

BRB No. 91-1469

ROBERT FROHLIN)
)
 Claimant-Petitioner)
)
 v.)
)
 BETHLEHEM STEEL) DATE ISSUED:
 CORPORATION)
)
 Self-Insured)
 Employer) DECISION and ORDER

Appeal of the Decision and Order - Awarding Permanent Partial Benefits of Robert L. Cox,
Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (O'Brien, Shafner, Bartinik, Stuart & Kelly, P.C.), Groton, Connecticut,
for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order - Awarding Permanent Partial Benefits (89-LHC-638/639) of Administrative Law Judge Robert L. Cox 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 if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Hopeman Brothers, Incorporated, from 1940 to 1942 installing asbestos paneling in cargo ships, and for employer from 1942 to 1945, where he was exposed to asbestos products. Claimant was then employed for 37 years as a salesman for Quaker Oats until his partial retirement in 1981 and full retirement in 1982. On July 10, 1984, claimant filed claims under the Act for occupational lung disease against both Hopeman Brothers and employer, both of whom responded by filing Notices of Controversion. The case against employer was referred to the Office of Administrative Law Judges for a formal hearing on December 12, 1989.

In his Decision and Order, the administrative law judge found that claimant was a voluntary retiree and awarded him compensation for a 30 percent permanent physical impairment pursuant to

Sections 2(10), 8(c)(23) and 10(d)(2) of the Act as amended in 1984, 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2) (1988). The administrative law judge also found that claimant was entitled to medical benefits for his asbestos-related lung condition pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, claimant contends that the administrative law judge erred by finding that he was a voluntary retiree. Claimant asserts that he retired due to a heart condition which required quadruple bypass surgery in March 1981, and that he is entitled to invocation of the presumption at Section 20(a), 33 U.S.C. §920(a), based on Dr. Murphy's opinion that claimant's heart condition was aggravated by his work-related pulmonary impairment. Employer has not responded to this appeal.

Under the Act as amended in 1984, when an employee voluntarily retires and his occupational disease becomes manifest subsequent to this retirement, his recovery is limited to an award for permanent partial disability based on the extent of his impairment as measured pursuant to the of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (3d ed. 1988), and is not based on economic factors. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Kellis v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 109 (1985). If, however, an employee involuntarily withdraws from the workforce due to an occupational disease, he is not a voluntary retiree, the post-retirement injury provisions of Sections 2(10), 8(c)(23) and 10(d)(2) do not apply, and claimant is entitled to an award based on his loss of wage-earning capacity. *See Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *Truitt v. Newport News Shipbuilding and Dry Dock Co.*, 20 BRBS 79, 82 (1987).

After review of the administrative law judge's Decision and Order in light of the evidence of record, we affirm his finding that claimant was a voluntary retiree because it is rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe*, 380 U.S. at 359. After noting the paucity of relevant information in the record regarding the circumstances surrounding claimant's retirement, the administrative law judge determined that there was virtually no evidence in the record to support a finding that a work-related condition caused claimant to retire. After considering Dr. Murphy's December 2, 1988, report which indicated that claimant retired because he was short of breath and tired easily, the administrative law judge discredited this evidence in light of the contrary evidence in the record, notably claimant's testimony, Tr.at 29, and the medical records of Dr. Golden, Cxs. 4, 5, which indicate that after completely recovering from his 1981 bypass surgery claimant was capable of heavy physical exertion by 1983 including playing golf and racket ball, heavy yard work, and aerobic exercises. The administrative law judge further determined that while claimant did experience respiratory problems in 1981 and 1982, this was due to use of the drug Procan, and resolved upon its discontinuance, and that it wasn't until sometime after September 12, 1983 that claimant had any asbestos-related respiratory impairment. *See CX 39 at 29*. Inasmuch as claimant's testimony and the medical reports of Dr. Golden provide substantial evidence to support the administrative law judge's finding that claimant did not retire due to his work-related respiratory condition, and claimant has raised no reversible error committed by the administrative law judge in

making this determination, his finding that claimant is a voluntary retiree is affirmed.¹ *See generally Smith v. Ingalls Shipbuilding Div., Litton Systems Inc.*, 22 BRBS 46 (1989); *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

¹Contrary to claimant's assertions, the medical opinion of Dr. Murphy does not mandate a contrary result. Cx. 43. Although Dr. Murphy indicated that claimant's dyspnea contributed to his cardiac impairment when he examined him in 1989, he did not voice an opinion as to claimant's condition at the time of his retirement. *Id.* at 10. Moreover, the Section 20(a), 33 U.S.C. §920(a), presumption does not aid claimant in establishing the nature and extent of his disability. *Jones v. Genco*, 21 BRBS 12 (1988).