BRB No. 02-0838

JOHN DISANO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: Dec. 16, 2003
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

David N. Neusner (Embry & Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison, Mahoney & Miller, L.L.P.), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2001-LHC-3057; 2002-LHC-1596) of Administrative Law Judge David W. Di Nardi 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.[1] 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer from 1974 until the date of his retirement on October 1, 1999, first as a battery repairman and later as an electrician. During the

[1]On August 1, 2003, the Board dismissed this appeal and remanded this case for reconstruction of the record. On October 21, 2003, the Board reinstated this appeal after receiving the reconstructed record.

course of his employment, he worked with pneumatic tools and he was exposed to asbestos, paint, dust, smoke, fumes, and other lung irritants. In 1993 or 1994, claimant began experiencing shortness of breath and he had difficulty climbing ladders. By the summer of 1999, claimant was having more difficulty, including pain and numbness in his hands, decided he was "beat," and he retired. Decision and Order at 4; Emp. Ex. 19; TR at 28-34, 38. Following his retirement, claimant received treatment for bilateral carpal tunnel syndrome, undergoing surgery on each hand/wrist in 2000, and he received treatment for his breathing problems. Employer paid some medical benefits but did not pay any disability benefits. Claimant filed claims for both injuries.

Despite a joint stipulation from the parties agreeing that claimant's hand injuries are work-related, Jt. Ex. 1, the administrative law judge considered the issue and found that claimant established a *prima facie* case for relating his carpal tunnel syndrome to his employment, 33 U.S.C. §920(a), and that employer submitted no evidence in rebuttal. Thus, he concluded claimant's hand injuries are work-related. Decision and Order at 25-26. With regard to claimant's lung condition, the administrative law judge found that claimant established a *prima facie* case relating that condition to his employment and that employer did not present sufficient evidence to rebut the relationship. He also determined that even if employer's evidence served to rebut the Section 20(a) presumption as to the lung injury, on the record as a whole, he gave greater weight to claimant's treating physician and found the condition to be related to claimant's exposure to lung irritants at work. Decision and Order at 26-27. The administrative law judge then found that claimant was disabled from his work due to his injuries and that claimant established a *prima facie* case of total disability. Moreover, he found that employer's labor market survey is "grossly deficient" and does not satisfy its burden of showing suitable alternate employment. *Id.* at 33-40. The administrative law judge acknowledged that this case arises within the jurisdiction of the United States Court of Appeals for the First Circuit and that *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir. 1979), could apply. Nevertheless, he concluded that claimant lacked the education, work experience, and transferable skills necessary for application of *Air America*. Decision and Order at 41-42. Accordingly, he determined that claimant is totally disabled, and he awarded claimant temporary and permanent total disability benefits, medical benefits, interest, and an attorney's fee. He also awarded employer relief from continuing liability for benefits pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Decision and Order at 42-50. Employer appeals the award of benefits, and claimant responds, urging affirmance.

Employer first contends the administrative law judge erred in finding claimant's lung condition to be work-related. Dr. Matarese, claimant's treating pulmonary specialist, diagnosed claimant with asbestosis, obstructive airways disease, chronic sinus congestion, and asthma, and he stated that claimant's work exposure contributed to his pulmonary condition. Cl. Exs. 2, 9 at 13-15, 31. Dr. DeGraff, also a pulmonary

specialist, confirmed the presence of pleural plaquing consistent with exposure to asbestos, and he concluded that claimant's pulmonary disability is the result of asbestos exposure at work. Cl. Ex. 10. Employer presented contrary evidence in the opinion of its pulmonary expert, Dr. Kanarek. Dr. Kanarek examined claimant and the previous studies and concluded there is no evidence of interstitial or restrictive disease related to asbestos exposure and that claimant's lung condition is the result of his allergies, asthma, cigarette smoking and obesity. Emp. Exs. 14, 23. After having properly invoked the Section 20(a) presumption, the administrative law judge concluded that Dr. Kanarek's opinion is equivocal because, although he voiced the above opinion, he also stated that exposure to lung irritants at work could have temporarily exacerbated claimant's asthmatic condition. Emp. Ex. 23 at 25, 43. We need not address whether the administrative law judge's conclusion regarding rebuttal is correct, because he went on to find that if Dr. Kanarek's opinion is sufficient to rebut the Section 20(a) presumption, causation is established on the record as a whole. In this regard, he credited the opinion of Dr. Matarese, as he is claimant's treating physician and his opinion is buttressed by the opinion of Dr. DeGraff. Decision and Order at 26-27. As authority for crediting Dr. Matarese's opinion over that of Dr. Kanarek, the administrative law judge cited *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042, 31 BRBS 84, 90-91(CRT) (2d Cir. 1997), in which, as the Supreme Court recently observed, the United States Court of Appeals for the Second Circuit approved according preference to the opinions of treating physicians over those of examining physicians in Longshore cases. *The Black & Decker Disability Plan v. Nord*, 123 S.Ct. 1965, 1970 n.3 (2003). The administrative law judge in the instant case determined it was "particularly appropriate" to prefer the treating physician's opinion when the issue is the work-relatedness of claimant's lung condition and when that opinion was buttressed by the opinion of an expert, examining physician. Decision and Order at 27. The administrative law judge had earlier observed that Dr. Matarese was also a pulmonary specialist and had been treating claimant's lung condition for more than seven years. Decision and Order at 5. In light of these facts it was entirely reasonable to accord greater weight to the treating physician's opinion. As it is within the administrative law judge's discretion to weigh the evidence, including medical opinions, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v.* Hughes, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v.* Heyde, 306 F.Supp. 1321 (D.R.I. 1969), we affirm his conclusion that claimant's lung condition is work-related, as his weighing of the evidence is rational and his conclusion is supported by substantial evidence.[2]

[2]Employer asserts that the administrative law judge did not address the shortcomings of Dr. Matarese's opinion. While the evidence may not support a finding of asbestosis, Cl. Ex. 2 at 6-7; Cl. Ex. 9 at 9, 12; Emp. Ex. 23 at 20, and Dr. Matarese admitted this in his deposition, Cl. Ex. 9 at 29, the evidence is uncontradicted that claimant was exposed to a number of lung irritants and that his condition was exacerbated

Next, employer contends the administrative law judge misapplied *Air America* and erred in finding claimant to be totally disabled. Specifically, employer argues that the evidence and testimony of record more than satisfy its burden under *Air America*, as it is evident there are jobs claimant can perform. Employer relies on the facts that no doctor restricted claimant from all work and that claimant testified he felt he was capable of performing some light or sedentary work, as well as on the labor market survey which identified a number of jobs it contends are appropriate for claimant. The administrative law judge rejected employer's arguments, and we hold that his conclusions are rational.

Claimant was born in 1937, he has an eighth grade education, although he passed the GED, and he was a jet engine mechanic in the Air Force. He also drove a delivery truck for a short period before he began working for employer and became a licensed electrician. Tr. at 21-24. In addition to his work-related carpal tunnel syndrome and lung condition, claimant has pre-existing disabilities to his knees and back, a hearing loss, and he is obese. Cl. Exs. 3-5; Emp. Exs. 1-7. Claimant's vocational counselor, Mr. Murgo, interviewed and tested claimant and determined, considering claimant's age, skills, health, ability to communicate and education, that no occupation is suitable for claimant. Cl. Ex. 7. In his deposition, he addressed the jobs identified by employer's expert and found them to be inappropriate for claimant for various reasons given his overall condition. Cl. Ex. 14. Mr. Calandra, employer's expert, concluded that claimant is capable of performing light work, and he identified jobs such as a security guard, cashier, front desk clerk, electrician, and quality control inspector, as suitable jobs for claimant. Emp. Ex. 18. However, the administrative law judge found Mr. Calandra's report and conclusions to be faulty, and he gave Mr. Calandra's opinion little or no weight because Mr. Calandra did not interview or test claimant, he based his conclusions on assumptions made from incomplete information, and he was unable to persuasively defend his position when questioned on cross-examination. Decision and Order at 39-40; Emp. Ex. 21 at 6, 25. Consequently, he determined that Mr. Murgo's opinion was more credible, and he found that employer did not satisfy its burden of establishing the availability of suitable alternate employment. Decision and Order at 39-42. This finding is rational in light of the evidence of record. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988); *Brandt v. Stidham Tire Co.*, 16 BRBS 277, 279 (1984), *rev'd on other grounds*, 785 F.2d 329, 18 BRBS 73(CRT) (D.C. Cir. 1986). This finding is also

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by this exposure. Cl. Ex. 9 at 13, 15, 32. Moreover, Dr. Matarese recommended that claimant limit his exposure to lung irritants in light of the condition of his lungs. Cl. Ex. 9 at 18. As even Dr. Kanarek agreed that exposure to airborne irritants can exacerbate claimant's asthmatic condition, if only temporarily, Emp. Ex. 23 at 25, 43, the administrative law judge did not err in finding that claimant has a work-related injury. *See generally Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 22 BRBS 376 (1989); *see also Crum v. General Adjustment Bureau*, 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990).

reasonable in light of the precedent set forth in *Air America*.

In *Air America*, the First Circuit held that where a "claimant's medical impairment affects only a specialized skill that is necessary in his former employment, his resulting inability to perform that work does not necessarily indicate an inability to perform other work, not requiring that skill, for which his education and work experience qualify him." *Air America*, 597 F.2d at 779, 10 BRBS at 513; *see also Argonaut Ins. Co. v. Director, OWCP*, 646 F.2d 710, 13 BRBS 297 (1st Cir. 1981). Thus, when it is "obvious" there must be other work available to the claimant, he cannot be found to be totally disabled. *Id.* Employer contends the case at bar fits within the confines of *Air America*. The administrative law judge disagreed, concluding that claimant, unlike the jet pilot in *Air America*, does not have the education and transferable skills to make alternate employment "obvious." Decision and Order at 41-42. This determination is rational in light of claimant's work history, education and abilities. Moreover, in *Air America*, the First Circuit gave examples of when alternate employment is not "obvious," thereby requiring the employer to satisfy the burden of showing the availability of specific jobs that would be appropriate for the claimant. For instance, where a claimant is restricted to light or sedentary work and has limited education and work experience, suitable job prospects may be limited or non-existent. *Air America*, 597 F.2d at 779-780, 10 BRBS at 513; *see Dixon v. John J. McMullen & Assoc., Inc.*, 19 BRBS 243 (1986). In this case, claimant's limited work experience and education,[3] the totality of his injuries, and his age all combine to restrict the type of work he would be capable of performing. Thus, pursuant to *Air America*, employer must demonstrate the availability of specific jobs for claimant. As the administrative law judge found that Mr. Calandra could not defend his opinion, and he credited the conclusion of Mr. Murgo that claimant is unsuitable for any work, we affirm his determination that claimant is totally disabled. *Dixon*, 19 BRBS at 246.

Finally, employer argues that claimant was a voluntary retiree and not an involuntary retiree, making his benefits payable under Section 8(c)(23), 33 U.S.C. §908(c)(23). We reject employer's argument. The uncontradicted evidence of record establishes that claimant's job required him to use pneumatic tools, walk long distances, climb ladders, lift heavy objects, and work in tight and confined areas. Decision and Order at 4; Tr. at 20-28. The evidence also establishes claimant's many physical ailments and limitations, as well as his increasing difficulty performing his job in 1999. Cl. Exs. 2-6, 9-10; Emp. Exs. 14, 23; Tr. at 28-34. Moreover, even employer's experts, as the administrative law judge stated, concluded that claimant was fit for nothing more

[3]Although claimant passed his GED and received Air Force training as well as training as a licensed electrician, the vocational testing performed by Mr. Murgo established that claimant has high school reading skills, but his spelling is at a third-grade level and his math is at a sixth-grade level. Cl. Ex. 7.

strenuous than sedentary or light work. Emp. Exs. 21, 23. Taking the facts into consideration, the administrative law judge found that claimant's injuries caused him to cease working in September 1999. Decision and Order at 4, 39. This finding is supported by substantial evidence of record,[4] Cl. Exs. 6, 9; Tr. at 39, and the administrative law judge correctly concluded that, as a result, claimant is not considered a voluntary retiree. *See MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986). As we have affirmed the administrative law judge's determination that employer did not establish the availability of suitable alternate employment, claimant is entitled to permanent total disability benefits pursuant to Section 8(a) of the Act, 33 U.S.C. §908(a), and he is not limited to partial disability benefits under Section 8(c)(23). *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]Although claimant testified that his retirement fell under "Magic 85" (age plus years of service is greater than or equal to 85), Tr. at 59; Emp. Brief at 16, claimant had previously testified that he stopped working because he was "beat up" as a result of his hand and lung conditions, Tr. at 38. His ability to take advantage of the "Magic 85" program and his application for retirement do not disprove the administrative law judge's conclusion that claimant's retirement was involuntary.