BRB No. 02-0723

CHARLES COLLINS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY	)	DATE ISSUED:JUN 18, 2003
	)	
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 Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (01-LHC-2163) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant was exposed to asbestos during the course of his employment with employer as a welder/shopfitter. On September 20, 1998, Dr. Nichols diagnosed claimant as having asbestosis. In their stipulations, employer and claimant agreed that claimant is permanently totally disabled due in part to asbestosis, which was diagnosed within one year of his retirement from the shipyard. They stipulated that claimant is entitled to permanent partial disability benefits for a 100 percent impairment; this rating was made pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). They further stipulated that claimant's medical condition necessitated his early retirement from employment. EX 1. The sole issue before the administrative law judge was employer's entitlement to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In his Decision and Order, the administrative law judge restated the parties' stipulations as agreeing that claimant was permanently partially disabled due in part to asbestosis. *See* Decision and Order at 2-3. He awarded claimant ongoing permanent partial disability benefits based on two-thirds of the applicable average weekly wage. *Id.* at 6. In addressing employer's claim for Section 8(f) relief, the administrative law judge discussed the opinions of Drs. Tornberg and Donlan and found their opinions insufficient to establish that claimant's total disability is not due solely to asbestosis. Since employer's proffer, moreover, did not include any vocational evidence, the administrative law judge concluded that employer failed to establish that claimant's total disability is not due solely to his work-related injury. Thus, the administrative law judge found that employer is not entitled to Section 8(f) relief. *Id.* at 5.

On appeal, employer challenges the administrative law judge's denial of Section 8(f) relief. The Director, Office of Workers' Compensation Programs, has

not responded to this appeal.

We cannot affirm the denial of Section 8(f) relief on the reasoning of the administrative law judge and thus must remand this case for further findings. The parties' stipulations as interpreted by the administrative law judge do not consistently reflect whether the award falls under Section 8(c)(23) or Section 8(a). As this determination affects the applicable legal standard under Section 8(f), the case must be remanded.

The parties stipulated that claimant has a 100 percent permanent impairment pursuant to the AMA *Guides* due to his asbestosis and that he is permanently totally disabled. EX 1. An award based on physical impairment alone under Section 8(c)(23) is appropriate only if claimant is a voluntary retiree, that is, if his work-related occupational disease did not cause his withdrawal from the workforce. *See* 33 U.S.C. §§902(10), 908(c)(23); *see Hanson v. Container Stevedoring Co.,* 31 BRBS 155 (1997); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); 20 C.F.R. §702.601(b), (c). In this case, the parties also stipulated that claimant's "medical condition" necessitated his early retirement from all employment. Such an employee is properly entitled to benefits for permanent total disability under Section 8(a). 33 U.S.C. §908(a). *See Hanson*, 31 BRBS 155; *Alcala v. Wedtech Corp.*, 26 BRBS 140 (1992). The parties' stipulations are consistent with this legal holding in that they state claimant is permanently totally disabled in stipulation 8. However, the agreement also states claimant has a 100 percent impairment under the AMA *Guides* in stipulation 9, and in stipulation 10, agrees to claimant's average weekly wage for "that permanent partial disability" at a rate computed by multiplying 2/3 by the average weekly wage times 100 percent, which is consistent with a permanent partial disability award under Section 8(c)(23). The administrative law judge thus had a basis for restating the agreement to find claimant

permanently partially disabled and to award benefits accordingly.[1] Notwithstanding this award, however, he applied the standards under Section 8(f) for permanent total disability, requiring evidence as to claimant's employability.

The standards for the applicability of Section 8(f) differ depending on whether claimant is permanently totally or permanently partially disabled. To avail itself of Section 8(f) relief where an employee is totally disabled, 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; and 3) that the total disability is not due solely to the work injury. *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748, 23 BRBS 34(CRT) (5th Cir. 1990). If the claimant is partially disabled, the employer must establish the pre-existing permanent partial disability and manifest elements, and additionally must establish that the current disability is not due solely to the subsequent injury and is materially and substantially greater than 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 (CRT)(1995).

The Director conceded below that claimant's coronary artery disease constituted

[1]In this case, the amount of benefits to which claimant is entitled is the same whether he receives permanent partial disability benefits for a 100 percent impairment, pursuant to Section 8(c)(23), or for permanent total disability, pursuant to Section 8(a), since the parties correctly stipulated that claimant's average weekly wage is his earnings from the 52 weeks preceding his retirement. *See* 33 U.S.C. §910(d)(2)(A); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). However, a claimant who is permanently totally disabled is entitled to annual increases in compensation under Section 10(f), 33 U.S.C. §910(f).

a pre-existing permanent partial disability. Thus, the first element for Section 8(f) relief is satisfied. See Wiggins v. Newport News Shipbuilding & Dry Dock Co., 31 BRBS 142 (1997). With regard to the manifest element, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, does not apply the manifest requirement in post-retirement occupational disease cases. Newport News Shipbuilding & Dry Dock Co. v. Harris, 934 F.2d 548, 24 BRBS 190(CRT) (4th Cir. 1991). As it is clear from the parties' stipulations that claimant's occupational disease was diagnosed subsequent to his retirement, under Harris employer is not required to prove this element. Thus, employer's entitlement to Section 8(f) relief turns on whether it has satisfied the contribution element.

As set forth above, the contribution element differs in partial and total disability cases. In this case, the administrative law judge addressed it as if claimant were totally disabled, notwithstanding his entry of an award of partial disability benefits. He found that employer's evidence is insufficient to establish that claimant's asbestosis alone would not have rendered claimant unable to participate in gainful employment. Specifically, the administrative law judge found that neither Dr. Tornberg nor Dr. Donlan addressed the issue of whether claimant could perform any work if he did not have coronary artery disease, nor did Dr. Donlan state whether claimant could work with only the 90 percent impairment due to the asbestosis. The administrative law judge also noted the absence of vocational evidence addressing claimant's employability. Thus, he denied employer Section 8(f) relief.

If, on remand, it is determined, by stipulation or otherwise, that claimant is entitled to permanent total disability benefits pursuant to Section 8(a), we affirm the administrative law judge's denial of Section 8(f) relief. In order to establish the contribution element in a permanent total disability case, employer must demonstrate with medical evidence or otherwise, that claimant's disability is not due solely to the work injury. *Pennsylvania Tidewater Dock Co. v. Director, OWCP [Lewis]*, 202 F.3d 656 (3d Cir. 2000); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 26 BRBS 1(CRT) (2d Cir. 1992). It is insufficient merely to show that the pre-existing condition worsened the claimant's overall disability. *Director, OWCP v. Jaffe New York Decorating*, 25 F.3d 1080, 28 BRBS 30(CRT) (D.C. Cir. 1994); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992). The administrative law judge correctly found that employer offered no evidence demonstrating that claimant's total economic disability was due in part to his pre-existing coronary artery disease, and thus Section 8(f) relief was properly denied on this basis. *See generally Two "R" Drilling Co.,* 894 F.2d 748, 23 BRBS 34(CRT).

If, however, claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(23), the administrative law judge must reconsider employer's entitlement to Section 8(f) relief. As the compensable disability in a case compensated pursuant to Section 8(c)(23) consists only of permanent physical impairment, claimant's employability is irrelevant, and the administrative law judge must consider whether the asbestosis alone caused claimant's compensable pulmonary impairment and whether the coronary artery disease materially and substantially contributed to claimant's compensable impairment. *See Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Beckner v. Newport New Shipbuilding & Dry Dock Co.*, 34 BRBS 181 (2000).

Dr. Tornberg's opinion is legally insufficient to establish the contribution element, pursuant to the law of the Fourth Circuit, as he does not state the degree of impairment claimant would have from the asbestosis alone. Rather, he states that claimant's disability would be "at least 10% less, and probably more . . ." if not for his coronary artery disease. EX 2b. The Fourth Circuit in *Carmines* specifically held that simply subtracting the extent of disability that resulted from the pre-existing disability from the extent of the current disability is insufficient to establish that the claimant's disability is materially and substantially greater than that due to the subsequent injury alone. *Carmines,* 138 F.3d at 143, 32 BRBS at 55(CRT); *see also Newport News Shipbuilding & Dry Dock Co. v. Pounders,* 326 F.3d 455 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 326 F.3d 427 (4th Cir. 2003). The administrative law judge must re-evaluate Dr. Donlan's opinion, however, in order to determine if it is sufficient to establish that claimant's current pulmonary condition is not due solely to asbestosis and is materially and substantially worse due to coronary artery disease than it would be due to asbestosis alone. Dr. Donlan examined claimant and reviewed the results of pulmonary function studies. Dr. Donlan opined that 90 percent of claimant's disability is secondary to asbestosis and 10 percent is due to coronary disease. EX 3. On remand, the administrative law judge must consider the sufficiency of this opinion in light of relevant law if he redetermines that claimant is permanently partially disabled. *See Pounders,* 326 F.3d 455; *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 326 F.3d 449 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434 (4th Cir. 2003); *Winn*, 326 F.3d 427; *Carmines,* 138 F.3d 134, 32 BRBS 48(CRT).

Accordingly, the administrative law judge Decision and Order is vacated, and the case is remanded for further consideration consistent with this decision. On remand, the consideration of Section 8(f) relief must be based on the type of benefits awarded to claimant.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge