

BRB No. 07-0580

P.S.)
(Deceased))
)
Claimant-Petitioner)
)
v.)
)
ELECTRIC BOAT CORPORATION) DATE ISSUED: 01/24/2008
)
Self-Insured)
Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits of Administrative Law Judge Colleen A. Geraghty (2006-LHC-0355) rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a piping inspector for employer during the summers from 1972 to 1977;¹ during this period he was exposed to asbestos. In 2001, claimant

¹ Claimant was employed as an industrial arts teacher during the school year from 1967 to 1982.

was diagnosed as suffering from lung cancer and underwent a right upper lobectomy on October 11, 2001. CX 4. The hospital discharge summary includes secondary diagnoses of asbestos-related pleural disease and chronic obstructive pulmonary disease with irritable airways. CX 4 at 23. Employer paid claimant compensation for permanent partial disability from April 26, 2005, to March 13, 2006, for a 32.5 percent respiratory impairment. 33 U.S.C. §908(c)(23). Claimant sought additional disability benefits.²

The parties stipulated that claimant's pulmonary impairment is work-related. The administrative law judge found that claimant's claim was timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge found claimant entitled to compensation for partial disability for a 32.5 percent permanent respiratory impairment from April 26, 2005, through November 2, 2006, based on the national average weekly wage in effect on October 1, 2004. 33 U.S.C. §§908(c)(23), 910(d)(2).

Claimant appeals, contending that the administrative law judge erred in finding that his entitlement to benefits did not commence until April 26, 2005, and that the correct date is September 10, 2001. Additionally, claimant contends that his impairment rating should be 33 percent from September 10, 2001, to April 26, 2005, and 40 percent from that date until November 2, 2006. Employer responds, urging affirmance of the administrative law judge's decision.³

As a voluntary retiree, claimant's benefits are payable pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), based on the percentage of permanent impairment assessed according to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). 33 U.S.C. §902(10). Under Section 8(c)(23), claimant is entitled to benefits from the date his work-related permanent impairment commenced. *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998) and 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988).

² Claimant died on November 2, 2006, several months after the formal hearing. The executor of his estate is pursuing this appeal.

³ Employer contends that the administrative law judge erred in finding that claimant's claim was timely filed. We decline to address this issue, as it was raised in a response brief and does not support the administrative law judge's decision. Under these circumstances, employer was required to file a cross-appeal in order to raise this issue. *Briscoe v. American Cyanamid Corp.*, 22 BRBS 389 (1989). Therefore, we grant claimant's motion to strike this argument.

Dr. Crawford diagnosed lung cancer in 2001 based on a chest x-ray and CT scan, and he performed a right upper lobectomy on October 11, 2001. EXs 2, 4; CX 4 at 4. A preoperative pulmonary function test showed “obstructive lung disease with mild to moderate air trapping and diffusion impairment.” CXs 3, 4. Dr. Buckley, who administered the test, stated that claimant had “moderate to moderately severe obstructive disease.” EX 2 at 7. Dr. Kern stated in 2005 that the 2001 test was indicative of mild emphysema, and that claimant had a pre-operative impairment of 33 percent and a post-operative impairment of 40 percent. CXs 19, 20. Claimant testified on deposition that at the time of the cancer diagnosis he was not experiencing any pulmonary difficulties, EX 4 at 25, and the pre-operative report noted that claimant was not suffering from shortness of breath. CX 4. Upon discharge from the hospital, claimant was diagnosed with cancer of the right upper lobe, asbestos-related pleural disease, and chronic obstructive pulmonary disease (COPD) with irritable airways. *Id.* at 23. A second pulmonary function study was conducted on April 26, 2005, by Dr. Teiger who concluded that claimant had moderate to severe COPD due primarily to emphysema and bilateral pleural plaques. EX 3. Dr. Teiger stated that claimant’s respiratory impairment was in the 25 to 40 percent range, pursuant to the *AMA Guides*. *Id.*

The administrative law judge found that at the time of the September 2001 pulmonary function study claimant was awaiting cancer surgery and that his pulmonary condition therefore was not permanent. In addition, the administrative law judge declined to rely on Dr. Kern’s opinion that claimant had a permanent pulmonary impairment in 2001 because he did not examine claimant, which the administrative law judge found was required by the *AMA Guides*. The administrative law judge also relied on claimant’s testimony that he was not experiencing any respiratory symptoms at that time. The administrative law judge found that claimant’s permanent pulmonary impairment commenced in April 2005, based on Dr. Teiger’s May 2005 opinion because claimant had fully recovered from the cancer surgery and Dr. Teiger’s opinion was based on a full examination, spirometry results, and an assessment of claimant’s physical and functional condition. In addition, the administrative law judge found that claimant’s impairment was 32.5 percent, the midway point of the impairment range stated by Dr. Teiger.

