BRB No. 00-0370

JOHN A. BECKNER, JR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Dec. 21, 2000
	)	
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Christopher A. Taggi (Mason, Cowardin & 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (99-LHC-1092) 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 was exposed to airborne asbestos dust and fibers in the course of his employment as a pipe coverer for employer between 1959 and 1962. On or about October 29, 1996, claimant was diagnosed with asbestosis by Dr. Shaw, which, as employer concedes, was caused, in part, by his employment-related exposure to asbestos. In addition, Dr. Shaw diagnosed organic heart disease, probable atherosclerotic cardiovascular disease with a history of congestive heart failure, diabetes mellitus, and he noted that claimant was a bilateral leg amputee. On December 4, 1997, Dr. Kane, following a review of claimant's medical records, confirmed the diagnosis of asbestosis and advised claimant that he suffers from a 25 percent permanent impairment.

Claimant filed a timely claim for benefits under the Act. Employer conceded that as of October 29, 1996, claimant was permanently and partially disabled as a result of his employment-related asbestosis. Claimant and employer stipulated, based upon Dr. Kane's assessment, that "in light of the progressive nature of asbestosis and in light of the uncertainty of the extent of impairment, claimant's disability is presently 25 percent," and thus concluded that claimant is entitled to compensation for his permanent partial disability at a rate of $66.76 per week from October 29, 1996, Employer's Exhibit (EX) 4. *See* 33 U.S.C. §908(c)(23). In addition, employer agreed to pay medical benefits incurred for the treatment, testing and surveillance of claimant's asbestosis, and an attorney's fee in the amount of $340 to claimant's counsel.

On February 28, 1997, Dr. Reid reviewed the medical reports of Drs. Shaw, Mick, and Gillen, and concluded that claimant's overall disability was not caused by asbestosis alone. He listed cardiovascular disease and diabetes as significant contributing factors. Specifically, he opined that claimant's overall impairment rating would have been 15 percent but for the asbestosis. Thereafter, employer filed an application for Section 8(f) relief, 33 U.S.C. §908(f), with the district director based on claimant's pre-existing diabetes and cardiovascular disease. Drs. Mick and Shaw subsequently concurred with Dr. Reid's overall assessment. EXs 7, 8.

Before the administrative law judge, employer argued that its entitlement to Section 8(f) relief stems from four pre-existing permanent partial disabilities: diabetes, heart disease, respiratory problems and amputations of both legs. In response, the Director asserted the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), with regard to any condition other than those listed in the original application for Section 8(f) relief submitted before the district director, *i.e.*, "diabetes-cardiovascular disease." EX 5.

In his decision, the administrative law judge initially determined that the absolute defense of Section 8(f)(3) is inapplicable as he found that claimant's amputations are, at

least in part, causally connected to his pre-existing diabetes, which was a specific basis cited by employer in support of its application for Section 8(f) relief. Moreover, he found that all of the medical evidence relied upon by employer was contained in its Section 8(f) application which was provided to the Director at the district director level. On the merits of the application, the administrative law judge determined that employer is entitled to Section 8(f) relief solely on the basis of claimant's leg amputations. Specifically, the administrative law judge found that while claimant's diabetes and heart disease constituted pre-existing permanent partial disabilities,[1] the record contained insufficient credible evidence to establish that those conditions contributed to his current disability. In contrast, the administrative law judge determined that claimant's leg amputations resulted in claimant's permanent total disability prior to the onset of his partially disabling asbestosis, and thus concluded that the leg amputations necessarily contributed to claimant's ultimate permanent partial disability. Accordingly, Section 8(f) relief was granted.

On appeal, the Director challenges the administrative law judge's finding that the absolute defense at Section 8(f)(3) does not apply with respect to claimant's amputations, and the finding that employer established the contribution element and thus entitlement to Section 8(f) relief. Employer responds, urging affirmance.

[1]The administrative law judge declined to consider the presence of pre-existing respiratory problems in his Section 8(f) analysis as he found that none of the physicians of record made any mention of such problems. Decision and Order at 6, n. 6.

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;[2] 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 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.*

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 *Harcum I*, 8 F.3d at 175, 27 BRBS at 116(CRT), 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 *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT), 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

[2]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).

would have been without the pre-existing disability. *Id.; see also Harcum II*, 131 F.3d at 1079, 31 BRBS at 164(CRT).

Additionally, in cases like the instant one involving Section 8(f) relief where benefits are awarded pursuant to Section 8(c)(23), only those pre-existing disabilities which played a part in claimant's compensable impairment under Section 8(c)(23) can properly serve as the basis for Section 8(f) relief. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 53, 31 BRBS 155, 160-161(CRT) (1st Cir. 1997); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 111 (1993); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989). Specifically, under the 1984 Amendments, a Section 8(c)(23) award provides compensation for permanent partial disability due to an occupational disease which becomes manifest after voluntary retirement. *Adams*, 22 BRBS at 85; *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234, 237 (1988). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. *See* 33 U.S.C. §§902(10), 908(c)(23)(1994). Thus, in *Adams*, the Board held that where the decedent's disability under Section 8(c)(23) was due to mesothelioma, the pre-existing disabilities due to hearing loss, lower back difficulties, anemia and arthritis could not, as a matter of law, contribute to the occupational lung disease being compensated. The Board held that only the decedent's pre-existing chronic obstructive pulmonary disease could materially and substantially contribute to the degree of occupational disease-related disability.

The Director argues that claimant's bilateral leg amputations did not, as a matter of law or fact, contribute to his 25 percent permanent pulmonary impairment from asbestosis. Citing *Adams*, 22 BRBS at 78, the Director states that claimant's pre-existing leg amputations cannot constitute a contributory pre-existing disability in this case since they played no role in claimant's compensable injury, *i.e.*, his asbestosis for which he is compensated under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). The Director additionally asserts that the administrative law judge applied an improper standard in assessing the contribution element based, in part, on claimant's "whole-body" impairment, and that under the proper standard employer cannot establish contribution since the administrative law judge essentially concluded, and the evidence of record supports, that claimant's 25 percent compensable permanent partial disability is due solely to his asbestosis.

The administrative law judge observed that claimant's condition as a bilateral leg amputee presented an interesting case of first impression and separately considered that condition in the context of the contribution element for Section 8(f) relief. In his analysis, the administrative law judge determined that Section 8(a) of the Act, 33 U.S.C. §908(a), presumes that a bilateral leg amputee is permanently and totally disabled. The administrative law judge therefore acknowledged that, in the instant case, claimant was already permanently and totally disabled by his bilateral leg amputations at the time of the onset of his partially disabling occupational disease. He then looked to the holding in *Director, OWCP v.*

Luccitelli, 964 F.2d 1303, 26 BRBS 1(CRT)(2d Cir. 1992),[3] but determined that it is inapplicable to the instant case, which he noted is the reverse of the situation in *Luccitelli*, as he found that such a bar would vitiate the congressional intent behind Section 8(f).[4] Accordingly, the administrative law judge determined that a total disability could provide the basis for Section 8(f) relief, and concluded that claimant's bilateral leg amputations, which in essence resulted in a 100 percent whole-body impairment, contributed to claimant's current disability.

[3]In *Luccitelli*, the Second Circuit held that in order to be entitled to Section 8(f) relief employer must show, by medical or other evidence, that a claimant's subsequent injury *alone* would not have caused the claimant's total permanent disability. *Luccitelli*, 964 F.2d at 1303, 26 BRBS at 1(CRT).

[4]In his decision, the administrative law judge described the congressional intent for Section 8(f) relief as encouraging employers covered by the Act to hire and retain handicapped workers, and he noted that this congressional intent would be vitiated in a case like the present. The record in the instant case clearly establishes that claimant's leg amputations occurred subsequent to his employment with employer between 1959 and 1962 and thus this purpose of Section 8(f) is simply not at issue here.

As the Director argues, the administrative law judge's analysis of the contribution element is flawed. First, inasmuch as claimant, in the instant case, received compensation under Section 8(c)(23), only those pre-existing disabilities which played a part in claimant's compensable disability can properly serve as the basis for Section 8(f) relief. *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 29 BRBS 44, 47 (1995); *Adams*, 22 BRBS at 85. Thus, claimant's bilateral leg amputations could not have, as a matter of law, contributed to his respiratory disability. *Id*. In addition, the administrative law judge's comparison of a "whole-body" impairment to the impairment due to the asbestosis alone is inconsistent with the correct standard wherein the administrative law judge is required to compare the claimant's compensable disability from the employment injury alone to the ultimate compensable permanent partial disability. *Johnson*, 129 F.3d at 53, 31 BRBS at 160-161(CRT) (where claimant had a 25 percent permanent disability from asbestosis, the employer was required to prove "that claimant's 25 percent disability was materially and substantially greater than that which would have resulted from the asbestos exposure"); *see also Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT). Moreover, in the instant case, claimant and employer agreed that claimant's present permanent partial disability as a result of his asbestosis is 25 percent and, as such, employer commenced the payment of permanent partial disability benefits, under Section 8(c)(23), based on that impairment. *See* EX 4, Joint Stipulations 9 and 10. In his decision, the administrative law judge explicitly determined that Dr. Kane quantified claimant's impairment from asbestosis alone at 25 percent.[5] It therefore is axiomatic that the ultimate permanent partial disability did not materially and substantially exceed the disability that would have resulted from the injury, *i.e.*, claimant's asbestosis, alone. *See generally Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT); *Harcum I*, 8 F.3d at 175, 27 BRBS at 116(CRT). We therefore hold that Section 8(f) relief cannot be awarded based on claimant's pre-existing bilateral amputations, and thus reverse the award of Section

[5]In considering the contribution element in the instant case, the administrative law judge initially determined that Dr. Kane quantified claimant's impairment from asbestosis alone at 25 percent. The administrative law judge then proceeded to discern whether the record contains a quantification of claimant's entire whole-body impairment, and found that the only relevant evidence, Dr. Reid's assessment that claimant's 25 percent impairment due to asbestosis would have been 15 percent less if he did not suffer from diabetes and cardiovascular disease, was calculated by a method of analysis explicitly rejected in *Carmines* as unsound. *See Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT). The administrative law judge thus accorded Dr. Reid's opinion no weight and concluded that employer could not establish the contribution element with regard to claimant's diabetes or cardiovascular disease. Employer's assertion, in its response brief, that Dr. Reid's opinion is sufficient to establish contribution is misplaced as the administrative law judge rationally determined that Dr. Reid's opinion is unsound and thus not entitled to any weight for the reasons in *Carmines*, 138 F.3d at 134, 32 BRBS at 48(CRT). *See also Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963).

8(f) relief on this basis.[6]

Accordingly, the administrative law judge's determination that employer is entitled to Section 8(f) relief is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[6]In light of this holding, we need not address the Director's contentions pertaining to the administrative law judge's finding that the absolute defense at Section 8(f)(3) is inapplicable in the present case.