No. 00-1815

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY
Petitioner

v.

HERBERT E. WINN
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents

On Petition for Review of a Final Order
of the Benefits Review Board

BRIEF FOR FEDERAL RESPONDENT, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arose from a claim filed by Herbert E. Winn ("the claimant") for workers' compensation disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994) (the "LHWCA" or the "Act") against Newport News Shipbuilding & Dry Dock Co., (the "employer" or "NNS") seeking compensation under 33

U.S.C. § 908(c)(23), for the occupational disease of asbestosis which was not diagnosed until after Winn voluntarily retired from employment. The employer filed a timely application with the district director requesting that its liability to pay compensation for the claimant's permanent pulmonary impairment be limited to 104 weeks of benefits, pursuant to section 8(f) of the Act, 33 U.S.C. § 908(f).

The case was presented to an administrative law judge (the "ALJ") who had jurisdiction under section 19(c)-(d) of the Act, 33 U.S.C. § 919(c)-(d). The Benefits Review Board (the "Board") had jurisdiction of the employer's timely appeal of the ALJ's denial of its application for section 8(f) relief, pursuant to section 21(b)(3), 33 U.S.C. § 921(b)(3).

Section 21(c) of the Act, 33 U.S.C. § 921(c), vests the court of appeals for the circuit in which a worker's injury occurred with jurisdiction to review a "final order of the Board," upon a petition for review filed within sixty days after issuance of the order by a "person adversely affected or aggrieved." In the present case, the claimant's injury was sustained in the course of employment performed in Virginia, within this Court's territorial jurisdiction. The Board issued its final order on May 9, 2000. The employer filed its petition for review with this Court on June 26, 2000, within the sixty

days allowed by section 21(c). Thus, this Court has subject matter and appellate jurisdiction under section 21(c), 33 U.S.C. § 921(c).

ISSUE PRESENTED

Whether substantial evidence supports the ALJ's finding that the employer failed to bear its burden to prove that claimant's alleged chronic obstructive pulmonary disease (COPD) constituted a preexisting permanent partial disability which materially and substantially contributed to the claimant's ultimate level of impairment as required by section 8(f).

STATEMENT OF THE CASE

The Director accepts the employer's statement of the case. Petitioner's Brief ("PB") at 3-4.

STATEMENT OF THE FACTS

The claimant was employed by NNS as a helper, handyman and machinist between 1960 and 1986. JA 15. The employer and claimant stipulated that, throughout his course of employment with NNS, he was continuously exposed to airborne asbestos dust and fibers. JA 16. The parties additionally stipulated that on April 18, 1997, Dr. James V. Scutero diagnosed the claimant with asbestosis, and as a result of that disease, the claimant had a 20% permanent impairment rating as specified under the classes of impairment set forth in the AMA *Guides to the Evaluation of*

Permanent Impairment (4th Edition). JA 17. Accordingly, the parties stipulated that the claimant was entitled to permanent partial disability benefits at the rate of $53.41 per week from April 18, 1997, through the present and continuing. *Id*. at 17. Further, the employer agreed to pay all past, present and future medical bills related to the claimant's asbestosis treatment and surveillance. JA at 17-18.

Administrative Law Judge Richard K. Malamphy accepted the parties' stipulations in a Decision and Order dated April 2, 1999. JA 38. In that Decision and Order, the ALJ also considered the employer's request for section 8(f) relief. JA 33-38. The ALJ found that the employer failed to establish that the claimant's alleged chronic obstructive pulmonary disease (COPD) constituted a preexisting permanent partial disability, and further, that the alleged COPD did not materially and substantially contribute to his ultimate level of disability. *Id.* Accordingly, the ALJ denied the employer's request for section 8(f) relief. *Id.*

In its effort to convince the ALJ of its entitlement to section 8(f) relief, the employer relied on the opinions of Drs. James Reid, Charles Donlan and R.J. Guardia. JA 9-12. The employer's in-house physician, Dr. Reid, opined that "by 1985, Mr. Winn was known to have COPD with approximately 10% impairment…[t]hus, if Mr. Winn did not have COPD,

and only his alleged asbestosis, his AMA rating would be at least 10% less." JA 9. The ALJ rejected Dr. Reid's opinion stating that the "assessment is conclusory rather than based on fact." JA 37.

In attempting to develop evidence favorable to its section 8(f) request, the employer sent a letter with Dr. Reid's report attached to Dr. Donlan, another physician who never treated Mr. Winn, and inquired whether he agreed with Dr. Reid's opinion. In response, Dr. Donlan opined that the claimant did have pulmonary asbestosis, as well as chronic bronchitis, and that his pulmonary function tests -- performed several months after asbestosis had been diagnosed -- showed mild obstructive impairment. JA 10. Dr. Donlan also found that the claimant's "[d]iffusion capacity was mildly reduced to 75% of predicted." *Id.* Further, Dr. Donlan opined:

> Using AMA guidelines, I would place his impairment as Class II, 10%. I think the majority of this impairment would be secondary to chronic bronchitis from cigarette smoking. I would agree with Dr. Reed (sic) that the pre-existing disease of chronic bronchitis contributes to his overall impairment. I would agree with Dr. Reed (sic) that had he not had chronic bronchitis that his impairment would be less.

JA 10.

In a supplemental three-sentence letter dated January 26, 1999, Dr. Donlan opined, "I would conclude that his overall impairment would be 4% had he had asbestosis alone." JA 11. Dr. Donlan never mentioned COPD.

The ALJ rejected Dr. Donlan's opinion as unsubstantiated and inconsistent with the other doctors' opinions in regards to the claimant's level of impairment. Specifically, the ALJ stated, "Dr. Reid has stated that the [c]laimant now has a 20% impairment [due to asbestosis]… and Dr. Donlan has reported a 10% impairment with 4% attributable to asbestosis." JA 37.

The employer also submitted to the ALJ a brief letter from Dr. Guardia. Dr. Guardia "reviewed Mr. Wynn's [sic] record," noted that although his office had once treated "Wynn" for an auto accident but never for a pulmonary condition, and reviewed "the reports from Dr. Donlan and Dr. Reid." JA 12. Dr. Guardia merely stated, "I would agree that had Mr. Wynn [sic] not been a smoker, his disability would have been much less." JA 12. The ALJ found Dr. Guardia's report "not illuminating as he does not specifically mention what reports were reviewed or describe the basis for his conclusions." JA 37. The ALJ found that the employer had failed to prove that Winn's alleged COPD amounted to a preexisting permanent partial disability within the meaning of section 8(f) and also failed to prove that

Winn's pulmonary impairment from asbestosis was materially and substantially contributed to by a preexisting permanent partial disability. JA 37.

Upon the employer's appeal to the Benefits Review Board, the Board, citing *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Carmines)*, 138 F.3d 134, (4th Cir. 1998), affirmed the decision of the ALJ. JA 41-44. The Board first addressed the employer's argument that the ALJ erred in not crediting what it characterized as "uncontradicted evidence" supporting its right to section 8(f) relief. JA 43. The Board reaffirmed that the employer, as the moving party, bears the burden to establish entitlement to section 8(f) relief and that the absence of contrary evidence by itself did not obligate the ALJ to credit evidence which was otherwise not worthy of credit. JA 43. The Board held that "the [ALJ] properly concluded that employer failed to establish any contribution from claimant's alleged pre-existing COPD to his current permanent partial disability."[1] JA 44.

The employer timely filed an appeal of the Board's decision to this Court.

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[1] Because it grounded its affirmance of the ALJ's denial of section 8(f) relief on the contribution element, the Board found it unnecessary to specifically address the employer's challenge to the ALJ's adverse finding on the pre-existing permanent partial disability element.

SUMMARY OF ARGUMENT

The employer simply failed to carry its burden of proof to establish all the elements necessary to qualify for section 8(f) relief. Specifically, the employer failed to convince the ALJ: (1) that the claimant had the preexisting permanent partial disability alleged by the employer; and (2) that such a preexisting permanent partial disability materially and substantially contributed to the claimant's ultimate level of impairment as this Court has defined that legal standard in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175 (4th Cir. 1993). The ALJ's assessment of the evidence was thorough, rational and in accordance with the law. Accordingly, the Board's decision affirming the ALJ's denial of section 8(f) relief is based on substantial evidence.

The Board correctly determined that the ALJ reasonably found the employer's medical-opinion evidence to be undocumented, unreasoned, and unpersuasive. Because of these flaws in the employer's evidence, the ALJ was fully justified in refusing to credit the employer's evidence, and the Board was correct in affirming the ALJ's decision. Both the ALJ and the Board properly applied the legal standard for contribution as set forth in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 140 (4th Cir. 1998) to the facts of this case. Thus,

this Court should affirm the Board's determination that the employer failed to establish its entitlement to section 8(f) relief, as the decision is supported by substantial evidence and in accordance with the law.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDINGS THAT THE EMPLOYER FAILED TO ESTABLISH THAT WINN SUFFERED FROM ANY PREEXISTING PERMANENT PARTIAL DISABILITY PRIOR TO HIS DIAGNOSIS OF ASBESTOSIS THAT MATERIALLY AND SUBSTANTIALLY CONTRIBUTED TO HIS CURRENT COMPENSABLE DISABILITY.

A. Standard of Review.

In reviewing a decision of the Benefits Review Board, this Court reviews the Board's decisions for errors of law and to determine whether the Board adhered to the substantial evidence standard when it reviewed the ALJ's factual findings. *See Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). To the extent that the employer's petition in this case challenges the validity of the ALJ's findings of fact, the statute provides that "the findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). Thus, this Court should not disturb the ALJ's factual findings unless they are unsupported by substantial

evidence on the record considered as a whole. *Maryland Shipbuilding and Drydock Co. v. Director, OWCP*, 618 F.2d 1082, 1084 (4th Cir. 1980).

Substantial evidence has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Where evidence is subject to multiple or conflicting inferences, "the ALJ's findings may not be disregarded on the basis that other inferences might have been more reasonable. Deference must be given the fact-finder's inferences and credibility assessments …." *Tann*, 841 F.2d at 543. Moreover, since the substantiality of the evidence must be viewed upon "the record as a whole," the Court must "tak[e] into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1947).

The employer attempts to generate a legal issue upon which to attack the ALJ's well-reasoned factual findings by asserting that the ALJ and the Board applied an erroneous legal standard. PB at 21. As to questions of law, this Court exercises plenary review. *Humphries v. Director, OWCP*, 834 F.2d 372, 374 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988).[2]

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[2] Although the courts certainly remain the final authorities on questions of statutory construction, the Director's constructions of the Act, should be accepted as controlling unless they are unreasonable or contrary to the

The employer, however, neither articulates any claimed legal error nor identifies any erroneous legal standard allegedly applied. Rather, the employer attempts to recast its factual argument as a legal one. In reality, the employer is actually arguing over the ALJ's application of the correct legal standard, set forth in *Carmines*, to the facts of this case. Thus, this case does not present a true legal issue.

B. The Standard for Section 8(f) Relief.

Under section 8(f) of the Act, 33 U.S.C. § 908(f), an employer's workers' compensation liability is partially mitigated when an employee's preexisting disability causes his or her workplace injury to be greater than it would be without the preexisting disability. *Lawson v. Suwannee Fruit & S.S. Co*., 336 U.S. 198 (1949); *American Mutual Insurance Co. v. Jones*,

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purpose of the statute or clearly expressed legislative intent. *See generally, e.g., Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-5 & nn. 9, 11 (1984*); Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 125-6 (1985). This Court has expressly accorded the Director *Chevron* deference with respect to the construction of section 8(f), 33 U.S.C. § 908(f). *See Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 208-209, 210-11 (4th Cir. 1990). In this case however, since the only legal principles implicated by the employer's petition for review are clearly answered by controlling circuit precedent, there is no reason for the Director to seek deference for any position stated herein. *See, e.g., Betty B. Coal Co. v. Director, OWCP*, 194 F.3d 491, 498 (4th Cir. 1999); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum I)*, 8 F.3d 175, 179 (4th Cir. 1993*)*; *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 258 (4th Cir. 1991).

426 F.2d 1263 (D.C. Cir. 1970). In a permanent partial disability case, as here, section 8(f) relief is available to the employer where the employer affirmatively establishes: 1) that the claimant suffered from a preexisting permanent partial disability; and 2) that the resulting disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone."[3] 33 U.S.C. § 908(f); *Harcum I*, 8 F.3d 175, 182-83.

To establish the first element, the employer must prove that the employee had an "existing permanent partial disability" which was in existence prior to the injury for which compensation is sought. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Langley),* 676 F.2d 110, 114 (4th Cir. 1982). There are three tests for determining whether an existing medical condition rises to the level of a permanent partial disability within the meaning of section 8(f). *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C. Cir. 1977). Impairments to specified body parts

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[3] Other courts have held, in agreement with the Director, that the employer must also establish that the preexisting disability was manifest to the employer during the employment. *Bath Iron Works v. Director, OWCP [Reno]*, 136 F.3d 34 (1st Cir. 1998); *Director, OWCP v. Sun Ship Inc. [Ehrentraut]*, 150 F.3d 288 (3rd Cir. 1998). The employer was not required to prove the manifest element for section 8(f) relief in this case because this Court has found that requirement inapplicable to cases involving post-retirement occupational diseases. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 551-53 (4th Cir. 1991).

and functions set forth in a statutory schedule, 33 U.S.C. §§ 908(c)(1)-(20); (23), will constitute existing permanent partial disabilities, as will conditions that diminish a worker's ability to earn wages. In addition, a condition will constitute an existing permanent partial disability if it satisfies the "cautious employer" test: "such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability." *C & P Telephone Co*., 564 F.2d at 513.[4]

To satisfy the contribution element, this Court has held that section 8(f) also requires that the existing disability contribute to the worker's ultimate level of disability. *See e.g., Harcum I,* 8 F.3d at 185. To fulfill the contribution requirement when the workplace injury causes permanent partial disability, the employer must establish that the disability is "materially and substantially greater" than that which would have resulted from the workplace injury alone. *Id.* A showing of material and substantial contribution "requires quantification of the level of impairment that would ensue from the work-related injury alone*." Id.* at 185-186 In *Carmines*, 138 F.3d at 142, this Court reaffirmed the holding

[4] This Court has yet to decide whether the "cautious employer" test is a valid method of identifying an "existing permanent partial disability."

of *Harcum I*, and further explained that quantification is necessary so the ALJ may have a basis from which to determine whether the ultimate permanent partial disability is, in fact, materially and substantially greater because of such pre-existing disability.

Finally, it is indisputably the employer's burden to prove each and every element necessary for section 8(f) relief. *Langley*, 676 F.2d at 114. If the employer's evidence fails to satisfy this burden, the fact that the evidence is uncontradicted is irrelevant. *Carmines*, 138 F.3d at 142.

C. Substantial Evidence Supports the ALJ's Factual Findings That the Employer Failed to Prove That Mr. Winn Suffered From an Existing Permanent Partial Disability That Materially and Substantially Contributed to His Ultimate Disability.

The employer clearly failed to establish the elements necessary for section 8(f) relief in this case. The employer's evidence failed to prove that the claimant's purported COPD constituted a preexisting permanent partial disability within the meaning of section 8(f), that materially and substantially contributed to the claimant's ultimate disability. Although the ALJ's analysis emphasized the employer's evidentiary failings with respect to the preexisting permanent partial disability element and the Board focused on the contribution element of section 8(f), both conclusions are correct.

The employer simply did not meet its burden of proof, on either element, to establish section 8(f) relief. Indeed, the ALJ found the employer's evidence unsupported and unconvincing, and the Board affirmed those findings as rational and in accordance with the law.

i. Contribution.

Substantial evidence supports the ALJ's and the Board's findings that the employer failed to satisfy the contribution element in this case. To satisfy the contribution element in cases of permanent partial disability, the employer must show that the resulting disability is "materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908 (f)(1)." 33 U.S.C. § 908 (f)(1); *Harcum I*, 8 F.3d 175, 182-183. To satisfy this element, this Court has held that "a showing of this kind requires quantification of the level of impairment that would ensue from the *work-related injury alone." Harcum I*, 8 F.3d at 185-186 (emphasis added). The Board correctly affirmed the ALJ's finding that the employer failed to carry its burden of proof on this point.

The ALJ was well within his discretionary authority in rejecting the doctors' reports submitted by NNS as insufficient to establish quantification because they failed to provide any rationale or basis for the conclusions

within those reports. Although Dr. Donlan's opinion -- that claimant's overall impairment would be 4% had he had asbestosis alone -- constitutes an attempt to satisfy the quantification requirement, his opinion was found to be unworthy of credit by the ALJ, not only because it was contrary to the stipulations of record, but because Dr. Donlan provided no basis whatsoever for his opinion. The fact that the letter is a mere three sentences long confirms the correctness of the ALJ's determination. As this Court noted in *Carmines*, the mere assertion of "contribution" by the employer's physician, without any basis to support the conclusion, need not be accepted by an ALJ. *Carmines*, 138 F.3d at 144.

Dr. Reid's attempt to quantify the level of Winn's pulmonary impairment attributable to asbestosis alone was no more convincing to the ALJ and, furthermore, was legally insufficient to meet the applicable legal standard. Dr. Reid stated, "by 1985, Mr. Winn was known to have COPD with approximately 10% impairment. Thus, if Mr. Winn did not have COPD, and only his alleged asbestosis, his AMA rating would be at least 10% less." JA 9. Expressions of quantification derived solely through mathematical deduction without any basis in evidence or logic are, as a matter of law, insufficient, to satisfy the contribution requirement. This Court has specifically held, "it is not proper simply to calculate the current

disability and subtract the disability that resulted from the pre-existing injury." *Carmines*, 138 F.3d at 143. To do so overlooks the more reasonable probability that the asbestosis is the cause of the full amount of pulmonary impairment even though other additional pulmonary conditions might co-exist. *Id*. This is exactly what Dr. Reid did in this case. Thus, even if it were assumed, *arguendo*, that Mr. Winn did, in fact, have a preexisting permanent partial disability, the employer still failed to satisfy its burden of proof in establishing that claimant's current disability is materially and substantially greater because of his pre-existing disability.

The ALJ reasonably concluded that Mr. Winn's COPD did not constitute a preexisting permanent partial disability that materially and substantially contributed to his ultimate disability, for purposes of section 8(f) relief. After a thorough review of the record evidence, the ALJ rationally and reasonably concluded that "the Shipyard [NNS] has not established that the Claimant had a preexisting disability prior to the diagnosis of asbestosis in 1997." JA 37. The Board affirmed the ALJ's determination, focusing on the contribution element alone. JA 43-44. The Board did not address the employer's challenge to the ALJ's finding that the employer's evidence also failed to establish a preexisting permanent partial disability under section 8(f). *See* fn. 3; JA 44.

A brief examination of the evidence discloses that the employer introduced three doctors' reports. The employer hoped to convince the ALJ that the claimant had COPD, and that this condition constituted a preexisting permanent partial disability that materially and substantially contributed to his ultimate disability for purposes of section 8(f) relief. JA 9-12. The ALJ considered and then rejected the submitted reports. JA 34-37. Indeed, the ALJ simply found the reports unpersuasive and lacking in any credible support for the conclusions stated within. JA 37.

The ALJ first rejected Dr. Reid's report, finding his assessment "conclusory rather than based on fact." JA 37. In his report Dr. Reid stated (JA 9):

> The Shipyard clinic read Mr. Winn's chest x-rays on April 9, 1979 and again on April 27, 1982 to show "Inc BVM" – increase bronchovascular markings (Exhibit 1). These are the x-ray findings indicative of chronic obstructive pulmonary disease ("COPD"). The Shipyard clinic interpreted Mr. Winn's pulmonary function tests in 1981, 1982, 1983, and 1985 to show "mild SAO" – small airways obstruction (Exhibits 2 and 3). In a long time smoker such as Mr. Winn, these x-ray findings and pulmonary function tests were diagnostic for COPD. Thus, by 1985, Mr. Winn was known to have COPD with approximately 10% impairment.
>
> Thus, if Mr. Winn did not have COPD, and only his alleged asbestosis, his AMA rating would be at least 10% less.

Dr. Reid's report fails to indicate that he ever examined the claimant personally, as he refers generally to findings made by the "Shipyard clinic." *Id.* Moreover, Dr. Reid failed to consider the obvious possibility that the claimant's long years of asbestos exposure themselves accounted for the reduced values on the pulmonary function tests and abnormal x-ray findings, rather than the never previously diagnosed COPD. The claimant and the employer stipulated that from 1960 through 1986, Mr. Winn was continuously exposed to asbestos dust and fibers. JA 15-16. Thus, the chest x-ray markings and pulmonary function tests reviewed by Dr. Reid appear after two decades of asbestos exposure. However, Dr. Reid never mentioned this fact in his report and apparently failed to take it into account when forming his opinion regarding the claimant's impairment. Applying common sense and logic, the ALJ was entitled to reject Dr. Reid's report for this reason alone.

Further, the ALJ found Dr. Donlan's conclusions in direct conflict with Dr. Reid and the stipulated facts, as Dr. Donlan found the claimant to have an overall impairment of 10% with only a 4% impairment due to asbestosis alone. JA 36. Additionally, the ALJ found Dr. Donlan's report lacking in support for his ultimate conclusions, stating "Dr. Donlan merely mentions that he did perform testing." JA 37. As stated above, the ALJ was

not persuaded by the inconsistent and unsupported opinion of Dr. Donlan and therefore rejected it as unworthy of credit. Finally, the ALJ also rejected Dr. Guardia's brief and conclusory four-sentence letter, finding that such letter was "not illuminating as he [did] not specifically mention what reports were reviewed or describe the basis for his conclusions." JA 37.

Contrary to the employer's argument that the ALJ and the Board violated the Administrative Procedure Act ("APA") by not providing any reasoning in their decisions regarding the employer's inadequate evidence (Petitioner's Brief at 13-14), the ALJ very clearly stated his reasons for finding the submitted physicians' reports incredible, unpersuasive and conclusory. Indeed, ALJ Malamphy precisely followed the mandate of *Carmines* to "examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Carmines*, 138 F.3d at 140.[5]

[5] The employer argues that an unpublished case of the Fourth Circuit, *Director, OWCP v. Newport News & Dry Dock Co., (Parkman)* 122 F.3d 1060 (table) (4th Cir. 1997) that preceded *Carmines*, sets forth the legal standard for determining contribution. PB at 27. Besides the fact that *Parkman* is an unpublished opinion, and factually distinguishable from the present case, the more recent controlling published opinion in *Carmines* on this very point is more instructive than *Parkman*, as it discusses the standard at length and describes the reasoning behind their holdings. *See* Local Rule 36(c) (disfavoring citation of unpublished opinions).

The ALJ's decision in this case indicates that he closely reviewed each of the doctors' reports, carefully evaluated their weight and credibility, and ultimately found them to be of little or no evidentiary value. One of the most important functions of an ALJ as a fact finder is to assess evidence for its appropriate weight. Since Drs. Reid, Donlan and Guardia offered no basis or analysis to either support or explain their medical opinions, the ALJ was well within his discretionary authority as fact-finder in rejecting their opinions. *E.g. Plaquemines Equipment & Machine Co. v. Neuman,* 460 F.2d 1241 (5th Cir. 1972) and authorities cited therein; *Copper Stevedoring, Inc. v. Washington*, 556 F.2d 268, 275-275 (5th Cir. 1977). *Cf. Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S.459, 467 (1968).

Moreover, the ALJ was also well within his discretionary authority in rejecting the employer's evidence as insufficient to prove that the claimant had a pre-existing permanent partial disability (in the form of COPD) that materially and substantially contributed to his ultimate disability. At the very least, implicit in the employer's burden to prove its entitlement to section 8(f) relief is the requirement that medical opinion testimony, in order to constitute "substantial evidence" must have a reasoned and documented basis for the opinion expressed. *See, e.g., Schrader v. Califano*, 608 F.2d 114, 118, n.4 (4th Cir. 1979); *Hobbs v. Clinchfield Coal Co.,* 45 F.3d 819,

822 (4th Cir. 1995); *Migliorini v. Director, OWCP*, 898 F.2d 1292 (7th Cir. 1990) (medical-opinion evidence requires documentation to be capable of supporting ALJ's reliance).

In rejecting the employer's evidence, the ALJ faithfully applied this Court's recent decision in *Carmines*, 138 F.3d 134. The employer asserts that much of *Carmines* is merely dictum, including *Carmines*' observation that an ALJ need not accept uncontradicted evidence just because it is uncontradicted. PB at 25-28. To the contrary, in *Carmines*, the same employer as in the present case argued that its in-house doctor's opinion must be accepted solely because it was "uncontradicted." *Carmines*, 138 F.3d at 142. This Court flatly rejected that assertion. Indeed, *Carmines* expressly held that the fact certain evidence was "uncontradicted" was "irrelevant." *Id.* The *Carmines* court's statement in this regard was not dicta, but rather a core element of its holding. In any event, this holding in *Carmines* is nothing more than a statement of the very unexceptional proposition of black letter law that a factfinder, here the ALJ, and not an appellate body, is the adjudicator who is supposed to weigh the value of evidence. *Id.* at 140-142.

Accordingly, the ALJ in this case did exactly as this Court instructed in *Carmines* and did "not merely credulously accept the assertions of the

parties or their representatives, but *must* examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Carmines,* 134 F.3d at 140 (emphasis added). In no sense did the ALJ, as the employer asserts, substitute his own medical opinion for that of the expert medical opinions. PB at 18. Instead, the ALJ merely examined those medical opinions submitted by the employer for the logic of their conclusions, evaluated the underlying evidence available to the doctors, and found their opinions to be insufficiently unexplained and conclusory. JA 37. Such analysis where the ALJ examines the conclusions of the parties' representatives, rather than merely accepting them as truth, is mandated by *Carmines*, and *Harcum I*, and should be upheld by this Court. Under this Court's well-established precedent, and under the standard of review applicable in this case, the ALJ's finding that the employer failed to establish contribution for purposes of section 8(f) relief, must be affirmed.

ii. Substantial Evidence Supports the ALJ's Finding that the Employer Failed to Satisfy the Preexisting Permanent Partial Disability Element for Section 8(f) Relief.

If for some reason, this Court were to decline to affirm the Board's decision regarding the contribution element of section 8(f), this Court may nevertheless affirm the Board's result on an alternative ground. *Clinchfield Coal Co. v. Director, OWCP [Harris]*, 149 F.3d 307, 309 (4th Cir. 1998);

Skipper v. French, 130 F.3d 603, 610 (4th Cir. 1997). The ALJ alternatively found that the claimant's purported COPD did not constitute a pre-existing permanent partial disability for purposes of section 8(f) relief. JA 37. As stated above with respect to the contribution element, the ALJ rejected the employer's evidence as unsupported, conclusory and unpersuasive as it relates to the preexisting permanent partial disability element of section 8(f) as well. As set forth above, the ALJ's findings are thorough, well-reasoned, supported by substantial evidence in the record and should be affirmed by this Court.

CONCLUSION

Substantial evidence supports the Board's decision affirming the ALJ's denial of the employer's request for section 8(f) relief. The employer failed to satisfy its burden of proof to establish that the claimant's purported preexisting COPD materially and substantially contributed to his pulmonary impairment due to asbestosis.

Respectfully submitted,
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STATEMENT REGARDING ORAL ARGUMENT

Due to the existence of binding precedent on all the issues raised by the petitioner, the Director, OWCP believes that oral argument will not aid the Court in deciding the present case.

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2000, a copy of the foregoing document was served by mail, postage prepaid, on the following:

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