Claimant contends the administrative law judge erred in finding that he is not entitled to benefits from September 2001. Claimant contends that his condition was permanent at the time the pulmonary function studies were performed on September 10, 2001, as Dr. Kern stated that the subsequent surgery to remove part of claimant’s lung was not intended to, and did not, improve claimant’s pulmonary function. Claimant also contends that ratings for respiratory impairments under the *AMA Guides* are based solely on the results of pulmonary function studies such that the fact that Dr. Kern did not examine claimant is not a basis for rejecting his opinion.

We agree with claimant that the administrative law judge's finding regarding the onset of claimant's permanent respiratory impairment cannot be affirmed. In order to obtain benefits pursuant to Section 8(c)(23), a retiree must establish that he has an impairment under the *AMA Guides* and that the impairment is permanent. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991). A disability is permanent once a claimant reaches maximum medical improvement, *see, e.g., Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999), or, alternatively, if the condition is of a lasting and indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *See, e.g., Pittsburgh & Conneaut Dock Co. v. Director, OWCP*, 473 F.3d 253, 40 BRBS 73(CRT) (6th Cir. 2007); *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). A condition may be permanent if the claimant's condition subsequently deteriorates. *Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1986). Claimant was diagnosed with lung cancer, which resulted in surgery to remove a lobe, and obstructive lung disease in 2001. Claimant thus had a permanent lung condition in 2001. In fact, Dr. Teiger, whose opinion the administrative law judge credited in using the May 2005 date, stated at that time that claimant's chronic moderate to severe COPD has been "present for many years and documented by pulmonary function studies." EX 3.

In finding that claimant's condition was not permanent in 2001, the administrative law judge relied on the fact that claimant was about to undergo surgery for lung cancer. In appropriate cases, impending surgery can preclude a finding of permanency where the surgery is intended to improve the claimant's condition. *Kuhn v. Associated Press*, 16 BRBS 46 (1983). In this case, however, there is no evidence that the surgery was intended to, or in fact did, improve claimant's respiratory impairment; thus a finding of permanency is not precluded. *McCaskie v. Aalborg Ciser Norfolk, Inc.*, 34 BRBS 9 (2000); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986). While removal of the cancerous lobe benefited claimant's overall health, Dr. Kern opined that removal of a portion of one's lung results in "further impairment of lung function." CX 19. On this basis, as well as on the results of claimant's pulmonary function studies, Dr. Kern stated that claimant's condition was permanent as of the time he underwent testing on September 10, 2001. Thus, the administrative law judge's reliance on claimant's surgery and recovery therefrom to find that claimant's condition was not permanent in 2001 is not supported by case precedent or the evidence of record. *McCaskie*, 34 BRBS 9.

The administrative law judge also declined to rely on Dr. Kern's assessment of permanency in 2001 because he did not personally examine claimant as required by the *AMA Guides*. The *Guides'* chapter on respiratory impairments states that "a thorough physical examination is mandatory to reach valid conclusions about an individual's impairment," and that an examiner should document the patient's respiratory symptoms

and may use the effect these symptoms have on the patient's ability to perform activities of daily life in assessing the degree of impairment. *AMA Guides*, 5th ed. at 91, 88. The *Guides* state, however, that "pulmonary function tests are the most useful in assessing functional changes," *id.*, and Table 5-12, which classifies impairments due to respiratory disorders, bases ratings on pulmonary function test results. *Id.* at 107.⁴ In this case, Dr. Buckley, who administered the September 10, 2001, pulmonary function studies, noted that claimant gave a "good effort" on the tests. CX 3. Dr. Crawford performed a thorough physical examination of claimant on October 11, 2001, and included a discussion of the test results. CX 4. Dr. Kerns stated that he reviewed the medical records provided to him, CX 19, and he provided an assessment of claimant's impairment in 2001 based on the pulmonary function test results consistent with the *AMA Guides*. In any event, while the fact that Dr. Kerns did not personally examine claimant may be relevant to his assessment of the degree of claimant's impairment under the *AMA Guides*, it is not a basis for giving less weight to his opinion concerning the permanency of claimant's condition in 2001, particularly since that opinion is consistent with the other medical evidence of record.⁵ See CX 19. See generally *Barlow*, 20 BRBS at 181-182.

The evidence in this case compels the conclusion that claimant's condition was permanent as of September 10, 2001. Claimant's pulmonary function tests taken on that date showed a lung impairment that was of a lasting and indefinite duration, and claimant was not undergoing treatment to improve his lung function. See *Monta v. Navy Exchange Serv. Command*, 39 BRBS 104 (2005). Dr. Kern stated that claimant's condition was permanent in 2001 as the lung cancer surgery only decreased claimant's lung function. Moreover, there is no contrary medical evidence which could establish that claimant's condition was not permanent at that time.⁶ See *Tucker v. Thames Valley Steel*, 41 BRBS

⁴ The *Guides* state that, "The classification system in Table 5-12 considers only pulmonary function measurements for an impairment rating." *AMA Guides*, 5th ed. at 107.

⁵ Similarly, the administrative law judge erred in relying on claimant's testimony concerning the absence of shortness of breath or other problems in 2001, as it is more relevant to the degree of impairment than to the existence of a permanent lung condition.

⁶ Dr. Teiger stated on May 9, 2005, that claimant "more likely than not has reached maximum medical improvement at this time." This opinion does not preclude the determination that claimant's condition was permanent at an earlier date, in view of the fact that Dr. Teiger first saw claimant in 2005 and his statement, *supra* at 4, that claimant's COPD had been present for many years as reflected by his pulmonary function studies.

62 (2007). Therefore, the onset date for any permanent partial disability benefits due claimant is September 10, 2001. *Barlow*, 20 BRBS at 183.

In view of this holding, we must remand the case to the administrative law judge to address the extent of claimant's respiratory impairment as of this date. Table 5-12 of the *AMA Guides* provides ranges of impairments, and the administrative law judge may appropriately account for the doctors' assessments of claimant's symptoms in determining a percentage of impairment within the range assessed. See *Tucker*, 41 BRBS at 68-69; *Alexander*, 34 BRBS at 37-38; *Johnson v. Ingalls Shipbuilding Div./Litton Systems, Inc.*, 22 BRBS 160 (1989); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). We reject claimant's contention that the administrative law judge's award of benefits for a 32.5 percent impairment is based on a misstatement by Dr. Teiger concerning the Class III impairment range.⁷ A Class III impairment is from 26 to 50 percent of the whole person. Table 5-12, *AMA Guides*, 5th ed. at 107. Dr. Teiger stated that claimant has "at least a Class III pulmonary disability with *perhaps* a 25 to 40 % impairment rating..." based on his pulmonary function test results and clinical findings. EX 3 (emphasis in original). Thus, contrary to claimant's assertion, Dr. Teiger did not misstate the Class III impairment range in the *AMA Guides* but opined that claimant suffered a 25 to 40 percent impairment within the Class III range. The administrative law judge, therefore, did not err in using the midpoint of the range given by Dr. Teiger to determine that claimant had a 32.5 percent impairment as of April 26, 2005. On remand, the administrative law judge should reconsider the evidence relevant to determining the extent of claimant's impairment as of September 10, 2001. In so doing, the administrative law judge is free to reconsider the extent of claimant's impairment as of April 2005 if she finds it necessary to do so.

⁷ Claimant does not argue that the administrative law judge erred in determining claimant's impairment by using the mid-point of the range, but challenges only the range used in this determination.

Accordingly, the administrative law judge's finding that claimant is not entitled to benefits prior to April 26, 2005, is vacated. The onset of claimant's permanent respiratory impairment is September 10, 2001. The case is remanded for a determination as to the extent of claimant's impairment. The administrative law judge's award of benefits otherwise is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge