

BRB No. 04-0956

ALFRED PINETTE)
)
 Claimant)
)
 v.)
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 BATH IRON WORKS CORPORATION) DATE ISSUED: 09/15/2005
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 and)
)
 ONE BEACON INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty,
Administrative Law Judge, United States Department of Labor.

Richard F. van Antwerp (Robinson, Kriger & McCallum, P.A.), Portland,
Maine, for employer/carrier.

Kathleen H. Kim (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.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-01068) of Administrative Law Judge Colleen A. Geraghty 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 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 worked intermittently for employer from 1943-1969 where he was exposed to asbestos. Cl. Ex. 7. Claimant retired in 1999. Cl. Exs. at 14-15; 8 at 14. He was awarded medical benefits on May 7, 2003, for his work-related asbestosis. Cl. Ex. 2. Claimant sought disability benefits on September 30, 2003, as Dr. Oldenburg rated him on September 17, 2003, with a 26 to 50 percent pulmonary impairment. Cl. Ex. 3. The parties subsequently agreed on a rating of 37.5 percent, the median between 26 and 50. Tr. at 9. The administrative law judge awarded claimant permanent partial disability for a 37.5 percent impairment from September 17, 2003, as stipulated by the parties. 33 U.S.C. §908(c)(23). With regard to employer's claim for Section 8(f) relief, 33 U.S.C. §908(f), the administrative law judge found that employer established that claimant had a manifest, pre-existing, permanent partial disability, chronic obstructive pulmonary disease due to smoking, which was first diagnosed in 1995. Decision and Order Awarding Benefits at 4; Emp. Exs. 1, 2; *see also* Tr. at 13-14. The administrative law judge found, however, that employer did not establish the contribution element. Therefore, he denied the claim for Section 8(f) relief.

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

Employer argues that it established that claimant's ultimate, permanent partial disability materially and substantially exceeds the disability resulting from the work injury alone based on the opinions of Drs. Oldenburg and LaPrad. Thus, employer asserts, it is entitled to Section 8(f) relief because it established the contribution element. To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, as here, employer must affirmatively establish: 1) that claimant has a pre-existing permanent partial disability; 2) that the pre-existing partial disability was manifest to employer; 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. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997).

The administrative law judge discussed the opinion of Dr. Oldenburg and found it

insufficient to establish the contribution element. Decision and Order Awarding Benefits at 4. With respect to claimant's pre-existing chronic obstructive pulmonary disease due to smoking, Dr. Oldenburg, on September 18, 2003, stated, "My impression is that there is probably an equal part of his abnormality due to smoking and an equal part due to the asbestosis resulting in his present situation." Cl. Ex. 9 at 53. Dr. Oldenburg classified claimant as having a Class III 26 to 50 percent pulmonary impairment according to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (5th ed.). Cl. Ex. 9 at 52. The administrative law judge found that Dr. Oldenburg did not quantify the level of impairment attributable to claimant's asbestosis beyond stating that the impairment was a Class III impairment. Decision and Order Awarding Benefits at 4. Additionally, the administrative law judge found that Dr. Oldenburg did not indicate the type and extent of disability the claimant would have as a result of his work-related asbestosis alone, in the absence of his chronic obstructive pulmonary disease. *Id.* Moreover, the administrative law judge stated that it would be misleading and inaccurate to deduce that claimant's asbestosis and chronic obstructive pulmonary disease each contributed in equal parts to his 37.5 percent impairment since the parties agreed on that percentage simply by splitting the difference in the Class III impairment range. *Id.* Since Dr. Oldenburg's opinion does not quantify the level of impairment or the type and extent of disability attributable to claimant's asbestos work injury alone, the administrative law judge properly concluded that it does not establish the contribution element. *Johnson*, 129 F.3d at 53-54, 31 BRBS at 161(CRT).

As employer contends, the administrative law judge did not discuss Dr. LaPrad's opinion in addressing the contribution element.¹ Dr. LaPrad reported on March 30, 2004, that claimant's "activity is primarily limited by his dyspnea as well as claudication in his legs" and that claimant's "[d]yspnea [is] most likely secondary to obstructive airways disease and questionable asbestosis." Emp. Ex. 3 at 1. On May 5, 2004, Dr. LaPrad diagnosed claimant with "[d]yspnea secondary to documented chronic obstructive airways disease of moderate severity." *Id.* at 2. Any error in the administrative law judge's failure to discuss Dr. LaPrad's opinion is harmless as it is insufficient as a matter of law to establish the contribution element because it does not quantify the level of impairment that ensues from the work injury alone. *Johnson*, 129 F.3d at 53-54, 31 BRBS at 161(CRT). Since neither the opinion of Dr. Oldenburg nor that of Dr. LaPrad quantifies the impairment due to the work injury alone, the administrative law judge properly concluded that the contribution element was not met. *Id.*; see also *Newport News Shipbuilding & Dry Dock Co. v. Pounders*, 326 F.3d 455, 37 BRBS 11(CRT) (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v.*

¹ The administrative law judge did discuss Dr. LaPrad's March 30, 2004, report of radiographic evidence of asbestos-related pleural disease in finding that employer established that claimant had a pre-existing permanent partial disability. Decision and Order Awarding Benefits at 4; Emp. Ex. 3 at 3; Dir. Br. at 10.

Winn, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Consequently, we affirm the administrative law judge's denial of Section 8(f) relief.²

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

² We need not address the Director's challenge, raised in its response brief, to the administrative law judge's finding that the manifest element was satisfied in light of our affirmance of the administrative law judge's finding that the contribution element was not met.