

|                              |   |                    |
|------------------------------|---|--------------------|
| DAVID F. PEELE               | ) |                    |
|                              | ) |                    |
| Claimant                     | ) |                    |
|                              | ) |                    |
| v.                           | ) |                    |
|                              | ) |                    |
| NEWPORT NEWS SHIPBUILDING    | ) |                    |
| AND DRY DOCK COMPANY         | ) | DATE ISSUED:       |
|                              | ) |                    |
| 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 Granting Petition for Relief Under Section 8(f) of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Mary W. Adelman (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for the self-insured employer.

Laura Stomski (Thomas J. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

The Director, Office of Workers' Compensation Programs (the Director) has filed a timely motion for reconsideration of the Board's decision in the captioned case. *Peele v. Newport News Shipbuilding & Drydock Co.*, BRB No. 92-0168 (Dec. 23, 1993).

To summarize the facts, claimant was exposed from 1953 until 1978 as a pipefitter and foreman, during which time he was exposed to asbestos. Claimant started experiencing weakness and shortness

of breath in September 1978, and was subsequently prevented from further asbestos exposure. He was diagnosed as having asbestos exposure in 1982, and in April 1983 employer transferred claimant to its Material Reclamation and Assembly (MRA) shop due to its concern over his declining health and weight loss. Claimant sought compensation under the Act.

The administrative law judge granted claimant a *de minimis* award of permanent partial disability benefits, finding that claimant's post-injury earnings at employer's facility did not accurately reflect his post-injury wage-earning capacity and that claimant had suffered some degree of economic harm, the amount of which was not presently determinable. The administrative law judge also found that employer was entitled to Section 8(f) relief based on claimant's pre-existing bronchitis. Claimant appealed, seeking permanent total disability benefits, or alternatively, increased permanent partial disability benefits based on his loss of overtime wages and his diminished wage-earning capacity. The Board affirmed the administrative law judge's denial of permanent total disability benefits, but vacated the *de minimis* award and remanded for the administrative law judge to reconsider whether claimant sustained an actual loss of wage-earning capacity based on a loss of overtime wages. *Peele v. Newport News Shipbuilding and Dry Dock Company*, 20 BRBS 133 (1987). The Board also vacated the administrative law judge's award of Section 8(f) relief, agreeing with Director that the contribution element of Section 8(f) cannot properly be met in the case of *de minimis* awards. *Peele*, 20 BRBS at 137-138.

On remand, claimant and employer stipulated that claimant is permanently partially disabled due in part to asbestosis caused by work-related exposure to asbestos and that he is entitled to permanent partial disability benefits based on loss of overtime wages. The only issue presented before the administrative law judge was employer's entitlement to Section 8(f) relief. In his Decision and Order on Remand, the administrative law judge again found that employer was entitled to Section 8(f) relief, concluding that claimant's pre-existing chronic obstructive pulmonary disease (COPD) and chronic bronchitis were pre-existing permanent partial disabilities within the meaning of Section 8(f) which were manifest to employer based on the June 5, 1990 opinion of Dr. Harmon, the shipyard medical director, and the ample medical evidence of record documenting these conditions for many years prior to claimant's definitive diagnosis of asbestosis. Based on Dr. Harmon's June 1990 opinion, the administrative law judge further determined that claimant's pre-existing COPD contributed with his asbestosis to cause the disability that resulted in his loss of overtime wages. Director appealed the award of Section 8(f) relief, contending that the administrative law judge erred in finding that claimant had a pre-existing permanent partial disability which combined with his asbestosis to result in his disability. Employer responded, urging affirmance of the Section 8(f) award.

Claimant worked for employer as a pipe coverer from 1953 until 1976, at which time he became a foreman. As both a pipecoverer and foreman, claimant was exposed to asbestos. In

September 1978, claimant began experiencing weakness and shortness of breath; accordingly, he was prohibited from further asbestos exposure. On November 8, 1982, Dr. Thomas P. Splan diagnosed claimant as having asbestosis. On April 4, 1983, claimant was transferred into employer's Material Reclamation and Assembly (MRA) shop when employer became concerned over his deteriorating health and weight loss. Claimant sought compensation under the Act.

In his initial Decision and Order, the administrative law judge granted claimant a *de minimis* award of permanent partial disability benefits, finding that claimant's post-injury earnings at employer's facility did not accurately reflect his post-injury wage-earning capacity and that claimant had suffered some degree of economic harm, the amount of which was not presently determinable. The administrative law judge also found that employer was entitled to Section 8(f), 33 U.S.C. §908(f), relief based on claimant's pre-existing chronic bronchitis.

Claimant appealed, seeking permanent total disability compensation, or, alternatively, increased permanent partial disability compensation based on his loss of overtime wages and his diminished wage-earning capacity. The Board affirmed the administrative law judge's denial of permanent total disability benefits, but vacated the *de minimis* award and remanded for the administrative law judge to reconsider whether claimant sustained an actual loss of wage-earning capacity based on a loss of

overtime wages. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). The Board also vacated the administrative law judge's award of Section 8(f) relief, agreeing with Director that the contribution requirement of Section 8(f) cannot properly be satisfied in the case of *de minimis* awards. *Peele*, 20 BRBS at 137-138.

On remand, claimant and employer stipulated that claimant is permanently partially disabled due in part to asbestosis caused by work-related exposure to asbestos and that he is entitled to permanent partial disability compensation based on loss of overtime wages in the amount of \$24.16 per week from January 1, 1981 and continuing.<sup>1</sup> Accordingly, the only issue presented for adjudication before the administrative law judge was employer's entitlement to Section 8(f) relief.

In his Decision and Order on remand, the administrative law judge determined that employer was entitled to Section 8(f) relief. The administrative law judge concluded that claimant's pre-existing chronic obstructive pulmonary disease (COPD) and chronic bronchitis constituted pre-existing permanent partial disabilities within the meaning of Section 8(f) which were manifest to employer based on the June 5, 1990 opinion of Dr. Harmon, the shipyard medical director, and the extensive medical

---

<sup>1</sup>Claimant involuntarily retired on March 1, 1988, subsequent to the Board's initial Decision and Order.

evidence of record documenting these conditions for many years prior to claimant's definitive diagnosis of asbestosis. Based on the June 5, 1990 opinion of Dr. Harmon, the administrative law judge further determined that claimant's pre-existing COPD contributed with his asbestosis to cause the disability that resulted in his loss of overtime wages. See Emp. Ex. 21.

On appeal, Director argued that the administrative law judge erred in finding claimant's pre-existing COPD and chronic bronchitis were pre-existing permanent partial disabilities within the meaning of Section 8(f) because claimant did not exhibit symptoms consistent with COPD until 1978, the same time that medical reports discussed his exposure to asbestos and possible asbestosis. Director further contends that Dr. Harmon's description of certain characteristics of claimant's lungs such as pleural thickening is insufficient to support a finding of a pre-existing permanent partial disability, absent evidence that these changes were accompanied by lasting physical impairment. Director also argued that the administrative law judge's finding of Section 8(f) contribution requirement did not comply with the Administrative Procedure Act, 5 U.S.C. § 557 because he credited Dr. Harmon's opinion as consistent with substantial medical evidence in the record without identifying the medical evidence he had relied upon. Moreover, the Director argued that the administrative law judge erred in finding that claimant's COPD was a contributing factor in his disability because claimant's loss in wage-earning capacity was due solely to the fact that he was

transferred to the MRA shop due to his asbestosis and that employer failed to establish the percentage of claimant's disability due to this pre-existing condition. Employer responded, urging that the award of Section 8(f) relief be affirmed.

In its December 23, 1993, Decision and Order, the Board held that Dr. Harmon's opinion in conjunction with the abnormal x-ray findings of pleural thickening and medical records documenting pre-existing respiratory problems dating back to 1969<sup>2</sup> provided substantial evidence to support the administrative law judge's determination that claimant's pre-existing COPD and chronic bronchitis were pre-existing permanent partial disabilities within the meaning of Section 8(f).<sup>3</sup> The Board also found that the administrative law judge had substantially complied with the APA in finding Section 8(f) contribution inasmuch as he had specifically identified the relevant medical records and x-rays relating to claimant's pre-existing COPD and chronic bronchitis which he viewed as consistent with Dr. Harmon's opinion. Finally, the Board found that in finding Section 8(f) contribution, the

---

<sup>2</sup>The November 9, 1983 opinion of Dr. Ross indicating that claimant has had "some respiratory symptoms" since 1969, including symptomatic bronchitis for several years and that claimant exhibited pleural thickening and parenchymal changes on X-rays, attributable to chronic bronchitis, not asbestosis, provides additional support for the administrative law judge's finding in this regard. Emp. Ex. 14.

<sup>3</sup>Although Director suggests as he did below that the fact that employer continued to employ claimant and that claimant continued to perform his regular duties despite his chronic bronchitis and COPD belies a finding that employer viewed him as presenting an increased risk of compensation liability, the administrative law judge reasonably determined that the fact that claimant continued to work did not support an inference that these pre-existing conditions would not have motivated a "cautious" employer to refuse to hire or retain him.

administrative law judge had considered and reasonably rejected the Director's argument that claimant's loss in wage-earning capacity was due solely to his asbestosis and rationally concluded based on Dr. Harmon's uncontroverted opinion that claimant's COPD combined with his asbestosis to result in his disability. The Board specifically noted that Dr. Harmon opined that claimant's loss of overtime due to fatigue and shortness of breath was not caused by his asbestosis alone, but his disability was materially and substantially worsened by his pre-existing and extensive COPD.

In her motion for reconsideration, the Director requests that the Board vacate its holding that employer met the contribution element of Section 8(f) and remand for reconsideration of this issue consistent with the United States Court of Appeals recent decision in *Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Harcum)*, 8 F.3d 175, 27 BRBS 116 (CRT) (4th Cir. 1993), *aff'd on other grounds*, 115 S.Ct. 1278, 29 BRBS 87 (CRT) (1995). For the reasons discussed *infra*, we grant reconsideration but deny the relief requested.

In *Harcum*, the Fourth Circuit stated that to establish the contribution element for purposes of Section 8(f) relief, it is insufficient to show that the pre-existing disability rendered the subsequent disability greater.<sup>4</sup> The court indicated that where the

---

<sup>4</sup>In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), a physician opined that claimant had a five percent whole body impairment attributable to his pre-existing condition and an eighteen percent whole body impairment following his work-related injury. The physician further stated that the pre-existing condition combined with the present disability to create a "greater impairment" than would otherwise have occurred. The Board affirmed the administrative law judge's determination that employer had established that claimant had a greater degree of disability than that which would have resulted from

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, which essentially held that employer must establish that the ultimate permanent partial disability materially and substantially exceeds that disability as it would have resulted from the work-related injury alone.

As previously discussed in finding Section 8(f) contribution in the present case the administrative law judge relied upon the medical opinion of Dr. Harmon.

Dr. Harmon, the shipyard medical director, who stated that: Claimant's disability, loss of overtime due to shortness of breath and fatigue, is not caused by his asbestosis alone. Rather, claimant's disability is substantially and materially

---

the work-related injury. The United States Court of Appeals for the Fourth Circuit, reversed, however, and remanded the case for further consideration.

worsened by his pre-existing COPD. If Mr. Peele only had asbestosis, the resulting greater shortness of breath and fatigue is such that it is not disabling. . . .

Claimant's ultimate disability, therefore, was not caused by his asbestosis alone. Rather, the pre-existing and extensive COPD added a significant insult to claimant's lungs, and caused obstruction in lung impairment. Claimant's pre-existing COPD significantly hastened his disability, and materially combined with his asbestosis, to significantly contribute and cause his lung impairment, and result in his disability.

Emp. Ex. 21.

Dr. Harmon therefore indicates that if claimant only suffered from asbestosis his shortness of breath would not have been so great as to prevent him from working overtime, thereby quantifying the degree of impairment due to the work-related injury alone. Accordingly, we hold that this opinion is sufficient to satisfy not only the standard for contribution extant at the time of the Board's 1993 Decision and Order, which we reaffirm, but also the new standard subsequently set forth by the court in *Harcum*. We therefore reaffirm the Decision and Order Awarding Section 8(f) of the administrative law judge.

Accordingly, the motion for reconsideration filed by employer is DENIED. 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301 (a), (b)802.407(a), 802.409.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

---

Administrative Appeals Judge