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Issue Date: 05 October 2004

Case No. 1999 LHC 01508
2000 LHC 01188

OWCP No. 5-105355
5-94575

In the Matter of

WILLIE M. RICHARDSON,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest

Appearances:
Gary R. West, Esq., for Claimant
Robert E. Walsh, Esq., for Claimant
Hugh B. McCormick, III, Esq., for Claimant
Jonathan H. Walker, Esq., for Employer
Yusuf Mohamed, Esq., for Director, OWCP

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER ON REMAND

This proceeding involves a claim for permanent partial disability from an injury alleged to have been suffered by Claimant, Leon E. Walker, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (Hereinafter "the Act").A Decision and Order was issued in the above action on January 30, 2003, finding that the Claimant's claim for compensation and medical expenses under the Act were barred by Section 33(g).

The denial of compensation and medical expenses under the Act was appealed to the Benefits Review Board. On February 17, 2004, the Benefits Review Board issued a decision and

order remanding the matter for further consideration of the cause of Claimant's disability. The formal record was returned to this office on May 18, 2004. On June 30, 2004, an order was issued scheduling briefs on remand within 30 days of the order. The parties requested an extension of time in which to file briefs. Employer submitted its remand brief on September 10, 2004. Claimant submitted his remand brief on September 13, 2004.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues were remanded by the Benefits Review Board for further findings:

1. Does Section 33(g) of the Act bar Claimant's claim for permanent total disability compensation due to occupational chronic obstructive pulmonary disease?

2. If the Claimant is entitled to disability benefits, is the Employer entitled to Special Fund relief under Section 8(f) of the Act?

STIPULATIONS

At the hearing, Claimant and Employer submitted written stipulations of fact (JX 1 as amended at the hearing, see Tr. 21-26, stipulations 1-10). Additionally, the parties stipulated to on the record to an additional fact, which is identified as stipulation 11 below. The stipulations are accepted and adopted as findings of fact as follows:

1. That an employer/employee relationship existed at all relevant times;

2. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

3. That the claimant alleges pulmonary problems resulting from his employment with Newport News Shipbuilding and Dry Dock Company as diagnosed on November 18, 1998, by Dr. Acosta;

4. That a timely notice of injury was given by the employee to the employer;

5. That a timely claim for compensation was filed by the employee;

6. That the employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

7. That the Claimant's average weekly wage at the time of the injury was $820.20 resulting in a compensation rate of $546.81;

8. That the claimant has been paid no workmen's compensation disability benefits as a result of his injury, but he has received Sick and Accident Benefits in the amount of $5,200.00 for the period covering 11/17/98 through 5/17/99, and the Employer is entitled to a credit for these monies against compensation awarded for this period;

9. That the employer has not paid for medical services as required by 33 U.S.C. Section 907 (1998), however, medical treatment has been covered by the claimant's personal insurance with the [ ] having been made by the claimant [sic];

10. That the claimant has a wage earning capacity of $6.00 per hour for 40 hours per week from 5/18/99 and continuing.

11. During questioning of Dr. James Baker, at the hearing, the parties further stipulated that asbestos exposure did not cause asbestosis and did not contribute to any lung impairment he has. (Tr. at 55). However, by order issued on August 22, 2002, Employer was permitted to withdraw this stipulation. (ALJ 39).

DISCUSSION OF LAW AND FACTS[1]

On remand the Benefits Review Board has directed that, in order to discern whether Section 33(g) bars Claimant's claim, the cause of Claimant's disability must be first determined.

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 614-15 (1982); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff'd*, 892 F.2d 173 (2d Cir. 1989). Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). However, as the Supreme Court has noted, "[t]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Indus.*, 455 U.S. at 615. Psychological injuries are included within the purview of the Act. *See Moss v. Norfolk Shipbuilding & Dry Dock Corp.*, 10 BRBS 428, 431 (1979).

[1] For a thorough recitation of the facts, please see the original decision and order issued on January 30, 2003.

In order for the claimant to avail himself of the Section 20(a) presumption, he must show that he sustained an injury, and that an accident occurred or working conditions existed that could have caused the harm. *See Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981), *decision and order after remand*, 17 BRBS 10 (1984), *aff'd*, 799 F.2d 1308 (9th Cir. 1986). Once the claimant establishes these elements of a *prima facie* case, the Section 20(a) presumption applies to link the harm with the claimant's employment. *Lacy v. Four Corners Pipe Line*, 17 BRBS 139 (1985).

Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

Several doctors have opined that Claimant suffers from COPD [chronic obstructive pulmonary disease], including his treating physician, Dr. Carlos Acosta; Dr. George Childs, a pulmonary specialist; and Dr. James Baker, another pulmonary specialist who examined and treated Claimant. Dr. Acosta routinely examined Claimant and treated him for shortness of breath. Through both his own evaluations of Claimant and through referring Claimant to various cardiologists and pulmonary specialists, Dr. Acosta reached the conclusion that Claimant is suffering from "severe chronic pulmonary disease." [CX 3-1]. Dr. Childs is one of the pulmonary specialists to whom Dr. Acosta referred Claimant. After conducting several examinations of Claimant, Dr. Childs concluded that "My impression continues to be that th[i]s patient has severe obstructive lung disease with a mild restriction." [CX 1-9]. Dr. Baker is another pulmonary specialist who examined Claimant and thereafter concluded that Claimant was suffering, at least in part, from a lung obstruction. [TR. at 50, 51].

Claimant's testimony establishes employment conditions existed which could have caused his condition, as he was consistently exposed to dust, smoke, fumes and other airborne particles during his work as a welder for Employer. Claimant testified that he had to work in cramped quarters with irritants such as smoke, fumes dust from grinding, paint dust from sanding and paint fumes. [TR at 113]. Claimant additionally stated that his position required him to weld with a variety of different metals, such as carbon, steel, stainless, copper-nickel combinations and alloy, each causing different fumes. [TR. at 106]. Claimant testified that neither he nor his wife is a smoker. [TR. at 118]. He additionally noted that while his father smoked throughout Claimant's childhood, it was never insider the house. [TR . at 118]. None of Claimant's non-work activities and hobbies expose him to smoke, dust or fumes. [TR. at 118].

Several of Claimants doctors agree that his work place exposure to these irritants caused and/or aggravated his obstructive lung condition. Dr. Acosta opined that Claimant's disability is work related, as a result of "exposure to welding fumes, dust at work." [CX 3-8]. The doctor reaffirmed this opinion when he wrote on January 5, 1999, that Claimant's disability was "aggravated by fumes." [CX 3-3]. Additionally, Dr. Baker specifically testified that the obstruction in claimant's lungs were significantly caused and/or aggravated by exposure to substances at the Shipyard while working as a welder from 1978 until 1998 and that has resulted in an irreversible abnormality. [TR. at 66, 67].

To invoke the presumption, all that a claimant must show is that he suffered harm and that employment conditions existed or a work accident occurred that could have caused, aggravated, or accelerated his condition. Claimant's credible testimony that he was exposed to dust and fumes during his employment was supported by the opinions of doctors who have worked with him over time.

Upon consideration of the evidence, I find that Claimant has established a prima facie case for compensation and is entitled to the presumption of Section 20(a) that his employment conditions existed or a work accident occurred that could have caused, aggravated, or accelerated his COPD. The burden of proof then shifts to Employer to rebut the presumption with substantial countervailing evidence.

Rebuttal of Section 20(a) Presumption

Since the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Section 20(a) places the burden on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment. *Swinton v. J. Frank Kelly, Inc.,* 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). When aggravation of or contribution to a pre-existing condition is alleged, the presumption also applies, and in order to rebut it, employer must establish that the claimant's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp.,* 18 BRBS 85 (1986); *LaPlante v. General Dynamics Corp./Elec. Boat Div.,* 15 BRBS 83 (1982); *Seaman v. Jacksonville Shipyards*, 14 BRBS 148.9 (1981). *See Hensley v. Washington Metro. Area Transit Auth*., 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), *rev'g* 11 BRBS 468 (1979) (employer must establish that aggravation did not arise even in part from employment).

Employer argues that Claimant's COPD is caused by his history of asthma, and is thus not work-related. In support of this argument, Employer highlights that Claimant has admitted to suffering from asthma as a child. (Tr. At 110; EX 10-7). Employer also cites the opinions of Dr. Shaw and Dr. Ross, who agree that Claimant has an asthmatic defect existing since childhood that accounts for his obstructive impairment. The physicians also agree that Claimant's condition is not materially aggravated by any occupational exposures.

Dr. Shaw examined Claimant in February of 1999. Dr. Shaw's initial impression was that Claimant's condition was "at least partially due to underlying asthmatic defect." [EX 13-2]. Dr. Shaw further elaborated on his opinion in a letter dated March 18, 1999:

> [Claimant] has a history of bronchial asthma and on my examination, showed positive bronchodilator response indicating reactive airways disease or bronchial asthma. It was felt that welding fumes probably exacerbated this underlying condition.
>
> The exacerbation by the welding fumes more than likely to a reasonable degree of medical certainty was temporary in nature and would resolve within a relatively short period of time after being out of the exposure. Moreover, welding fumes did not cause the asthma and should not cause any permanent worsening of his asthmatic symptoms once [Claimant] is removed from exposure.

[EX 13-3].

Dr. Ross concluded after a review of Claimant's medical records that there was no evidence in the record that Claimant had a work-induced disease. The doctor concluded that Claimant

> [M]ay have small airway disease without wheezing as an adult manifestation of childhood asthma. There is still the possibility of chest wall impairment or muscle weakness which could account for his problem. It is my opinion that the only possible effect of dust and fumes would be to accentuate is symptoms temporarily, but I agree that the basic minimal underlying impairment was neither caused by nor made worse permanently, or in any significant way, by his work environment. If [Claimant] cannot work because of this apparently mild condition, his incapacity is not because of an occupational disease.

[EX 16-10].

Employer also claims support from the opinion of Dr. Childs, who once stated that Claimant's condition is due to improper use of medication. [EX 12-3]. Employer additionally cites Dr. Acosta's certification to an insurance company that Claimant's disability does not arise from Claimant's employment. [EX 11-4].

Thus, Employer argues that the Section 20(a) presumption has been rebutted by the aforementioned medical evidence that concluded Claimant's employment did not cause, contribute to, or aggravate his condition beyond a mere temporary basis.

It is well established that "[t]he unequivocal testimony of a physician that no relationship exists between a claimant's disabling condition and the claimant's employment is sufficient rebuttable evidence" to overcome the Section 20(a) presumption. *Flood v. NAF Billeting Branch*, 134 F.3d 363 (4th Cir. 1998) (table decision) (citing *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129-30 (1984)). Dr. Ross concluded after a review of Claimant's medical records that there was no evidence in the record that Claimant had a work-induced disease. Additionally, Dr. Shaw opined that any exacerbation of Claimant's condition from his work-related exposure to fumes was only temporary. Because of this unequivocal medical evidence, I find that

Employer has presented substantial evidence, which if credited, could establish that the Claimant does not have a work induced lung condition. Therefore, I find that the Employer has rebutted the Section 20(a) presumption.

Weighing the Evidence

Because the presumption no longer controls, the evidence must now be examined and weighed as to the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Id.* Therefore, it must be determined whether Claimant has shown by a preponderance of the evidence that the alleged injury is causally related to his employment with Employer. 5 U.S.C. §556(d) (2002); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1981)); *Devine v. Atl. Container Lines*, *G.I.E.*, 25 BRBS 16, 20-21 (1990).

As to the issue of causation, Claimant argues that his employment conditions caused his disability as he had to work in cramped quarters with irritants such as smoke, fumes dust from grinding, paint dust from sanding and paint fumes throughout the course of his employment with Employer. [TR at 113]. Claimant additionally stated that his position required him to weld with a variety of different metals, such as carbon, steel, stainless, copper-nickel combinations and alloy, each causing different fumes which he inhaled. [TR. at 106].

Claimant has also offered his medical records from his course of treatment in support of establishing a causal link between his working conditions and his lung disability. Dr. Acosta opined that Claimant's disability was "aggravated by fumes," and later reaffirmed this opinion when he later noted that Claimant's disability is work related, as a result of "exposure to welding fumes, dust at work." [CX 3-3; 3-8]. Finally, Dr. Baker, another pulmonary specialist, explicitly testified that the obstruction in claimant's lungs were significantly caused and/or aggravated by exposure to substances at the Shipyard while working as a welder from 1978 until 1998 and that has resulted in an irreversible abnormality. [TR. at 66, 67].

As evidence that Claimant's obstructive lung disease is not causally linked to his working conditions, Employer has offered the opinions of Dr. Shaw and Dr. Ross, who agree that Claimant has an asthmatic defect existing since childhood that accounts for his obstructive impairment and that Claimant's condition is not materially aggravated by any occupational exposures. Employer also claims support from the opinion of Dr. Childs, who once stated that Claimant's condition is due to improper use of medication. [EX 12-3]. Employer additionally highlights Dr. Acosta's certification to an insurance company that Claimant's disability does not arise from Claimant's employment. [EX 11-4].

Upon consideration of all of the evidence, I find that Claimant has established by a preponderance of the evidence that his obstructive lung disability is causally linked to his working conditions. In reaching this conclusion, I find that opinions of Drs. Acosta and Baker are entitled to greater weight than those of Drs. Shaw and Ross. Dr. Acosta is Claimant's treating physician and has continuously monitored Claimant's overall treatment conducted by Dr. Acosta himself, as well as treatment completed through referrals to pulmonary and cardiology

specialist. Employer argues that Dr. Acosta informed an insurance company that Claimant's disability did not arise out of Claimant's employment. However, on this same form, Dr. Acosta noted that Claimant's condition is "aggravated by fumes." [EX 11-4]. Additionally, Dr. Acosta later unequivocally stated on July 12, 1999 that Claimant's disability is work related, an opinion that he further clarified by writing "exposure to welding fumes (pt never smoked)." [CX 3-8]. Thus, it is Dr. Acosta's most recent, and most explicitly stated, opinion that Claimant's working conditions caused his obstructive lung disability. Dr. Acosta reached this conclusion after treating the Claimant over a extended period of time.

Dr. Baker is a board certified pulmonary specialist who treated Claimant from April 15, 1999 until November 10, 1999. [TR. at 43]. Dr. Baker testified that during his treatment of Claimant, Claimant had told him that he suffered either bronchitis or asthma as a child, a fact of which he was reminded during his testimony. [TR at 44]. With this in mind, Dr. Baker reaffirmed his conclusion that the obstruction in Claimant's lungs is caused by exposure to substances while working for Employer. Dr. Baker reached this conclusion because Claimant's lung abnormalities are ones which are typically caused by inhaled irritants. [TR. at 67]. Dr. Baker noted that Claimant has neither been a smoker nor been exposed to irritants outside of the work environment, and thus concluded that Claimant's disability is caused by the irritants Claimant was exposed to at work. [TR at 67].

Employer cites to Dr. Childs in arguing that Claimant has not established a causal link by the preponderance of the evidence. Dr. Childs originally noted that Claimant suffered from obstructive lung disease in 1994, though he was silent on the cause. Dr. Childs prescribed Claimant steroids and bronchodilators. [CX 1-6]. Claimant was seen again by Dr. Childs on December 18, 1998, after which Dr. Childs opined that Claimant's shortness of breath may be related to his improper use of Servent MDI. Claimant argues that this opinion supports the lack of causal connection between Claimant's disability and his employment. However, Dr. Childs later noted that Claimant had "been off of his pulmonary medications [including Servent MDI] since January 1998." [CX 1-2]. Additionally, Dr. Child diagnosed Claimant with obstructive lung disease *before* he prescribed any pulmonary medications. Thus, I accord Dr. Childs' December 18, 1998 statement little weight on the issue of causation.

Employer primarily cites to the opinions of Dr. Ross and Dr. Shaw in arguing Claimant has not established causation by the preponderance of the evidence. Dr. Ross possesses impressive credentials as he is currently Associate Chancellor Emeritus, and Professor of Medicine Emeritus at Vanderbilt University. However, Dr. Ross's opinion that Claimant's disability stems from childhood asthma is entitled to less weight because he never actually examined Claimant, and can't remember the last time he even examined *any* patient with asthma. [TR. at 144]. Additionally, Dr. Ross examined Claimant's medical records at the request of Employer. Interestingly, the following cover letter was attached when Employer's counsel sent Claimant's medical records to Dr. Ross:

> Separate and apart from your principle evaluation, I would greatly appreciate a secondary report, preferably before April 20th, which sets forth the following opinion: One, whether you agree [Claimant] had a long-standing history of chronic asthmatic condition which in itself is

> permanent in nature; two, to a degree that his overall impairment is due in principle part to, but no[t] exclusively to his asthmatic condition; and three, assuming [Claimant's] underlining Asbestosis or lung disease is attributable in some part to occupational exposure, whether you would agree that any such impairment would be substantially less, example, more than 15 percent absent to his preexisting asthma, otherwise would you agree that [Claimant] has either no impairment or minimal impairment if he did not have a preexisting or long-standing asthmatic condition.

[TR. at 157]. This letter makes difficult comprehension of any unbiased processes Dr. Ross could have employed in reaching his conclusion on causation. Though it does not specifically speak to the causation issue, it is also essential to note that Dr. Ross's conclusion specifically stated that Claimant's lungs were "borderline normal" according to the AMA Guidelines. [TR. at 155]. It is further noted that Dr. Ross utilized the AMA Guide's reference table for African Americans, despite the fact that Claimant's father was full-blooded American Indian and his mother was one-half American Indian and one-half African American. [TR. at 162, 168]. Furthermore, Dr. Ross conceded that the AMA Guidelines to which he cited in his opinion require a thorough physical examination before a conclusion may be reached. As mentioned above, Dr. Ross never physically examined Claimant, and thus, for the aforementioned reasons, his opinion is entitled to less weight on the issue of causation.

Employer additionally relies heavily upon the conclusions of Dr. Shaw. Dr. Shaw examined Claimant at the request of Employer. Dr. Shaw found asthma to be the only known cause of Claimant's symptoms, but agreed that Claimant's disability was exacerbated by welding fumes. [EX 13-3]. Dr. Shaw concluded to a reasonable degree of medical certainty that this exacerbation was "temporary in nature and would resolve within a relatively short period of time after being out of the exposure." [EX 13-3]. However, almost one year after Claimant ceased working, Dr. Baker noted that Claimant continued to suffer shortness of breath to which Dr. Baker attributed consistent exposure to fumes. Furthermore, Claimant testified that he ceased suffering asthmatic symptoms when he was twelve years old. [TR at 101]. Moreover, Claimant began his employment with the shipyard in 1968, and continued for thirty years following, all the while exposed to work-place fumes and irritants. These facts make Dr. Baker's explanation of the causation of Claimant's disability much more plausible than that offered by Dr. Shaw.

Upon consideration of all of the evidence, I find that Claimant has established by a preponderance of the evidence that his obstructive lung disability is causally linked to his exposure to fumes and irritants while working for Employer. Thus, I find that Claimant's disability is compensable.

Application of *Chavez* to Claimant's Claim

Pursuant to the directions of the BRB, as I have determined that Claimant's disability is caused, at least in part, by work-related COPD, I will now determine the applicability of Section 33(g) to the aforementioned findings in light of *Chavez.* Section 33(g)(1) requires that a "person entitled to compensation" obtain employer's prior written consent before he enters into third-

party settlements for an amount less than the compensation to which he would be entitled under the Act. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 369, 26 BRBS 49(CRT); *Brown Root Inc. v. Sain*, 162 F.2d 813, 32 BRBS 205 (CRT) (4th Cir. 1998). Absent the employer's approval, employer is not liable for disability or medical benefits. *Cowart*, 505 U.S. 469, 26 BRBS 49 (CRT); *Espoito v. Sea-Land Services, Inc.*, 36 BRBS 10 (2002).

In order for Section 33(g) to apply, the disability for which the claimant seeks compensation under the Act must be the same disability for which he recovered from third parties. *See Untied Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979) (Section 33 (g) limited to situation where third party is potentially liable to both the employee and the covered employer); *Goody v. Thames Valley Steel Co.*, 31 BRBS 29 (1997); *aff'd mem. sub nom. Thames Valley Steel Co. v. Director, OWCP*, 131 F.3d 132 (2nd Cir. 1997) (table); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991).

Chavez v. Todd Shipyards Corp

The Benefits Review Board addressed the issue of whether two conditions comprise the "same disability" in the context of Section 33(f) in *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J. dissenting), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWPC*, 139 F.3d 1309, 32 BRBS 67 (CRT) (9th Cir. 1998). The claimant in *Chavez* suffered from both asbestosis and hypertension. Upon retirement, the claimant filed for permanent total disability benefits. Prior to the hearing, the claimant filed several third party suits against asbestos manufacturers, and the employer argued that this action barred the claimant's entire claim pursuant to Section 33(g). The ALJ rejected Employer's Section 33(g) argument because no settlements had been executed, but nonetheless determined that the employer was entitled to a full lien pursuant to Section 33(f) with regard to any asbestos-related third party settlements that may occur in the future.

On appeal to the BRB, the claimant argued that employer's Section 33(f) offset should be applied only to the party of claimant's disability caused by asbestosis. The employer countered that it should receive credit against the entire liability. The BRB adopted the position that the determination of whether the employer received credit depended on the cause of the claimant's disabilities. If asbestosis was the claimant's only work-related disability, then the employer would be entitled to full offset against claimant's third party recoveries. However, if claimant's sole work related disability was hypertension, then the employer would not be entitled to any Section 33(f) credit because the third party suits were not for the same disability. The BRB additionally held that:

> [I]f both conditions were work related, then claimant could have sought benefits for hypertension alone and received total disability benefits under the aggravation rule. Under this scenario, no offset is available because the tortfeasors' actions did not cause the compensable injury.

BRB Opinion at 7, *citing Chavez*, 27 BRBS at 85-87; *O'Berry*, 22 BRBS at 433.

The Ninth Circuit affirmed the Benefits Review Board's interpretation of Section 33(f), stating:

> The rationale behind this interpretation is that an employee who is totally disabled based on either injury alone could recover from the employer under either injury. Therefore, to allow an employer set-off for third party proceeds received under one injury would result in a windfall for the employer because the employee could have sought recovery under the other injury for which no third party proceeds are available. Such an interpretation in effect would reward the employer for causing two work related disabilities instead of one.

Chavez, 139 F.3d at 1312, 32 BRBS at 70 (CRT).

Application of Chavez to the Instant Case

In the instant case, the Benefits Review Board noted that, "As Section 33(g) is premised on Section 33(a) as is Section 33(f), it follows that the holding in *Chavez* should be applied before Section 33(g) can be found to bar [C]laimant's COPD claim in this case." Following the holding in *Chavez*, the BRB instructed that Section 33(g) can be invoked to bar Claimant's COPD claim **only if Claimant is disabled solely by asbestosis** (emphasis added). However, the Board instructs that if a review of the medical evidence reveals that Claimant is disabled by both asbestosis and COPD, Section 33(g) cannot bar Claimant's claim. The BRB reasoned that in the latter scenario, the aggravation rule applies, making COPD the disabling, compensable condition and therefore not the same disability for which claimant settled his third-party claimant. The BRB additionally noted in a footnote that:

> [U]nder such circumstances, [C]laimant's claim for medical monitoring for any asbestos-related condition cannot be barred by Section 33(g) because, ultimately, [C]laimant is not entitled to disability compensation for asbestosis. A person entitled only to medical benefits is not a "person entitled to compensation for purposes of Section 33(g).

BRB Opinion at 8, *citing Brown &Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (BRT) (4th Cir. 1998); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 6 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *aff'd* 28 BRBS 254 (1994).

The original decision and order entered in this case found, "Upon consideration of all of the evidence, I find that the preponderance of the evidence establishes Claimant suffers from asbestosis, asbestos related pleural plaques, and has both restrictive and obstructive lung impairment [. . .] caused by [Claimant's] simultaneous exposure to asbestos fibers, smoke, dusts and fumes from welding." ALJ Dec. at 47. That finding is not changed in this reconsideration of the record.

However, as stated above, I have found that Claimant's disability is caused, at least in part, by COPD. As instructed by the Board, it follows that even if Claimant is also suffering

from asbestosis, the aggravation rule prevents the application of §33(g). The Board further instructs that in that case, COPD is considered to be Claimant's disabling, compensable condition, and therefore is not the same disability for which Claimant settled his third party claims. Accordingly, I find that Claimant's COPD claim is not barred under §33(g) and is compensable under the Act.

Nature and Extent of Disability

The parties have stipulated that the Claimant's average weekly wage at the time of the injury was $820.20, and that he has a residual wage earning capacity of $240 per week ($6.00 per hour for 40 hours per week) from 5/18/99 and continuing. Therefore, I find that from May 18, 1999 to the present and continuing, the Claimant is partially disabled and has a loss of wage earning capacity of $580 per week.

It is noted that the parties have not stipulated or address the matter of whether the Claimant's disability is permanent or temporary. An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. *Lozada v. General Dynamics Corp*., 903 F.2d (2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co*., 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition or if his condition has stabilized. *Leech v. Service Engineering Co*., 15 BRBS 18 (1982); *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

The Claimant testified that he left his work for the Employer in November of 1998, due to his lung problems, and that he has not worked since (Tr. 125). While the Employer has argued that he Claimant's lung problems are reversible because they are due to asthma, I have found to the contrary, that the Claimant does have disability due to exposure to dust, smoke, fumes and other irritants (including asbestos) inhaled during his employment. Therefore, the Employer's argument that the Claimant's lung problems are reversible has been rejected. In light of the Claimant's 6+ year absence from the workplace, and in light of the medical evidence, I find that the Claimant's condition is permanent.

8(f) Relief

Because I have found that Section 33(g) does not bar Claimant's claim for compensation and medical expenses, it is necessary to address the issue of Section 8(f) relief. Employer argues that if it is ordered to compensate Claimant, it is entitled to Section 8(f) relief due to Claimant's pre-existing asthma. Section 8(f) was enacted to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. *See C& P Tel. Co. v. Director, OWCP*, 564 F.2d 503, 512 (D.C. Cir. 1977). Without such protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have. *See Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 839 (9th Cir. 1982). *See also* H. Rep. No 92-1441,

92nd Cong., 2d Sass. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; A. Larson, *Workers' Compensation Law* § 59.00 (1992). In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed. *See Director v. Todd Shipyard Corp.*, 625 F.2d 317 (9th Cir. 1980).

Pre-existing disability

The first element of 8(f) relief is met in this case. In analyzing an 8(f) claim, the first question to address is whether Claimant had a preexisting permanent partial disability prior to the subject injury. In this regard, it is not necessary for the preexisting disability to have caused an economic loss. *See Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198 (1949); *C & P Telephone v. Director OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). Rather, this first requirement is satisfied if it is shown that:

> [T]he employee had 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.

Lockheed Shipbuilding, 25 BRBS at 87 (CRT) (*citing C & P Telephone Co.*, 564. F.2d at 513).

Employer argues that Claimant has suffered from asthma since childhood. Claimant was diagnosed as chronic asthmatic as early as 1974. [EX 10-1]. Dr. Ross noted that Claimant had a "longstanding history" of asthma, thus making clear that Claimant suffered from a pre-existing injury.

Manifestation requirement

The second element of 8(f) relief is met in this case. In general, to establish 8(f) relief, the employer must show that the employee's disability was manifest to the employer prior to the subsequent work-related injury. *Harcum* I, 8 F.3d at 175. A disability is considered manifest if an employer has actual knowledge of the pre-existing disability or if there is a medical record in existence making the disability objectively determinable. *Delinski v. Brandt Air-Flex Corp*., 9 BRBS 206 (1978), *aff'd sub nom Director, OWCP v. Brandt Air Flex Crop.*, 645 F.2d 1053 (D.C. Cir. 1981). However, the Fourth Circuit has declined to extend the manifestation requirement to the area of post-retirement occupational diseases. *Newport News Shipbuilding & Dry Dock Co. v. Harris*, 934 F.2d 548, 551-53, 24 BRBS 190 (CRT) (4th Cir. 1991).

Claimant's pre-existing asthma was manifest to Employer based upon the medical records of Duke University, as well as Employer's own medical history signed by Claimant. As a result, Employer has met the second element required to qualify for Special Fund relief.

Contribution Requirements

Having established pre-existing manifest permanent partial disability, Employer must establish that the ultimate permanent partial disability is not due solely to the work-related

injury. The Fourth Circuit explained the contribution element in *Newport News Shipbuilding & Dry Dock v. Director, OWCP (Harcum I)*, 8 F.3d 175 (4th Cir 1993):

> To satisfy this additional prong of the contribution element, 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. A showing of this kind requires quantification of the level of impairment that would ensue from the work-related injury alone. In other words, an employer must present evidence of the type and extent of disability that the claimant would suffer if not previously disabled when injured by the same work-related injury. Once the employer establishes the level of disability in the absence of a pre-existing permanent partial disability, an adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater.

Id. at 185-6.

Employer must quantify the type and extent of disability the employee would have suffered in the absence of the previous injury, so that the "adjudicative body will have a basis on which to determine whether the ultimate permanent partial disability is materially and substantially greater." *Id.* In assessing whether the contribution element has been met, an ALJ may not "merely credulously accept the assertion of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon wither their conclusions are based." *Carmines*, 138 F.3d at 140. Recent cases in the Fourth Circuit have stressed that doctors' opinions which attempt to quantify the hypothetical injury will not be sufficient if "they are conclusory and lack[ing] in evidentiary support." *Newport News Shipbuilding & Dry Dock Company v. Ward*, 326 F.3d 434, 442 (4th Cir. 2003); *see also Newport News Shipbuilding & Dry Dock Company v. Cherry*, 326 F.3d 449, 453 (4th Cir. 2003) (rejecting similar evidence as "pure conjecture.")

To establish entitlement to 8(f) relief, it is not enough for employer to show that preexisting condition led to serious disability, if work-related injury would itself have led to same or greater disability. *Carmines*, 138 F.3d at 139. 8(f) relief is available only if ultimate disability is substantially greater than that which would have arisen absent preexisting disability. *Id.* Additionally, it is not sufficient to simply calculate the current disability and subtract the percentage of disability that resulted from the pre-existing disability. *Id.* at 143.

It is here that Employer's argument fails. Employer argues that uncontradicted medical opinions "establish that Claimant's pre-existing asthma accounts in primary, if not exclusive part, for his present condition, resulting in a clearly greater level of overall impairment than would exist as a result of exposure to workplace air alone." [Employer's Remand Brief at 35]. Quite simply, this argument is insufficient because it is "conclusory and lack[ing] in evidentiary support." Employer's mere generalized statements fails to properly quantify the level of impairment that would ensue from Claimant's work-related injury alone. Thus, Employer has

not succeeded in establishing that Claimant's current impairment is materially and substantially greater than the disability resulting from the work-related condition alone.

Accordingly, based on the evidence in the record, Employer has failed to properly quantify the extent of Claimant's work-related impairment resulting from his obstructive lung disease diagnosis alone, absent his pre-existing asthmatic condition. The court is therefore unable to evaluate whether Claimant's ultimate disability materially and substantially exceeded the disability that would have resulted from Claimant's most recent injury. The contribution element has not been established, and Employer is therefore not entitled to relief.

Asbestos Medical Monitoring

Claimant also seeks medical monitoring for asbestos-related changes pursuant to Section 7 of the Act. The BRB stated in regards to this claim that §33(g) can only be invoked to bar Claimant's claim if asbestosis is Claimant's only work related disability. As it has been determined that the Claimant is entitled to compensation for COPD, the Board has held that §33(g) cannot be invoked, and that:

> [U]nder such circumstances, [C]laimant's claim for medical monitoring for any asbestos-related condition cannot be barred by Section 33(g) because, ultimately, [C]laimant is not entitled to disability compensation for asbestosis. A person entitled only to medical benefits is not a "person entitled to compensation for purposes of Section 33(g).

BRB Opinion at 8, *citing Brown &Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (BRT) (4th Cir. 1998); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 6 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *aff'd* 28 BRBS 254 (1994).

Thus, the issue is whether Claimant is entitled to medical monitoring benefits for asbestos-related changes. Medical evidence supports the finding that Claimant has suffered a harm as a result of his work-related exposure to asbestos. Several doctors who have examined Claimant have noted pleural thickening, which indicates asbestos exposure. Specifically, Dr. Stephen Fink authored a Radiology Report of Claimant dated January 31, 1994 that noted minimal bi-apical pleural thickening. [EX 9-4]. Dr. Childs examined Claimant on June 17, 1994 and also concluded that, among other factors, Claimant had "minimal biapical pleural thickening." [CX 3C-A]. Dr. Baker examined an x-ray of Claimant's chest taken on April 5, 1999, and concluded that while he did not think Claimant had asbestosis, "[Claimant] clearly had asbestos exposure." [CX 2D-A]. Dr. Baker explained this opinion by noting that Claimant had an abnormality in his pulmonary function which is compatible with asbestosis, but that his chest x-ray did not indicate pulmonary asbestosis. [CX 5-8]. Dr. Baker also examined a high resolution CT scan of Claimant's chest taken on September 20, 1999 and noted that it revealed focal areas of pleural thickening. [CX 2J-a]. Dr. Baker testified that Claimant, due to his asbestos exposure, should be followed on a periodic basis by virtue of his previous asbestos exposure. [Tr. at 72].

Upon consideration, I find that the preponderance of the evidence does establish that the Claimant, at least, suffers from asbestos related pleural thickening. Therefore, I find that the evidence establishes that Claimant has suffered a harm as a result of asbestos exposure, and that the Claimant is entitled to medical monitoring for asbestos-related disease.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Newport News Shipbuilding and Dry Dock Company, is hereby ordered to pay to Claimant, Willie M. Richardson, permanent partial disability benefits from May 18, 1999 and continuing at the compensation rate of $386.80;

2. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries, including but not limited to medical monitoring for any asbestos-related condition;

3. Employer shall receive credit for any compensation already paid;

4. Interest at the rate specified in 28 U.S.C.§ 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984); and

5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge