BRB No. 00-0898

JUANITA GUPTON (Widow of LESTER GUPTON) Claimant v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: June 4, 2001 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Compensation and Denying Special Fund Relief of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Christopher R. Hedrick (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Andrew D. Auerbach (Judith E. Kramer, Acting Solicitor of Labor, Carol DeDeo, Associate Solicitor; Joshua T. Gillelan II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Compensation and Denying Special Fund Relief (97-LHC-2139) of Administrative Law Judge Richard E. Huddleston 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).

This is the second time that this case has come before the Board. To briefly restate the procedural history, claimant's spouse (the decedent), on May 22, 1996, died from mesothelioma arising out of his employment with employer. Claimant subsequently sought permanent partial disability and death benefits under the Act, while employer sought relief pursuant to Section 8(f). *See* 33 U.S.C. §§908(c)(23), 908(f), 909. On December 10, 1998, the administrative law judge issued a decision in which he denied the request for Section 8(f) relief and remanded the case for entry of a compensation Order. Employer appealed this decision to the Board. On June 24, 1999, the Board remanded the case for "the entry of an award of benefits based on stipulations of the parties and/or findings of fact following a hearing" as well as reconsideration of employer's entitlement to Section 8(f) relief. *Gupton v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 94 (1999). In his Decision and Order on Remand, the administrative law judge awarded the permanent partial disability and death benefits sought by claimant. In addressing employer's request for Section 8(f) relief, the administrative law judge found that employer failed to establish that the decedent suffered from a pre-existing permanent partial disability which combined with his mesothelioma so as to contribute to the resulting disability. Accordingly, employer's request for Section 8(f) relief was denied.

Employer now appeals, arguing that the administrative law judge erred in denying it relief under Section 8(f). The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's decision.

Section 8(f) limits employer's liability for compensation to the first 104 weeks of permanent disability or of death benefits; additional compensation is paid from the Special Fund. *See* 33 U.S.C. §944; *Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd,* 243 F.3d 179, 35 BRBS 12(CRT)(4th Cir. 2001). Where employer claims Section 8(f) relief and the case involves two separate claims, as in this case which presents a claim for partial disability, 33 U.S.C. §908(c)(23), and a claim for death benefits, 33 U.S.C. §909, employer's entitlement to relief must be separately evaluated with regard to each claim. *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT)(4th Cir. 1990). To avail itself of Section 8(f) relief where an

employee suffers from a permanent partial disability, employer must affirmatively establish: 1) that decedent had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to 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 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 on other grounds*, 514 U.S. 122, 29 BRBS 87 (1995). Similarly, employer is entitled to Section 8(f) relief in a death claim if the employee's death is not due solely to the work injury, a standard which can be met if employer establishes the existence of a pre-existing condition which hastened the employee's death. *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT)(4th Cir. 1998); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

In the instant case, employer argues on appeal that the administrative law judge erred in determining that the opinion of Dr. Reid, employer's in-house physician, is insufficient to meet its burden of establishing that the decedent suffered from pre-existing permanent partial disabilities, specifically hypertension and chronic obstructive pulmonary disease (COPD), which contributed to his resulting disability and death. We disagree and, for the reasons that follow, we affirm the administrative law judge's conclusion that employer is not entitled to Section 8(f) relief.

With regard to the decedent's alleged, pre-existing hypertension, the administrative law judge found that Dr. Reid's April 2, 1997, opinion that the decedent suffered from pre-existing hypertensive cardiovascular disease and COPD was based upon the notes and reports of Drs. Acosta and Harden. The administrative law judge determined, however, that while Dr. Acosta's March 1987 hand-written office notes contain a word which might be "hypertension," those notes contain no clarification of this term. *See* Emp. Ex. 3. Moreover,

[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 suffered 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).

the administrative law judge found that no further mention of "hypertension" exists in the nine years of subsequent medical reports following the decedent's later medical examinations. The administrative law judge concluded that Dr. Acosta's notes do not support the conclusion reached by Dr. Reid and that Dr. Reid's opinion was thus not well-reasoned. Accordingly, the administrative law judge determined that employer failed to establish that the decedent suffered from pre-existing hypertension. Decision and Order at 7-8.

Similarly, in addressing Dr. Reid's opinion that the decedent suffered from pre-existing COPD, the administrative law judge reviewed the evidence and determined that Dr. Acosta's September 1976 and January 1991 office notes each contain a hand-written notation which might be the word "bronchitis." The administrative law judge found, however, that these possible references stand alone and are unexplained, and that five examinations conducted between the writing of these two reports fail to mention this alleged condition. The administrative law judge also found that in the treatment notes at Hampton General Hospital on April 16, 1996, Dr. Harden noted, "Chronic Medical Diseases: COPD." Emp. Ex. 5. This note was written two years after decedent's mesothelioma was diagnosed and contains no indication as to whether the COPD pre-existed the mesothelioma. Emp. Ex. 1. Given the two unexplained notations of bronchitis, separated by five years of silence on the matter, the administrative law judge found that the evidence suggests decedent did not have pre-existing COPD. The administrative law judge thus concluded that employer, through the opinion of Dr. Reid, failed to establish that decedent suffered from pre-existing COPD.[2] *See* Decision and Order at 8.

Similarly, in considering Dr. Reid's testimony in light of the contribution element

[2]In addition, the administrative law judge found that Dr. Reid did not discuss any specific disabling effect decedent's alleged hypertension and COPD had upon him. Thus, the administrative law judge concluded that employer failed to establish that the decedent was disabled to any extent by either his alleged hypertension or COPD. The mere existence of prior conditions is insufficient to establish the existence of a serious and lasting physical impairment sufficient to satisfy the pre-existing permanent partial disability element. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991).

required to establish entitlement to relief under Section 8(f), the administrative law judge noted that Dr. Reid failed to discuss how the decedent was affected by his alleged hypertension and COPD. Specifically, the administrative law judge determined that Dr. Reid made no effort to prove the effects of the decedent's alleged pre-existing conditions but, rather, focused on the average quantitative effects of hypertension and the reduction in ventilatory values due to the presence of COPD. Based on these findings, the administrative law judge concluded that Dr. Reid's opinion was insufficient to establish the contribution element.

In challenging the administrative law judge's decision, employer repeatedly avers that an administrative law judge cannot reject uncontroverted medical evidence; thus, employer asserts that the administrative law judge's decision to discount Dr. Reid's opinion cannot stand and his denial of Section 8(f) relief must be reversed. Contrary to employer's argument, however, there is no requirement that the administrative law judge credit an uncontradicted medical opinion. *See Carmines*, 138 F.3d at 140-141, 32 BRBS at 52-53(CRT) (wherein the court emphasized that an administrative law judge may not merely credulously accept a physician's assertions, but must examine the logic of the physician's conclusions and evaluate the evidence upon which those conclusions are based). Thus, the court's holding in *Carmines* requires the administrative law judge to determine whether there is a reasoned and documented basis for the medical opinion, and to evaluate such opinion in light of the evidence in the record considered as a whole. *See Carmines*, 138 F.3d at 140-141, 32 BRBS at 52(CRT). In so doing, the administrative law judge may accept or reject all or any part of any testimony according to his judgment. *See Perini Corp. v. Heyde,* 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, the administrative law judge's decision not to rely upon Dr. Reid's testimony, since that physician's opinion is not supported by the underlying medical records and his conclusions are not adequately reasoned or documented, is within his discretion as the trier-of-fact. *See Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Heyde*, 306 F.Supp. 1321. Consequently, the administrative law judge's determination that employer failed to establish that the decedent suffered from a pre-existing permanent partial disability which contributed to his disability and death is affirmed.[3] *See Carmines*, 138 F.3d 134, 32 BRBS

[3]With regard to decedent's permanent partial disability award, we agree with the Director that even if it were credited, Dr. Reid's opinion is insufficient to establish contribution in light of the Fourth Circuit's decision in *Carmines.* In *Carmines*, the court specifically stated that in demonstrating an employee's disability is "materially and substantially greater" due to a pre-existing condition, it is not proper simply to calculate the claimant's current disability and subtract the disability that resulted from the pre-existing disability. *See Carmines*, 138 F.3d at 143, 32 BRBS at 55 (CRT). As this is precisely the method used by Dr. Reid in the instant case, his opinion is in conflict with the holding in

48(CRT); *Harcum II*, 131 F.3d 1079, 31 BRBS 164(CRT); *Harcum I,* 8 F.3d 175, 27 BRBS 116(CRT). We, therefore, affirm the administrative law judge's denial of Section 8(f) relief to employer.

Carmines and is thus insufficient to establish the contribution element regarding employer's request for relief from claimant's permanent partial disability claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge