BRB No. 00-0115

THOMAS YOUNG	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 3, 2000
	)	
	)	
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.

Christopher A. Taggi (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Andrew D. Auerbach (Henry L. Solano, Solicitor of Labor; Carol 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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (99-LHC-0264) 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 findings of fact and conclusions of law of the administrative law

judge 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 at employer's shipyard from 1959 to 1995, where he was exposed to asbestos. He was diagnosed as suffering from asbestosis on June 17, 1997. Prior to the hearing in the instant case, claimant and employer stipulated that claimant's asbestosis was caused in part by his exposure to asbestos during the course of his employment with employer. The sole issue before the administrative law judge was the applicability of Section 8(f) of the Act, 33 U.S.C. §908(f). In his decision, the administrative law judge found that employer failed to demonstrate a pre-existing permanent partial disability due to either claimant's congestive heart failure and diabetes conditions, but determined that claimant's hypertensive cardiovascular condition constituted a pre-existing permanent partial disability within the meaning of Section 8(f). Nevertheless, the administrative law judge denied relief under Section 8(f), finding that employer failed to establish that claimant's disability is materially and substantially greater because of his pre-existing hypertensive cardiovascular condition.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. Specifically, employer contends that it established a pre-existing permanent partial disability based on claimant's congestive heart failure and his diabetes. Employer further argues that the administrative law judge erred in concluding that it failed to satisfy the contribution element necessary for Section 8(f) relief, asserting that the opinions of Drs. McCune and Donlan are sufficient to establish that claimant's ultimate permanent partial disability materially and substantially exceeds the disability that would have resulted from the work injury alone. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

To avail itself of Section 8(f) relief where claimant suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury;[1] 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. 33 U.S.C. §908(f)(1); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS

[1]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifestation requirement in cases such as the case at bar where the worker suffers from a post-retirement occupational disease. *See Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 248, 24 BRBS 190 (CRT)(4th Cir. 1990).

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). If employer fails to establish any of these elements, it is not entitled to Section 8(f) relief. *Id.*

Employer initially contends that the administrative law judge erred in failing to find that claimant suffered from pre-existing disabling congestive heart failure and diabetes conditions. Although the record contains evidence that claimant suffered from pre-existing congestive heart failure and diabetes, the administrative law judge rationally found that there is no evidence that either of these conditions was serious enough to disable claimant from working. In addressing this element, the administrative law judge specifically found that there was only one notation, by Dr. Franklin, of congestive heart failure without further documentation or explanation. *See* Decision and Order at 4; Emp. Ex. 4. While Dr. Donlan noted this assessment in his March 16, 1999, report, he provided no further explanation of whether this condition disabled claimant. *See* Emp. Ex. 9. Similarly, the administrative law judge noted the diagnosis by both Dr. Franklin and Dr. Donlan that claimant suffered from diabetes, but found that there was no evidence that this condition affected his ability to perform his usual employment, or that a prospective employer would be deterred from hiring claimant. As the mere existence of prior conditions is insufficient to establish the existence of a serious and lasting physical impairment, we affirm the administrative law judge's conclusion that employer did not establish that claimant suffered from a pre-existing permanent partial disability due to either his congestive heart failure or his diabetes. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998).

Employer next argues that the administrative law judge erred in finding that it failed to establish the contribution element for Section 8(f) relief with regard to claimant's hypertensive cardiovascular disease. In order to satisfy the contribution element, an 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.

> A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes 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.

Harcum I, 8 F.3d at 185, 27 BRBS at 131 (CRT). In *Harcum II*, the Fourth Circuit reiterated that employer is not limited to medical evidence, but may also submit vocational evidence in an effort to meet its burden to establish the contribution element. *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT). The evidence must determine what claimant's disability would have been independent of the pre-existing injury; it is not proper simply to calculate the current disability and subtract the disability that resulted from the pre-existing injury. *Carmines*, 138 F.3d at 134, 32 BRBS at 48 (CRT).

Employer argues on appeal that the administrative law judge erred in determining that the medical opinions of Drs. McCune and Donlan are insufficient to meet employer's burden to establish the contribution element. We disagree. In his August 25, 1998, report, Dr. McCune opined that claimant's lung impairment and disability are not caused by his asbestosis alone, but rather, his lung impairment and disability are materially and substantially contributed to and caused by his pre-existing hypertensive cardiovascular disease. Dr. McCune stated further that if claimant merely had asbestosis, his AMA rating, and hence his disability, would be at least 10 percent less. *See* Emp. Ex. 7. Accordingly, as Dr. McCune opined only that claimant's hypertension accounts for 10 percent of his overall disability but said nothing about what claimant's disability would have been without the hypertension, we affirm the administrative law judge's determination that Dr. McCune's opinion does not set forth a basis on which to determine whether claimant's ultimate permanent partial disability is materially and substantially greater, as it is supported by substantial evidence and it is in accordance with law.[2] *See Carmines*, 138 F.3d at 134, 32

[2]In *Carmines*, the claimant was exposed to asbestos at the employer's facility for over 30 years. He was diagnosed with pulmonary asbestosis in 1990 and assessed with a 25 to 30 percent permanent impairment of the whole person. The employer sought Section 8(f) relief on the basis of Dr. Hall's report stating that claimant Carmines had substantial pre-existing scarring of the lungs due to pleurisy. Dr. Hall, the employer's physician, did not examine or treat Carmines, but on review of old x-ray evidence believed that Carmines's pre-existing disability accounted for about 18 percentage points of the total disability of 28 percent; therefore, he estimated that the asbestosis accounted for 10 percentage points. The Fourth Circuit concluded that such evidence was insufficient to demonstrate that claimant's disability was materially exacerbated by pre-existing conditions, stating that "an employer must *quantify* the type and extent of the disability that the claimant would have suffered without the pre-existing condition: 'A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone.'" *Carmines*, 138 F.3d at 139, 32 BRBS at 50-51(CRT) (emphasis in original), *quoting Harcum I*, 8 F.3d at 185-186, 27 BRBS at 130(CRT). The court reasoned that "the seriousness [of the pre-existing condition] is irrelevant to the seriousness of the asbestosis[;]" thus, it concluded that one could not deduce the seriousness of the impairment of the work-related asbestosis by

BRBS at 48 (CRT); *Harcum II*, 131 F.3d at 1079, 31 BRBS at 164 (CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT). Moreover, we affirm the administrative law judge's conclusion that the opinion of Dr. Donlan is not sufficient to satisfy the contribution element. Dr. Donlan's opinion states that given the assumption that claimant suffers from a 20 percent impairment, 10 percent is related to his asbestosis and 10 percent is related to his pre-existing conditions. *See* Emp. Ex. 9. The administrative law judge rejected the opinion of Dr. Donlan as evidence of contribution, as there is no medical evidence to support the assumption that claimant is 20 percent disabled.[3] *See* Decision and Order at 7. This determination is rational, as the administrative law judge is entitled to evaluate the medical evidence and he gave a rational basis for rejecting Dr. Donlan's opinion. Moreover, such a percentage quantification alone is insufficient to meet the Fourth Circuit's standard under *Carmines.*[4]

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subtracting the percentage of impairment attributable to the pre-existing pulmonary impairment from the percentage of total impairment. *Carmines*, 138 F.3d at 143, 32 BRBS at 55 (CRT).

[3]On appeal, employer contends that its stipulation that claimant suffers from a 20 percent pulmonary impairment contradicts the administrative law judge's finding that no medical evidence supports the assertion of a 20 percent disability. *See* Emp. Ex. 10. This argument must fail, as any stipulation between employer and claimant affecting the liability of the Special Fund is not binding on the Fund absent the participation of the Director. *See McDougall v. E.P. Paup Co.*, 21 BRBS 204 (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).

[4]As we affirm the administrative law judge's denial of Section 8(f) relief, the Director's contention, raised in his response brief, that the administrative law judge erred in finding that

claimant’s hypertension constituted a pre-existing permanent partial disability is moot.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge