BRB Nos. 92-0856

LAWRENCE BRASWELL	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	DATE ISSUED:
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 Denying Petition for Relief Under Section 8(f) of Daniel A. Sarno, Jr.,Administrative Law Judge, United States Department of Labor.

Antje E. Huck, (Newport News Shipbuilding & Dry Dock Company), Newport News, Virginia, for the self-insured employer.

Mark A. Reinhalter (Thomas S. 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Petition for Relief Under Section 8(f) (91-LHC-596) 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 which 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 asbestos while working as sheet metal worker in employer's shipyard from 1951 until March 1, 1988, when he voluntarily retired. On April 25, 1988, claimant was diagnosed as suffering from pleural plaques, calcification, and probable asbestos by Dr. David Shaw, a pulmonary specialist. Claimant filed a claim under the Act on April 30, 1988 for asbestos-related lung disease. Employer initially controverted the claim. Prior to the formal hearing, however, employer and claimant stipulated that claimant was entitled to permanent partial disability compensation for a 25 percent whole person impairment under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), based on the results of a pulmonary function test performed on April 25, 1989 and an average weekly wage of $304.48, commencing April 25, 1989.[1] Accordingly, the only issue remaining for adjudication before the administrative law judge was employer's entitlement to Section 8(f), 33 U.S.C. §908(f), relief. Employer argued that it was entitled to Section 8(f) relief based on claimant's pre-existing coronary artery disease and hearing loss.

The administrative law judge found initially that employer was not entitled to Section 8(f) relief based on claimant's pre-existing hearing loss, inasmuch as the Board had previously held that hearing loss cannot be considered to contribute to a claimant's resulting permanent partial disability due to a lung condition for purposes of Section 8(f) relief where the resulting disability is compensable under Section 8(c)(23). *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 85 (1989). The administrative law judge then found that inasmuch as claimant was being compensated under Section 8(c)(23) for his pulmonary impairment, the only aspect of claimant's pre-existing coronary artery disease which may be considered a pre-existing permanent impairment for purposes of Section 8(f) relief is that which resulted in pulmonary impairment. The administrative law judge noted that claimant had a prior history of heart disease and discussed the opinion of Dr. Harmon, the shipyard medical director, that most, if not all, of claimant's pulmonary problems are related to his pre-existing heart disease. The administrative law judge, however, rejected Dr. Harmon's opinion in favor of that of Dr. Shaw and denied employer Section 8(f) relief, finding that the question of whether claimant's pre-existing coronary artery disease contributed to his pulmonary impairment in this case was, at best, speculative.

On appeal, employer contends that the administrative law judge erred in finding that it failed to establish the contribution element of Section 8(f). Employer argues that Dr. Harmon's opinion is clearly sufficient to establish contribution for purposes of Section 8(f) and that inasmuch as Dr. Shaw indicated in his June 4, 1990, letter that he agreed with paragraph 8 of Dr. Harmon's opinion that claimant's pre-existing coronary artery disease could have materially contributed to his impairment, Dr. Shaw's opinion cannot be said to contradict Dr. Harmon's opinion. The Director responds, urging affirmance.

We reject employer's arguments. In order to be entitled to Section 8(f) relief where the claimant is permanently partially disabled, the employer must affirmatively establish: 1) that the claimant

[1]The administrative law judge erroneously refers to the commencement date of the award as April 25, 1988, in the order portion of his decision although in discussing the pulmonary function test earlier in his decision he indicates that the proper date is April 25, 1989. *Compare* D. & O. at 3 & 8.

suffered from a pre-existing permanent partial disability; 2) that the pre-existing permanent partial disability was manifest to the employer; and 3) that the pre-existing condition combined with the employment injury to render the employee materially and substantially more disabled than he would have been from the employment (second) injury alone. 33 U.S.C. §908(f); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 16 BRBS 107 (CRT)(4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 24 BRBS 190 (CRT) (4th Cir. 1991).[2] Moreover, where, the claimant is a retiree and benefits are awarded pursuant to Section 8(c)(23), the pre-existing permanent partial disability must combine with the claimant's occupational disease to result in a materially and substantially greater degree impairment in the area being compensated. *Adams*, 22 BRBS at 85. 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; rather, where the 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. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *cert granted*, 63 U.S.L.W. 3255 (U.S. Sept. 23, 1994).[3]

We reject employer's argument that the administrative law judge erred in finding that employer failed to establish the contribution element of Section 8(f). In the present case, Dr. Harmon opined that claimant's coronary artery disease was materially contributed to and made materially and substantially worse by his pre-existing coronary artery disease. Dr. Harmon further stated that given the long-standing nature of claimant's coronary artery disease, and that it required bypass surgery, it is evident that most, if not all, of claimant's fatigue, shortness of breath, and reduced pulmonary function values are caused by his coronary artery disease. Although the administrative law judge considered Dr. Harmons' opinion, he chose not to credit it, finding the opinion to be extremely conclusary and unsupported by any rationale. The administrative law judge further noted that Dr. Harmon's expertise in pulmonary matters was unclear from the record. The administrative law judge chose instead to credit the opinion of Dr. Shaw, as he was claimant's attending physician and a pulmonary expert and as he found his opinion to be well-reasoned.

---

[2]In *Harris*, the Fourth Circuit, within whose jurisdiction the instant case arises, held that the manifest requirement does not apply in post-retirement occupational disease cases. The manifest requirement is not at issue in the present appeal.

[3]In *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *cert granted*, 63 U.S.L.W. 3255 (U.S. Sept. 23, 1994), 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 the work-related injury. The United States Court of Appeals for the Fourth Circuit, reversed, however, finding this evidence insufficient.

Employer argues on appeal that the administrative law judge erred in reaching these conclusions, inasmuch as Dr. Shaw agreed with paragraph 8 of Dr. Harmon's opinion, which indicated that claimant's pre-existing coronary artery disease could have materially contributed to a part of the patient's impairment. We reject this contention. Although Dr. Shaw did indicate in his June 14, 1990, report that he agreed with paragraph 8 of Dr. Harmon's opinion, in that same report Dr. Shaw also stated that neither claimant's medical records nor the medical literature supported Dr. Harmon's statement that "most, if not all, of (claimant's) fatigue, shortness of breath, and reduced pulmonary function values are caused by his coronary artery disease." EX. 7. Moreover, Dr. Shaw also noted that the medical literature does not support the notion that reduced pulmonary function values ... (are) caused by relatively stable coronary artery disease, as is present in the patient's case at this time, citing a medical text as supporting authority. Finally, Dr. Shaw concluded his report by stating, "(s)uffice it to say, the important point in this patient's case is that *the patient's dyspnea and symptomatology could be caused by a combination of coronary artery disease and asbestosis*. (emphasis in original).

Because of the confusing nature of Dr. Shaw's June 14, 1990, opinion, by letter dated August 14, 1991, the Director requested that Dr. Shaw clarify his opinion. In response, Dr. Shaw wrote a report dated September 10, 1991, in which he explained that while "(i)t is not possible to rule out contribution of the patient's coronary artery disease as one component contributing to the patient's overall dyspnea, there is no direct evidence in his records that this was the case, and that therefore this was a speculative opinion which is hard to prove based on the data available in his record through claimant's last visit on April 26, 1991." DX. 2. In this report, Dr. Shaw also reiterated his earlier opinion that the evidence against coronary artery disease affecting pulmonary function is supported by the medical literature as well as by his own experience in caring for several hundred patients with asbestos lung disease, many of whom have suffered some form of coronary artery disease. Moreover, Dr. Shaw stated that the 25 percent impairment reflected on claimant's April 25, 1989, pulmonary function test had "always been considered to be secondary to asbestosis."

Dr. Shaw's opinion as a whole suggests that he did not believe that claimant's pre-existing coronary artery disease contributed to his decreased pulmonary function. In any event, it does not establish that claimant's coronary artery disease materially and substantially contributed to his disability. The opinion is thus not consistent with Dr. Harmon's view. Dr. Shaw's September 10, 1991, report, moreover, provides substantial evidence to support the administrative law judge's finding that whether claimant's pre-existing coronary artery disease contributed to his loss in pulmonary function is, at best, speculative. Employer bears the burden of establishing its entitlement to Section 8(f) relief. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Barclift]*, 737 F.2d 1295, 16 BRBS 107 (CRT) (4th Cir. 1984); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Langley]*, 676 F.2d 110, 14 BRBS 716 (4th Cir. 1982). As Dr. Shaw's September 10, 1991, opinion provides substantial evidence to support the administrative law judge's finding that employer did not meet its burden in this case, and as employer has failed to demonstrate any reversible error by the administrative law judge in evaluating the conflicting medical evidence, the administrative law judge's denial of Section 8(f) relief is affirmed.

Accordingly, the administrative law judge's Decision and Order Denying Petition for Relief Under Section 8(f) is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge