BRB No. 00-0266

JAMES B. HAYNES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 27, 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 Awarding Benefits and Denying 8(f) of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Benjamin M. Mason (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Laura Stomski (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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Denying 8(f) (99-LHC-0783) of Administrative Law Judge Daniel A. Sarno, 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 was employed as a rigger/sheet metal worker for approximately forty years with employer, until his retirement in 1995. Claimant and employer stipulated, *inter alia*, that claimant was exposed to asbestos in the course of his employment; that on May 7, 1998, claimant was diagnosed with asbestosis, which was caused, in part, by his work-related exposure with employer; and that claimant has a 65 percent impairment, calculated under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, and is entitled to benefits for permanent partial disability under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). Employer sought relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on claimant's pre-existing chronic obstructive pulmonary disease (COPD). The Director, Office of Workers' Compensation Programs (the Director) conceded in his brief that employer needed only to establish the contribution element in order to obtain Section 8(f) relief in this case.[1] After consideration of the evidence of record, the administrative law judge denied employer's claim for Section 8(f) relief, finding that employer did not establish the contribution of claimant's COPD to his ultimate disability.

On appeal, employer contends that the administrative law judge erred in concluding that it did not produce sufficient evidence to satisfy the contribution element necessary for Section 8(f) relief. The Director responds, urging affirmance.

[1]The Director agreed that employer established that claimant's COPD constitutes a pre-existing permanent partial disability. In addition, as this is a post-retirement, occupational disease claim, the manifest element is not required for Section 8(f) relief. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991).

In order to establish the contribution element for Section 8(f) relief in a case where the claimant is permanently partially disabled, employer must establish that the claimant's partial disability is not due solely to the subsequent injury, and that it is materially and substantially greater than that which would have resulted from the subsequent injury alone. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has addressed this standard in several cases. In *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), the Fourth Circuit held that in order to establish contribution in a permanent partial disability case, 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 injury alone. The court stated that a showing of this kind requires quantification of the level of the impairment that would ensue from the work-related injury alone. *Id.*, 8 F.3d at 185, 27 BRBS at 130-131(CRT). Subsequently, in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998), the Fourth Circuit applied the *Harcum I* holding in the context of an employer's seeking Section 8(f) relief for a permanent partial disability award to a claimant for work-related asbestosis. The court denied employer Section 8(f) relief because employer was unable to establish what degree of disability claimant would have suffered from the asbestosis alone, specifically holding that employer failed to meet its burden to quantify the disability that claimant would have suffered absent any pre-existing conditions. The court held that it is not proper simply to calculate the current disability and to subtract from this the disability that resulted from the pre-existing disability. *Id.*, 138 F.3d at 143, 32 BRBS at 55(CRT). The court stated that without the quantification of the disability due solely to the subsequent injury, it is impossible for the administrative law judge to determine that claimant's ultimate disability is materially and substantially greater than it would have been without the pre-existing disability. *Id.; see also* *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164(CRT) (4th Cir. 1997).

We affirm the administrative law judge's finding that employer's evidence is insufficient to establish the contribution element. Initially, we reject employer's contention that the administrative law judge is required to credit uncontradicted evidence. Rather, the administrative law judge is required to determine if the medical evidence submitted as proof of contribution meets the legal standards for Section 8(f) relief, as established by the Fourth Circuit. *Carmines*, 138 F.3d at 142, 32 BRBS at 53(CRT). Moreover, the administrative law judge's finding that the opinions of Drs. McClune, Donlan and Scutero are insufficient to meet this standard accords with law. The administrative law judge found that the opinion of Dr. McClune, that claimant's COPD is the biggest problem, that the asbestosis is very mild and recent, and that claimant's impairment rating would be "at least 10% less" without the pre-existing condition, is insufficient to quantify the disability due solely to the subsequent injury. EX 3 at 2. The administrative law judge properly found that Dr. McClune merely subtracted the disability resulting from the pre-existing condition, an approach explicitly rejected by the court in *Carmines*. *See* Decision and Order at 6; EX 3 at 2. That Dr.

McClune also stated that the COPD materially and substantially contributes to claimant's disability is an insufficient basis to support a finding that the contribution element is satisfied. *Carmines*, 138 F.3d at 143, 32 BRBS at 54-55(CRT).

The administrative law judge also found Dr. Donlan's opinion insufficient to quantify the extent of claimant's current disability absent the pre-existing COPD, as he states only that the primary pulmonary impairment is due to COPD, and that the asbestos-related disease is a contributing factor. EXs 5, 6. The administrative law judge properly concluded that this opinion does not state the degree of claimant's disability due to the asbestosis alone. *See Carmines*, 138 F.3d at 143-144, 32 BRBS at 55(CRT); *Harcum I*, 8 F.3d at 185 , 27 BRBS at 130-131(CRT). Thus, the administrative law judge is unable to ascertain from this opinion whether claimant's ultimate permanent partial disability is materially and substantially greater due to the pre-existing COPD. Contrary to employer's contention, the fact that Drs. McClune and Donlan state that claimant's COPD is the primary or greater factor in causing claimant's respiratory impairment, is, standing alone, insufficient to satisfy the requirement of *Harcum I* and *Carmines* that employer establish the degree of disability without the effects of the pre-existing condition.

Finally, the administrative law judge properly found the opinion of Dr. Scutero insufficient to satisfy employer's burden. Dr. Scutero stated in his December 1998 letter that it was impossible for him to quantify the level of the disability from the asbestosis alone, but that both asbestosis and COPD contribute to the overall disability rating of 65 percent. DX 1. The opinion therefore does not establish the degree of disability due to asbestosis alone. Thus, as the evidence submitted in support of employer's claim for Section 8(f) relief is insufficient under the case law of the Fourth Circuit to support a finding that the contribution element is satisfied, the administrative law judge's denial of Section 8(f) relief is affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Denying 8(f) is affirmed

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge