

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

Appeal of the Decision and Order of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor and the Order Affirming Decision and Order on Reconsideration of James Guill, Administrative Law Judge, United States Department of Labor.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Michael S. Hertzog (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order of Administrative Law Judge Reno E. Bonfanti and the Order Affirming Decision and Order on Reconsideration of Administrative Law Judge James Guill (93-LHC-2752) 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 the 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, a retiree, who worked for employer as a steam engineer from 1940 to 1984, was diagnosed with asbestosis resulting from exposure to airborne dust and fibers during the course of his employment. Based on stipulations submitted by claimant and the employer, the administrative law judge awarded claimant permanent partial disability compensation under Section 8(c)(23), 33 U.S.C. §908(c)(23), at the rate of \$186.66 per week commencing June 22, 1992, premised upon a finding of an 80 percent whole person impairment. As employer had also agreed to pay claimant continuing medical benefits pursuant to 33 U.S.C. §907, and attorney's fees and costs totalling \$1453.00, the only issue pending for adjudication was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief.

After conducting a formal hearing on June 20, 1994, Administrative Law Judge Reno Bonfanti issued a Decision and Order awarding claimant Section 8(f) relief. In this decision, Judge Bonfanti found that claimant's pre-existing tuberculosis/fibrosis pulmonary disease, chronic obstructive pulmonary disease, and cor pulmonale constitute manifest pre-existing permanent partial disabilities for Section 8(f) purposes which, in combination with claimant's work-related asbestosis, rendered him more disabled than he otherwise would have been based on his work injury alone.

The Director, who did not participate in the case prior to the issuance of Judge Bonfanti's initial Decision and Order, sought reconsideration. On December 12, 1995, Administrative Law Judge James Guill issued an Order denying the Director's request for reconsideration based on his determination that the Director failed to provide a justifiable excuse for his failure to participate in the initial proceeding.

The Director appeals this decision, arguing that the administrative law judge's award of Section 8(f) relief cannot stand because the evidence upon which he relied in finding that employer satisfied the contribution element of Section 8(f) entitlement does not comport with the applicable standard articulated by the United States Court of Appeals for the Fourth Circuit in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum)*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, ___ U.S. ___, 115 S.Ct. 1278, 29 BRBS 87 (CRT) (1995). The Director specifically contends that the medical reports submitted by Dr. Hall cannot properly support a finding of Section 8(f) contribution because they do not contain an ultimate disability rating and he failed to identify the basis for his determination that no more than 25 percent of claimant's disability is due to claimant's asbestosis. In addition, the Director maintains that Dr. Hall failed to explain how he differentiated claimant's impairments. The Director further maintains that even accepting Dr. Moore's opinion that claimant had an 80 percent whole person impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (3d ed. 1988)(AMA *Guides*), and Dr. Hall's opinion that only 25 percent of that impairment is due to asbestosis, Dr. Hall's opinion is nonetheless insufficient to support a finding of contribution because he did not apply the AMA *Guides* in apportioning the percentage of claimant's disability due to his pre-existing conditions. Employer responds, urging affirmance. In addition, employer has filed a motion to strike the Director's brief in which it requests that the Director's appeal be dismissed because the arguments raised in the Director's brief are based almost entirely on application of the AMA *Guides* which were

not made a part of the record before the administrative law judge.

Initially, we note that on the facts presented Judge Guill did not abuse his discretion in denying the Director's motion for reconsideration. In his motion for reconsideration, the Director attributed his non-participation in the initial proceeding to administrative oversight, asserting that the notice of the hearing in this case was not properly placed in the case file of the attorney assigned to the case. Judge Guill, however, rationally determined that "while it was unfortunate that 'administrative oversight' resulted in the Director's failure to prepare and attend the hearing," it did not excuse the Director's non-participation because the Director had been properly served with the Notice of Hearing and had received employer's exhibits prior to the hearing. *See generally Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Brown v. Bethlehem Steel Corp.*, 20 BRBS 26 (1987), *aff'd on recon.* 19 BRBS 200 (1987), *aff'd in part and rev'd in part sub nom. Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759, 22 BRBS 47 (CRT)(5th Cir. 1989).

Although the Director failed to timely raise any arguments regarding Section 8(f) while the case was before the administrative law judge, the Board has held that the Director has standing to appeal findings with regard to Section 8(f) relief regardless of whether he participated in the proceedings before the administrative law judge. We therefore will address the merits of the Director's appeal. *See McDougall v. E.P. Paup Co.*, 21 BRBS 204, 213 n.9 (1988), *aff'd in part and modified on other grounds sub nom. E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41 (CRT)(9th Cir. 1993); *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353, 354 (1984).

After review of the administrative law judge's Decision and Order in light of the relevant evidence and the arguments which the Director raises on appeal, we affirm the administrative law judge's finding that employer established the elements necessary for application of contribution under Section 8(f). In a claim for permanent partial disability benefits under Section 8(c)(23), Section 8(f) of the Act limits employer's liability to 104 weeks if employer establishes claimant suffered from a pre-existing permanent partial disability, which combined with his work-related condition to result in a materially and substantially greater degree of disability than that due to the work-related condition alone.¹ 33 U.S.C. §908(f)(1); *see Harcum*, 8 F.3d at 182-183, 27 BRBS at 126 (CRT). In this case, it is not disputed that claimant suffered pre-existing permanent partial disabilities affecting his lungs; thus, only the contribution requirement is in dispute. Although the Director correctly asserts that in making his determination on contribution the administrative law judge did not discuss the standard articulated by the Fourth Circuit in *Harcum*, we nonetheless affirm his finding because the evidence he credited is sufficient to satisfy the standard for contribution set forth in *Harcum* as a matter of law.

In *Harcum*, the Fourth Circuit stated that to establish the contribution element for purposes

¹In a case involving a post-retirement award, the United States Court of Appeals for the Fourth Circuit has held that the manifest requirement does not apply. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991).

of Section 8(f) relief, it is insufficient to show that the pre-existing disability rendered the subsequent disability greater. The court stated that where, as here, the employee is permanently partially disabled, the 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-related injury alone. The court further indicated that a showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone, *i.e.*, the employer must present evidence of the type and extent of disability that the employee would suffer "if not previously disabled when injured by the same work-related injury." *Id.*, 8 F.3d at 185, 27 BRBS at 131 (CRT). The court explained that by establishing the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater. *Id.*

In finding that the contribution requirement of Section 8(f) was satisfied in the present case, the administrative law judge relied upon the medical opinions of Drs. Hall and Moore. After reviewing claimant's clinic and other medical records and noting that claimant suffered from pre-existing tuberculosis/fibrosis, chronic obstructive pulmonary disease, and cor pulmonale, Dr. Hall opined in a report dated May 17, 1994, that claimant's lung impairment, AMA rating, and disability are not due to his asbestosis alone; the doctor stated that if claimant merely had asbestosis, his AMA rating, and thus his impairment, would be no greater than 25 percent. Employer's Exhibit 12. This opinion adequately quantifies the degree of disability claimant would have had based on the work-related injury alone, as is required under *Harcum*. Moreover, Dr. Hall's opinion that claimant's asbestosis-related impairment is no greater than 25 percent in conjunction with Dr. Moore's overall 80 percent impairment rating and Dr. Moore's May 19, 1994, letter expressing agreement with Dr. Hall's May 17, 1994, apportionment of claimant's asbestos-related disability, Employer's Exhibits 11 and 13, also complies with the Fourth Circuit's mandate in *Harcum* that employer show that the ultimate permanent partial disability materially and substantially exceeds the disability as it would have resulted from the work-related injury alone. Accordingly, we reject the Director's assertion that the administrative law judge's award of Section 8(f) relief should be reversed because his finding of contribution does not comport with the standard articulated in *Harcum*.

The Director also asserts that the medical report of Dr. Hall cannot properly support a finding of contribution for purposes of Section 8(f) because he failed to follow the AMA *Guides* in apportioning claimant's disability. We disagree. The only requirement under the Act for impairment ratings based on the criteria of the AMA *Guides* is in determining the extent of disability in awards for hearing loss and for voluntary retirees. *See* 33 U.S.C. §§908(c)(13), 902(10). *See also Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154 (1993). That adherence to the AMA *Guides* is not required in order for a medical opinion to be credited in establishing contribution is evident from the Fourth Circuit's recognition in *Harcum* that employer may establish that claimant's ultimate permanent partial disability is materially and substantially greater than that which would have resulted from the subsequent injury alone "by medical evidence or otherwise." 8 F.3d at 185, 27 BRBS at 130 (CRT). *See also Sproull v. Director, OWCP*, 86 F.3d 895 (9th Cir. 1996)(where claimant is permanently partially disabled, his testimony about the effects of his injuries may satisfy the contribution element). We thus reject the Director's argument in this regard.²

Finally, we reject the Director's argument that Dr. Hall's report should not have been credited by the administrative law judge because he failed to adequately explain the basis for his conclusions. The Director's assertion is not supported by the record.³ Inasmuch as the medical opinions of Drs. Hall and Moore provide substantial evidence to support a finding that employer established contribution under the *Harcum* standard, and the Director has failed to establish that the administrative law judge erred in crediting this medical evidence, we affirm the administrative law judge's award of Section 8(f) relief.

²In light of this determination, employer's motion to strike the Director's brief is moot.

³Dr. Hall specifically considered claimant's lengthy medical history of pulmonary problems and rationally concluded that as claimant had had severe lung scarring, which was causing significant pulmonary impairment, as early as 1954 and was in congestive failure due to cor pulmonale at the time his asbestosis was diagnosed in June 1992, the great majority of his pulmonary impairment is attributable to his pre-existing conditions. EX-12.

Accordingly, the Decision and Order of Administrative Law Judge Bonfanti and the Order Affirming Decision and Order on Reconsideration of Administrative Law Judge Guill are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge