

BRB No. 99-0114

DOROTHY T. DAVIS)
(Widow of GALVESTON DAVIS, JR.))
)
Claimant)
)
v.)
)
)
NEWPORT NEWS SHIPBUILDING) DATE ISSUED: 9/24/99
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 of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

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

Andrew D. Auerbach (Henry L. Solano, 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 and BROWN, Administrative Appeals Judges, and
NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2637) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 and employer stipulated that decedent was exposed to asbestos during the course of his employment. After his retirement, decedent was diagnosed with asbestos-related mesothelioma on April 7, 1995, which caused his death on September 23, 1996. Prior to his death, decedent filed a claim for an asbestos-related disability. His widow (claimant) filed a death claim under Section 9 of the Act, 33 U.S.C. §909. The parties stipulated that decedent's death was caused, in part, by his exposure to asbestos. The parties further stipulated that claimant is entitled to decedent's permanent partial disability benefits for a 75 percent impairment from April 7, 1995, the date of the diagnosis of mesothelioma, to September 23, 1996, the date of death, see 33 U.S.C. §908(c)(23), and to death benefits pursuant to Section 9 thereafter.

Employer applied for Section 8(f), 33 U.S.C. §908(f), relief from continuing liability for compensation. The administrative law judge denied the relief, finding that employer failed to establish the contribution element with respect to both decedent's disability claim and the death claim. Employer appeals this decision, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

Employer contends the administrative law judge erred in concluding that it failed to satisfy the contribution element necessary for Section 8(f) relief on both the disability and death claims. Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks 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 of permanent partial disability, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that the 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." 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). Employer must quantify the type and extent of the disability that claimant would have suffered without the pre-existing condition. *Carmines*, 138 F.3d at 134, 32 BRBS at 50 (CRT); *Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130-131 (CRT). In order to establish the contribution element on the death claim, employer must establish that the death was not due solely to the work injury. 33 U.S.C. §908(f). In cases involving post-retirement occupational disease arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, an employer need not establish that a claimant's pre-existing disability was manifest. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991). Employer's entitlement to Section 8(f) relief must be separately evaluated with regard to the Section 8(c)(23) claim and the Section 9 claim. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). If Section 8(f) applies to both claims, employer is liable for only one period of 104 weeks, if the death and disability arose from the same injury. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Adams*, 22 BRBS at 78.

In this case, employer and the Director do not dispute the fact that decedent had a pre-existing disability. The administrative law judge found, and the record reflects, that decedent had hypertension and diabetes prior to the diagnosis of his mesothelioma in 1995. Decision and Order at 4-5; EX 1. Thus, employer has established the first element necessary for relief from the Special Fund. As this post-retirement occupational disease case arises within the jurisdiction of the Fourth Circuit, employer need not establish that claimant's pre-existing disability was manifest. See *Harris*, 934 F.2d at 548, 24 BRBS at 190 (CRT). Consequently, the sole issue before the Board is whether the administrative law judge properly determined that employer failed to satisfy the contribution element on both claims.

To satisfy the contribution element, employer relies on the opinion of Dr. Reid, employer's in-house physician, who stated that decedent's disability was materially and substantially contributed to by the pre-existing condition and that if decedent had only mesothelioma, his impairment "rating and hence his disability would be 15% less." EX 1. Dr. Reid also stated that decedent's death was contributed to and hastened by the pre-existing condition. Dr. Reid submitted a report based on a review of selected medical records, in which he stated: "The effect of hypertension alone, in a 1994 NIH study, published in January 1995 in Chest, a leading medical journal, reduced FEV1 value 3% and FVC value 4%. Of course, the longer standing the hypertension, the greater the effect. In general, each 1% drop increases the AMA rating 1%." *Id.* Employer also submitted into evidence a form in which Dr.

Moy, who examined decedent when he was admitted to the hospital for a right pleural effusion, placed a check next to the statement “I agree with Dr. Reid’s opinion.” EX 2.

The administrative law judge determined that employer’s evidence is insufficient to establish the contribution element on either claim. He found that Dr. Reid failed to explain how he applied his principles regarding FVC and FEV1, which are not discussed in the supporting medical records, to decedent’s particular case, and provided no explanation of how the figure of 15 percent is reached to quantify the reduction in decedent’s disability due to the pre-existing conditions. Decision and Order at 6. With regard to the death claim, the administrative law judge found that Dr. Reid’s opinion that the pre-existing hypertensive cardiovascular disease inhibited the treatment of the mesothelioma is inadequately explained.

We affirm the administrative law judge’s finding that employer did not satisfy the contribution element on decedent’s disability claim. Contrary to employer’s argument, the fact that Dr. Reid’s opinion is uncontradicted is irrelevant. *Carmines*, 138 F.3d at 142, 32 BRBS at 48 (CRT). The administrative law judge rationally found that Dr. Reid does not explain how he applied the information he cites from the medical journal to decedent’s case in reaching the 15 percent reduction in lung capacity figure, and there is no apparent logical relationship between the 3 percent and 4 percent figures cited in the article and the assignment of a 15 percent disability due to the pre-existing conditions. Thus, the administrative law judge’s conclusion that employer failed to explain how he quantified the contribution of decedent’s pre-existing hypertensive condition, and failed altogether to show any contributory effect of the diabetes, is rational and supported by substantial evidence, and therefore is affirmed.¹ Further, it was within the administrative law judge’s discretion to give very

¹Moreover, the court in *Carmines* stated that “*Harcum* requires that [the physician] determine what the Claimant’s disability would have been independent of the pre-existing injury.” *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998). In this case, there is no independent evidence in the record of what effect the mesothelioma alone had on decedent’s pulmonary function, independent of the alleged effects of

little weight to Dr. Moy's opinion due to its perfunctory nature and lack of supporting documentation.

hypertension and diabetes.

Next, addressing employer's assertion that it established the contribution requirement in the death claim, we note that the appropriate standard for determining whether a pre-existing condition contributed to a decedent's death in a case in which the work-related injury could have produced death by itself, is whether the pre-existing condition hastened the death. *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (CRT) (4th Cir. 1998). See also *Fineman*, 27 BRBS at 104. We affirm the administrative law judge's finding that employer failed to meet its burden relevant to this standard as well. According to Dr. Reid's report, hypertensive cardiovascular disease inhibited the treatment of decedent's mesothelioma, and thus sped the progression of the mesothelioma, and that effect, as well as the cumulative burden the hypertensive cardiovascular disease/diabetes had on decedent's heart, significantly hastened his death. EX 1. The administrative law judge found that Dr. Reid's postulate that decedent's death was contributed to and hastened by his pre-existing partial disability is insufficient without corroboration by supporting medical records, that Dr. Reid does not explain how the hypertensive cardiovascular disease inhibited the treatment of mesothelioma, and that no explanation for this is apparent in the underlying medical records.² The three medical reports subsequent to decedent's diagnosis of malignant mesothelioma attached to Dr. Reid's report do not, in fact, indicate that hypertensive cardiovascular disease or diabetes had any effect on the treatment or progression of claimant's mesothelioma, or hastened his death in any way. EX 1 at Exs. 6-8. Consequently, as the administrative law judge rationally found that Dr. Reid's opinion is inadequately explained, we affirm the administrative law judge's denial of Section 8(f) relief for failure to establish that claimant's pre-existing condition hastened his death. See generally *Sain*, 162 F.3d at 821, 32 BRBS at 211 (CRT).

Accordingly, the administrative law judge's Decision and Order is affirmed.³

²Further, employer's representation that Dr. Reid alleges that the hypertension speeds up the process of mesothelioma is inaccurate, as Dr. Reid only maintained that hypertension impedes the treatment of the disease. EX 1.

³Employer argues that there is substantial evidence in the record in support of its position, contrary to the administrative law judge's finding, that the contribution element was established. As the Director correctly notes in his response brief, "Where there is substantial evidence on both sides of an issue, the [administrative law judge's] finding is conclusive. *Wheatley v. Adler*, 407 F.2d 307, 314 (D.C. Cir. 1968) (*en banc*). See also *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT) (4th Cir. 1998) (an administrative law judge's findings will not be disregarded merely on the basis that other inferences might have been more reasonable).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge