

JAMES G. WOODALL)	
)	
Claimant)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 09/21/2006
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 of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Marne K. Mitskog (Howard M. Radzely; Solicitor of Labor, Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM

Employer appeals the Decision and Order (2005-LHC-1588) 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 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 employed by employer as a machinist and machinery installer from 1940 until his voluntary retirement in 1994. While working for employer claimant was exposed to airborne asbestos dust and fibers; Dr. Scutero diagnosed claimant as suffering from asbestosis on April 22, 1997. Claimant and employer stipulated that claimant is entitled to permanent partial disability benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), for a 70 percent respiratory impairment commencing April 22, 1997. JX 1. The parties’ stipulations were incorporated into a Decision and Order awarding benefits issued by the administrative law judge in January 1999. Employer also sought relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f).¹

In his Decision and Order, the administrative law judge denied such relief. He found that although the Director, Office of Workers’ Compensation Program (the Director), conceded that claimant’s chronic obstructive pulmonary disease (COPD), stroke and pulmonary fibrosis constitute pre-existing disabilities, employer failed to establish the contribution element for Section 8(f) relief. Employer appeals the administrative law judge’s denial of relief under Section 8(f). The Director responds, urging affirmance.

Section 8(f) shifts the liability to pay compensation for permanent disability after 104 weeks from 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 claimant is permanently partially disabled if it is established that claimant had a manifest pre-existing permanent disability, and that his current permanent partial disability is not due solely to the subsequent work injury and is “materially and substantially greater than that which would have resulted from the subsequent work injury alone.”² 33 U.S.C. §908(f)(1); *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); *see also Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). In *Harcum I*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,

¹ Based on an apparent administrative error, employer’s petition for Section 8(f) relief, which was filed in 1997, was not adjudicated until 2005.

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

held that in order to satisfy this requirement, employer must quantify the level of impairment that would ensue from the work-related injury alone. *Harcum I*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). Thereafter, 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 whether claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *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. Winn*, 326 F.3d 427, 37 BRBS 29(CRT) (4th Cir. 2003).

Employer contends that Dr. Reid's opinion is sufficient to establish the contribution element. Dr. Reid stated in his November 1997 opinion that:

[Claimant's] lung impairment, AMA rating and disability are not caused by his asbestosis alone, but rather his lung impairment AMA rating and disability are materially and substantially contributed to, and materially and substantially caused by his pre-existing COPD. The COPD significantly reduce both the FEV1 and FVC values. If [Claimant] merely had asbestosis and lung cancer, his disability would be at least 20% less. Moreover, the asbestosis is a pre-existing condition to the lung cancer. They are separate diseases. Moreover, [claimant's] stroke adds to his disability.

EX 1a.³ Dr. Reid subsequently reviewed additional medical documentation concerning claimant's pre-existing pulmonary fibrosis, likely due to old tuberculosis. Dr. Reid amended his opinion to include the fibrosis as a contributor to claimant's ultimate impairment and to the reduction in claimant's pulmonary function results since 1984. EX 2d.

We reject employer's contentions of error and affirm the administrative law judge's denial of Section 8(f) relief. The administrative law judge extensively discussed the arguments of employer and the Director, as well as Fourth Circuit precedent, and properly found that Dr. Reid did not quantify the level of impairment resulting from the work-related asbestosis alone and that his opinion utilizes the rejected "subtraction" method. The parties stipulated that claimant has a 70 percent pulmonary impairment. Dr. Scutero diagnosed a 70 percent impairment, and opined that this respiratory impairment "is caused in whole or in significant part by his asbestosis." CX 1d; JX 1.

³ Claimant was diagnosed with lung cancer in September 1997, but his award of benefits is based solely on the work-related asbestosis. JX 1.

The fact that physicians, including Dr. Reid, stated that claimant has both a restrictive and an obstructive component to his pulmonary function study results, does not establish that claimant's compensable disability is not due solely to his asbestosis. *Winn*, 326 F.3d 427, 37 BRBS 29(CRT). Moreover, Dr. Reid's opinion that claimant's disability would be 20 percent less but for his COPD and/or fibrosis runs afoul of *Carmines*. *Carmines*, 138 F.3d at 139, 32 BRBS at 55(CRT). In addition, in *Pounders*, the Fourth Circuit addressed employer's argument, repeated here, regarding the difficulty in obtaining an accurate measurement of claimant's asbestosis alone if the claimant suffers from pre-existing conditions which also affect the lungs. The *Pounders* court stated that, "[t]he difficulty of making the assessment in isolated cases, however, does not compel us to adopt a different rule." *Pounders*, 326 F.3d at 460 n.2, 37 BRBS at 14 n.2(CRT). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that the contribution element is not satisfied in this case, and the consequent denial of Section 8(f) relief. *Winn*, 326 F.3d 427, 37 BRBS 29(CRT).

Accordingly, we affirm the administrative law judge's Decision and Order denying Section 8(f) relief.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge