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| WOODROW J. KINCAID |) | |
| |) | |
| Claimant |) | |
| |) | |
| v. |) | |
| |) | |
| NEWPORT NEWS SHIPBUILDING |) | DATE ISSUED: |
| & DRY DOCK COMPANY |) | |
| |) | |
| 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 Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Antje E. Huck, Newport News, Virginia, for the employer.

Laura Stomski (Judith E. Kramer, Acting 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: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-2193) of Administrative Law Judge Daniel A. Sarno denying its request for relief under Section 8(f), 33 U.S.C. §908(f), 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 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 was exposed to asbestos while working for employer from 1939 to 1941, and from 1946 to 1983, when he retired from employer's employ. He subsequently filed a claim for benefits under the Act, alleging that he had asbestosis resulting from his work-related exposure to asbestos. Following a formal hearing, the claim was denied by an administrative law judge in a 1984 Decision and Order. Claimant's request for modification also was denied. In 1988 claimant submitted new evidence, consisting of three medical reports, which indicated he had a respiratory impairment. Employer accepted responsibility for a work-related impairment, and commenced voluntary payments for permanent partial disability benefits based on a 70 percent respiratory impairment under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988). *See also* 33 U.S.C. §902(10)(1988). Employer subsequently filed a claim for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f); the Director, Office of Workers' Compensation Programs (the Director), resisted the claim.

The administrative law judge denied employer Section 8(f) relief, finding that while employer established claimant had a pre-existing permanent partial disability, heart disease, which was manifest to employer, it failed to establish that it combined with his work-related respiratory disease to result in a materially and substantially greater degree of disability than that caused by the work injury alone. The administrative law judge found that three of the four doctors did not indicate that claimant's overall impairment was greater because of any contributing, pre-existing cause. The administrative law judge discredited the opinion of the fourth physician of record, Dr. Harmon, because he found the opinion lacked medical evidence substantiating his "conclusory" statement that claimant's pre-existing heart disability contributed to his overall disability. Decision and Order at 9. Dr. Harmon stated that claimant's 70 percent impairment was due to the cumulative effect of asbestosis, interstitial fibrosis¹ and heart disease, that claimant's pulmonary impairment and disability are materially and substantially greater due to his pre-existing interstitial fibrosis and heart disease, and that if claimant only suffered from asbestosis alone, his impairment would be far less than 70 percent. The administrative law judge therefore concluded that employer submitted insufficient evidence to support its claim that the contribution element of Section 8(f) had been met. He therefore denied employer's Section 8(f) claim.

On appeal, employer contends that the administrative law judge misinterpreted the evidence in finding that it failed to establish the contribution element of Section 8(f). Employer contends that the three doctors credited by the administrative law judge, Drs. Scutero, Moore and Fairman, did not conclude that claimant's overall disability resulted from his respiratory impairment or asbestosis alone, and that they all suggested there were

other contributing factors which resulted in a greater degree of disability.² Employer also contends

¹ The administrative law judge found that claimant's interstitial fibrosis does not constitute a pre-existing permanent partial disability for purposes of Section 8(f).

² Employer notes that Dr. Fairman specifically noted the lack of asbestosis changes in claimant's x-ray findings in his March 1990 report, which he advised was atypical for patients diagnosed with asbestosis; employer asserts that this indicates that claimant's respiratory impairment was contributed to by additional factors.

that the administrative law judge's Decision and Order fails to comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), because he failed to consider or discuss key pieces of evidence. Employer specifically argues that the administrative law judge disregarded the fact that there was no evidence in the record which indicated that claimant had a 70 percent lung impairment from pulmonary asbestosis alone, and gave insufficient weight to Dr. Harmon's opinion. The Director responds to employer's appeal, urging affirmance of the administrative law judge's denial of Section 8(f) relief.

Section 8(f) relief is available to employer in a case where claimant is permanently partially disabled if employer establishes that claimant had a manifest pre-existing permanent partial disability, and that claimant's disability is not due solely to the work injury and is materially and substantially greater than that caused by the work injury alone.³ See generally *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984); 33 U.S.C. §908(f)(1). In the instant case, the administrative law judge's determination that employer failed to establish that claimant's disability was not due solely to asbestosis and that his manifest pre-existing disability, heart disease, combined with his work-related respiratory impairment to result in a greater degree of permanent disability is rational and supported by substantial evidence in the record.

The administrative law judge relied on the opinions of Drs. Scutero, Moore, and Fairman, finding that none of these physicians stated that claimant's permanent disability was materially and substantially greater because of his pre-existing heart disease, or that the latter contributed in any way to his overall disability.⁴ See generally *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). Moreover, it is within the administrative law judge's discretion to credit the opinions of these three doctors over that of Dr. Harmon. See generally *John W. McGrath v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge rationally found there was no medical evidence supporting Dr. Harmon's conclusory opinion that claimant's pre-existing heart disability contributed to his overall disability. Lastly, we reject employer's argument that the administrative law judge's findings in the instant case are not in conformity with APA guidelines, as the administrative law judge discussed all the evidence of record and provided a reasoned analysis for his conclusions. See *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). We therefore affirm the administrative law judge's denial of Section 8(f) relief, as he rationally found that employer did not establish that claimant's disability is not due solely to his work injury.

³It is noted that in the case of retirees, such as the instant claimant, the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has held that the manifest requirement will not be applied. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT)(4th Cir. 1991).

⁴Contrary to employer's contention, none of these physicians indicated that there were factors other than asbestosis or respiratory illness which contributed to claimant's overall disability to result in a materially and substantially greater degree of permanent disability. See Emp. Exs. 3, 4, 5. While Dr. Fairman did note that claimant's chest x-ray did not show the usual changes of asbestosis, he stated that these may be absent in about 10 percent of patients with biopsy evidence of the disease. See Emp. Ex. 3, report of March 8, 1990.

Accordingly, the Decision and Order of the administrative law is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge