each claim. *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT)(4<sup>th</sup> Cir. 1990). To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, employer must affirmatively establish: 1) that decedent had a pre-existing permanent partial disability; 2) that the

pre-existing disability was manifest to employer prior to the work-related injury;<sup>1</sup> 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)(4<sup>th</sup> Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT)(4<sup>th</sup> Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116(CRT)(4<sup>th</sup> Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995). Similarly, employer is entitled to Section 8(f) relief in a death claim if the employee's death is not due solely to the work injury, a standard which can be met if employer establishes the existence of a pre-existing condition which hastened the employee's death. *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT)(4<sup>th</sup> Cir. 1998); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

Employer argues on appeal that the administrative law judge erred in determining that the opinions of Drs. Tornberg and Maddox are insufficient to meet its burden of establishing that the decedent suffered from a pre-existing permanent partial disability, specifically hypertensive cardiovascular disease, which contributed to his resulting disability and death. We disagree and, for the reasons that follow, we affirm the administrative law judge's conclusion that employer is not entitled to Section 8(f) relief.

In order to establish the contribution element for Section 8(f) relief in a case where the decedent was permanently partially disabled, employer must establish that the decedent's partial disability was 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

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<sup>1</sup>The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifestation requirement in cases such as the case at bar where the worker suffered from a post-retirement occupational disease. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 248, 24 BRBS 190(CRT)(4<sup>th</sup> Cir. 1990).

disability materially and substantially exceeded 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).

We reject employer's assertion that the administrative law judge erred in concluding that it did not meet its burden of establishing the contribution element regarding claimant's permanent partial disability claim. In the instant case, the administrative law judge properly held that the opinions of Drs. Tornberg and Maddux are legally insufficient to establish the contribution element as they do not quantify the disability that the decedent experienced from his current work injury alone in accordance with *Harcum* and *Carmines*. Specifically, Dr. Tornberg stated in relevant part,

Mr. Bryd's hypertension caused at least a 10% AMA impairment . . . . [I]f he merely had lung cancer, his AMA rating, and hence his disability would be 10% less.

Emp. Ex. 1. Dr. Maddox stated in relevant part that decedent's pre-existing hypertension caused a "significant" impairment. See Emp. Ex. 4. The administrative law judge rationally found that these two medical opinions do not quantify the disability that the decedent sustained without the presence of his pre-existing hypertensive cardiovascular disease, and that they therefore cannot establish that the decedent's ultimate impairment was materially and substantially greater as a result of his pre-existing heart disease.<sup>2</sup> See Decision and Order at 9.

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<sup>2</sup>We note that the implication of Dr. Tornberg's report is that the degree of impairment

Accordingly, as the administrative law judge properly held that the opinions of Drs. Tornberg and Maddox are legally insufficient to establish that the decedent's permanent partial disability was not materially and substantially greater due to the contribution of his pre-existing hypertensive cardiovascular disease, we affirm this finding. Consequently, the administrative law judge's finding that employer is not entitled to Section 8(f) relief on the decedent's permanent partial disability award is affirmed. *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).

Employer next avers that the administrative law judge erred in concluding that the decedent's hypertensive cardiovascular disease did not hasten his demise; in support of its position on appeal, employer notes that both Drs. Tornberg and Maddox opined that the decedent's hypertensive cardiovascular disease contributed to and hastened his death. *See* Emp. Exs. 1, 4. In addressing this issue, the administrative law judge initially determined that Dr. Tornberg's opinion was insufficient to satisfy the contribution element regarding claimant's death claim since Dr. Tornberg cited to no facts regarding how the decedent's heart disease allegedly contributed to his death; rather, Dr. Tornberg took a generalized medical study which averred that pre-existing heart disease may shorten a patient's life and applied it to the decedent. Similarly, the administrative law judge concluded that the opinion of Dr. Maddox failed to satisfy employer's burden of proof since that physician failed to offer a factual basis for his agreement with Dr. Tornberg's conclusion that hypertension contributed to the decedent's death. *See* Decision and Order at 10.

Contrary to employer's contention, the administrative law judge is not required to accept the opinions of Drs. Tornberg and Maddox merely because they are uncontradicted. Rather, it is the role of the administrative law judge to determine the weight to be given to all medical evidence of record, based on factors such as whether the opinions are well-reasoned and/or are supported by objective information. *See Carmines*, 138 F.3d 134, 32 BRBS 48(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

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due to asbestosis sustained by the decedent prior to his death may be arrived at by subtracting from the undisclosed total impairment the supposed degree of impairment due to hypertension. This method, however, was specifically rejected by the Fourth Circuit in *Carmines*, 138 F.3d 134, 32 BRBS 48(CRT).

and evaluate the evidence upon which those conclusions are based). Thus, the Fourth Circuit's holding in *Carmines* requires the administrative law judge to determine whether there is a reasoned and documented basis for a medical opinion, and to evaluate the 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 the reports of Drs. Tornberg and Maddox, since those physicians' opinions are not supported by a factual analysis addressing the specifics of the decedent's case, is within his discretion as the trier-of-fact. *See generally Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4<sup>th</sup> Cir. 1994)(administrative law judge's inferences and credibility assessments are to be afforded deference); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Consequently, the administrative law judge's determination that employer failed to establish that the decedent's pre-existing permanent partial disability contributed to his death is affirmed. *See Carmines*, 138 F.3d 134, 32 BRBS 48 (CRT); *Harcum II*, 131 F.3d 1079, 21 BRBS 164(CRT); *Harcum I*, 8 F.3d 175, 27 BRBS 116(CRT). We therefore affirm the administrative law judge's denial of Section 8(f) relief to employer.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge