BRB Nos. 08-0569
and 08-0569A

M.F. Claimant-Respondent Cross-Petitioner v. UNIVERSAL MARTIME SERVICE CORPORATION Self-Insured Employer-Petitioner Cross-Respondent and MIDLAND INSURANCE COMPANY by NEW YORK STATE LIQUIDATION BUREAU Liquidated Carrier-Respondent Cross-Respondent	)	DATE ISSUED: 03/19/20092009 DECISION and ORDER

Appeals of the Decision and Order Awarding Medical Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Pedersen & Robbins), Hoboken, New Jersey, for claimant.

Francis M. Womack III (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

Kevin W. Dorr (Foley, Smit, O'Boyle & Weisman), New York, New York, or carrier.

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order Awarding Medical Benefits (2006-LHC-02058) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a longshoreman between 1966 and 1986. In December 1986, claimant retired from all employment after suffering a non-work-related heart attack. In 1999, claimant filed a claim under the Act, alleging that his occupational exposure to asbestos, dusts, and fumes resulted in a disabling pulmonary condition. CX 2. Claimant named Universal Maritime as the responsible employer. Employer was insured by Midland prior to January 1, 1978. Thereafter, employer was self-insured.

In her Decision and Order, the administrative law judge invoked the Section 20(a) presumption of causation, 33 U.S.C. §920(a), with regard to the restrictive component of claimant's respiratory impairment because employer conceded that it exposed claimant to asbestos during his employment and claimant established the existence of pleural plaques, which are a marker of asbestos exposure. The administrative law judge found, however, that employer presented sufficient evidence to rebut the Section 20(a) presumption, based on the opinion of Dr. Karetzky, a Board-certified pulmonary specialist who examined claimant in 2003 and 2007. Dr. Karetzky opined that claimant's pleural plaques did not cause any of claimant's respiratory impairment and that claimant's impaired pulmonary function is due entirely to claimant's deteriorating cardiac condition. On weighing the medical evidence as a whole, the administrative law judge found that claimant failed to establish a causal relationship between his pulmonary condition and his occupational exposure to asbestos, because she could not discern any basis upon which to credit the opinion of claimant's examining expert pulmonologist, Dr. Nahmias, over the conflicting opinion of Dr. Karetzky, noting that both opinions are supported by objective medical evidence. In this regard, the administrative law judge concentrated her discussion on the cause of claimant's pleural effusion, which caused a

restrictive respiratory impairment.[1] Thus, the administrative law judge rejected claimant claim for compensation. Nonetheless, the administrative law judge awarded claimant medical monitoring for his pleural plaques, which are related to his asbestos exposure. The administrative law judge found employer in its capacity as self-insurer liable for these medical benefits because claimant was last exposed to asbestos after January 1, 1978.

Employer appeals and claimant cross-appeals. Employer challenges the administrative law judge's finding that it last exposed claimant to injurious stimuli after it became self-insured in January 1978. New York State Liquidation Bureau, representing employer's defunct carrier, Midland, responds, urging affirmance of the administrative law judge's finding that self-insured employer is the liable entity. In his cross-appeal, claimant challenges the administrative law judge's findings that his pulmonary disease is not work-related and the consequent denial of benefits. Employer responds, urging affirmance of the administrative law's decision in this regard.

We first address claimant's appeal. Claimant contends the administrative law judge erred in addressing the cause of his pulmonary disease only in terms of any condition caused by exposure to asbestos. Claimant contends that, in addition to addressing any restrictive pulmonary condition that could be due to asbestos exposure, the administrative law judge failed to address his contention that he has an obstructive impairment due, at least in part, to his work exposure to dust, fumes, and smoke. We agree with claimant that the case must be remanded for further findings, as the administrative law judge addressed only whether claimant had a respiratory condition due to asbestos exposure.

Claimant's claim was for an "occupational pulmonary condition" based on his work exposure to "dust, fumes, asbestos, and other deleterious fumes and substances." Emp. Ex. 2. In his deposition, claimant testified to exposure to dust from asbestos, coffee, red peppers, rubber, and tapioca, which was loose cargo in the holds of ships. Cl. Ex. 8 at 9-10. Claimant testified to fumes and smoke from gasoline and diesel powered machinery and inside containers.[2] *Id.* at 12-14, 23. The medical records in evidence state

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[1] Dr. Nahmias stated that the effusion was caused at least in part by asbestos exposure, whereas Dr. Karetzky stated it was due solely to claimant's cardiac condition.

[2] The administrative law judge discounted the medical report of Dr. Hermele to the extent that it reported claimant's exposure to other substances, such as acetone, cobalt, nickel, herbicides, and coal dust, as claimant did not testify at his deposition to exposure to such substances. *See* Cl. Exs. 5, 8.

that claimant has been treated for breathing problems and chronic obstructive pulmonary disease (COPD) since 1999. Cl. Exs. 5, 9. Dr. Nahmias stated claimant has both a restrictive and an obstructive component to his respiratory impairment; he opined that the latter is chronic obstructive pulmonary disease due to claimant's industrial exposures and smoking. Cl. Ex. 10. Dr. Karetzky reported the results of pulmonary function studies and stated that claimant has a severe restrictive ventilatory defect; he did not believe claimant has an obstructive defect. Emp. Ex 5; Emp. Ex. 6 at 31.

We must remand this case for the administrative law judge to address the totality of claimant's claim that his overall respiratory condition is due to his work exposures to asbestos, dust, fumes and smoke; the claim is not limited to a respiratory injury due to asbestos exposure.[3] In this regard, the administrative law judge must determine if claimant established his *prima facie* case for invocation of the Section 20(a) presumption. Claimant bears the initial burden of establishing he has a physical harm and that working conditions existed that could have caused the harm. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). The administrative law judge must determine whether claimant established an obstructive impairment in addition to the restrictive impairment previously found, and then determine whether claimant established that he sustained the alleged exposures.[4]

If the Section 20(a) presumption is invoked, the employer bears the burden of producing substantial evidence that the established harm is not related to any of the employment exposures. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). Under the aggravation rule, if a work injury aggravates, accelerates or combines with a pre-existing condition, the entire resultant disability is compensable. *Id.; see also Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Thus, in order to rebut the Section 20(a) presumption, employer must produce substantial evidence that claimant's condition was not aggravated or contributed to by the work injury. *Rainey,* 517 F.3d at 634, 42 BRBS 13(CRT); *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). Once the Section 20(a) presumption is rebutted it drops from the case and claimant bears the burden of establishing that his pulmonary

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[3] We note that claimant does not specifically challenge the administrative law judge's finding that claimant failed to establish that asbestos exposure caused the restrictive portion of his respiratory impairment.

[4] If the administrative law judge finds claimant has an obstructive impairment and was exposed to the alleged injurious substances, then the presumption is invoked, as Dr. Nahmias opined that these exposures could have caused his impairment. *See Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).

disease is work-related, based on the evidence as a whole. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). If, on remand, the administrative law judge finds that claimant has a work-related pulmonary injury, she must determine the degree of permanent impairment and award benefits pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23).[5] *See* 33 U.S.C. §§902(10), 910(d)(2); *Donnell v. Bath Iron Works Corp*., 22 BRBS 136 (1989). Pursuant to the aggravation rule, claimant would be entitled to compensation for the entirety of his pulmonary condition if any of it is caused by his work exposures. *Hensley,* 655 F.2d 264, 13 BRBS 182. Thus, the denial of benefits is vacated and the case is remanded for further findings.

In its appeal, employer contends the administrative law judge erred in finding it liable for the awarded medical monitoring. Employer concedes claimant was exposed to asbestos in its employ, but contends that claimant's last asbestos exposure occurred before it became self-injured on January 1, 1978. Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible carrier is the one on the risk at the time of claimant's last exposure to injurious stimuli with a covered employer prior to claimant's awareness that he is suffering from an occupational disease. Carrier bears the burden of establishing it did not expose claimant to injurious stimuli in order to shift liability to the earlier carrier. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005), *decision after remand,* 41 BRBS 28 (2007).

As the case is being remanded for the administrative law judge to address the work-relatedness of claimant's respiratory condition based on his exposure to several deleterious substances, we note that on remand the administrative law judge also must make a finding of the responsible entity consistent with the causation finding. That is, the responsible carrier will be the one on the risk at the time of claimant's last exposure to any of the substances that resulted in his work-related injury. *General Dynamics Corp., Electric Boat Div. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977).

With regard to claimant's last exposure to asbestos, the administrative law judge discussed claimant's deposition testimony regarding his exposure. She found that he was exposed to asbestos while working on Piers 1, 3, 4 and 5, but not on Pier 11. *See* Cl. Ex.

[5] We reject claimant's contention that he may be entitled to a nominal award. A nominal award is based on Section 8(h) of the Act, 33 U.S.C. §908(h), *see Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54(CRT) (1997), and Section 8(h) is not applicable to an award to a voluntary retiree pursuant to Section 8(c)(23). Such an award is based solely on the degree of claimant's permanent physical impairment. 33 U.S.C. §902(10); *Donnell v. Bath Iron Works Corp*., 22 BRBS 136 (1989).

8 at 8. The administrative law judge found that claimant's last exposure occurred on Pier 5, although she found that claimant did not state when he was last exposed to asbestos. Claimant testified on deposition that he worked on Pier 5 until it closed, which, he stated, may have been in 1975 or 1978. *Id.* at 25. The administrative law judge thus concluded that claimant could have been exposed to asbestos on Pier 5 after employer became self-insured on January 1, 1978, and that employer did not establish that claimant was not exposed after that date.

Employer accepts the administrative law judge's finding that claimant's last exposure to asbestos occurred on Pier 5, but challenges the inference that this occurred after January 1, 1978. Employer contends that claimant's testimony establishes that his last exposure to asbestos was in the early 1970s.

We reject self-insured employer's contention that the administrative law judge erred in holding it liable for claimant's medical monitoring. In order to shift liability to the earlier carrier, self-insured employer must establish that it did not expose claimant to injurious stimuli during its period of coverage. *McAllister,* 39 BRBS 35. In this case, the administrative law judge rationally relied on claimant's testimony that Pier 5 could have closed as late as 1978. Employer did not establish a different date for the closing of the pier on which claimant was last exposed to asbestos. Moreover, the administrative law judge properly found that claimant did not state when he was last exposed to asbestos. Claimant stated only that he was exposed to and worked with asbestos in the early 1970s. Cl. Ex. 8 at 8-9. This evidence does not establish the absence of exposure during employer's period of self-insurance. *See, e.g., Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001). Therefore, as it is rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's finding that self-insured employer is liable for the awarded medical benefits.

Accordingly, the administrative law judge's Decision and Order denying disability compensation is vacated, and the case is remanded for further findings consistent with this decision. The award of medical benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge