

BRB Nos. 02-0716
and 02-0716A

DOMENICO GRILLO	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE	)	DATE ISSUED: 07/14/2003
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order Granting Attorney Fees of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Francis M. Womack III (Field Womcak & Kawczynski), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Granting Attorney Fees (2000-LHC-913), and claimant cross-appeals the Decision and Order, of Administrative Law Judge Paul H. Teitler 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. ' 921(b)(3). The amount of an attorney=s fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as a longshoreman from 1964 until his retirement in May 1981, during which time he was periodically exposed to asbestos. In 1998, claimant underwent spirometry testing and was diagnosed with chronic bronchitis, emphysema, and pleural asbestosis. Claimant thereafter filed a claim for benefits under the Act, seeking permanent partial disability compensation for a 50 percent impairment that he avers is the result of his occupational exposures while working for employer. At the formal hearing, claimant testified that he has difficulty breathing, walking more than one block, and walking stairs, and that he has been prescribed medication for his breathing condition.

In his Decision and Order, the administrative law judge invoked the Section 20(a), 33 U.S.C. ' 920(a), presumption with regard to causation and found that employer failed to establish rebuttal; accordingly, claimant=s lung condition was held to be work-related. Relying upon the opinion of Dr. Adelman, the administrative law judge then determined that claimant did not establish that he is presently disabled due to his pulmonary condition. The administrative law judge found, however, that claimant is entitled to a nominal award of \$1 per week because he is at risk of developing other conditions as a result of his work-related exposure to asbestos.

Claimant=s counsel subsequently submitted a fee petition to the administrative law judge requesting an attorney=s fee of \$13,650, and \$1,351.25 in expenses. After finding that employer submitted no objections to counsel=s requested fee, the administrative law judge disallowed 1.25 hours of services performed while this case was pending before the district director, and awarded claimant=s counsel a fee of \$13,275 and \$1,351.25 in expenses.

On appeal, employer challenges the administrative law judge=s nominal award of benefits to claimant, as well the amount of the attorney=s fee awarded to claimant=s counsel by the administrative law judge. Claimant, in his cross-appeal, avers that the administrative law judge erred in determining that he has failed to establish a compensable pulmonary impairment.

We first address claimant=s argument in his cross-appeal that the administrative law judge erred in concluding that claimant did not establish that he has sustained a compensable pulmonary impairment. Specifically, claimant alleges that as Dr. Adelman did not utilize the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) in evaluating claimant=s pulmonary condition, the administrative law judge erred in relying upon that physician=s opinion in determining whether claimant has sustained a compensable work-related impairment under the Act. Claimant=s contentions have merit

and, for the reasons that follow, we vacate the administrative law judge=s finding on this issue.

In cases involving voluntary retirees who claim benefits under Section 8(c)(23) of the Act, the Act as amended in 1984 requires impairment ratings to be based on medical opinions using the criteria contained within the *AMA Guides*. See 33 U.S.C. ' 902(10); 908(c)(23); 910(d)(2); *Pimpinella v. Universal Maritime Service, Inc*, 27 BRBS 154 (1993); *Ponder v. Peter Kiewit Sons= Co.*, 24 BRBS 46 (1990). Section 8(c)(23) provides for an award based on the percentage of permanent impairment Aas determined under the *Guides* referred to in Section 2(10).@ Section 2(10) defines the term A disability,@ for purposes of such awards as A permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, . . . @. See also 20 C.F.R ' 702.601(b). Thus, use of the *AMA Guides* in determining a voluntary retiree=s impairment rating for compensation purposes under Section 8(c)(23) is specifically required by the Act and its implementing regulations. See *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

In the instant case, the administrative law judge initially stated that he would utilize the most recent edition of the *AMA Guides* in determining the extent of claimant=s alleged disability. Decision and Order at 15-16. Thereafter, however, the administrative law judge determined that claimant sustained no impairment based upon the testimony of Dr. Adelman, whose opinion the administrative law judge found to be well-reasoned and supported by objective testing. *Id.* at 17. Dr. Adelman testified that although claimant complained of dyspnea for 25 years, wheezing and morning sputum production, and x-rays exhibited both pleural thickening and calcifications, he could attribute no disability to the existence of those conditions since his objective testing of claimant, specifically pulmonary function studies performed in October 1999, revealed no evidence of obstructive or restrictive lung disease. Emp. Ex. 1; Adelman depo. at 16, 30-32, 48, 59. Dr. Adelman conceded on cross-examination, however, that he did not utilize any guidelines when evaluating claimant=s condition; rather, Dr. Adelman rendered his diagnosis solely on the basis of his interpretation of claimant=s October 1999 pulmonary function studies.

¹ *Id.* at 51, 59. In contrast, Dr. Nahmia testified that he utilized the *AMA Guides* to conclude that claimant has sustained a 50 percent permanent partial disability as a result of his exposure to work-place irritants. Specifically, Dr. Nahmia testified that he calculated claimant=s *AMA Guides*-based impairment rating after taking into consideration claimant=s April 2001 pulmonary function studies which revealed abnormal results, claimant=s subjective symptoms, and the affect of claimant=s condition on his daily activities. Nahmia depo. at 21-22, 34-37, 38-40.

In light of the statutory mandate of Sections 2(10) and 8(c)(23) that a claimant=s impairment in cases such as this one be determined in accordance with the *AMA Guides*,

¹ While pulmonary function studies performed on June 9, 2000, similarly revealed lung volumes within normal limits, Dr. Basti opined that claimant has a minimal obstructive lung defect based upon a decrease in flow rates. See Clt. Ex. 4.

which clearly state that a physician should assess a claimant=s impairment by weighing both subjective and objective information, we cannot affirm the administrative law judge=s reliance upon Dr. Adelman=s opinion in determining the issue of the extent of claimant=s work-related disability since that physician unequivocally stated that he had not used any guidelines when rendering his opinion regarding claimant=s impairment. Accordingly, we vacate the administrative law judge=s determination regarding the extent of claimant=s alleged disability, and we remand this case for the administrative law judge to reconsider the evidence of record in light of the Act=s specific requirement that an impairment rating be determined pursuant to the criteria contained in the *AMA Guides*.

We will now address employer=s appeal of the administrative law judge=s award of nominal benefits to claimant. In his Decision and Order, the administrative law judge relied upon the United States Supreme Court=s decision recognizing the viability of nominal awards in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)(1997), and awarded claimant \$1 per week based upon his finding that claimant=s work-related exposure to asbestos put him at risk of developing additional medical conditions. Employer challenges this nominal award, arguing that it should be reversed since a claim for benefits arising pursuant to Section 8(c)(23) of the Act is based upon physical impairment and not economic disability and that, accordingly, a nominal award is not available to claimant under Section 8(c)(23). We disagree.

It is now well-established that a claimant may be entitled to a *de minimis* award under Section 8(c)(21), 33 U.S.C. ' 908(c)(21), in cases where a claimant with a work-related injury, but no current loss of wage-earning capacity, establishes that there is a significant possibility of future economic harm.

² See *Rambo II*, 521 U.S. 121, 31 BRBS 54 (CRT); see also *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108(CRT)(2^d Cir. 1989); *Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3(CRT)(9th Cir. 1986); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT)(4th Cir. 1985); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002). The Supreme Court in *Rambo II* specifically addressed whether a claimant can receive a nominal award under Section 8(c)(21) for a potential future loss of wage-earning capacity. Since wage-earning capacity is determined under Section 8(h) of the Act, 33 U.S.C. ' 908(h), the Court=s analysis relied on the fact that the factors to be considered under that subsection include the effect of disability as it may naturally extend into the future. See *Rambo II*, 521 U.S. at 131-132, 31 BRBS at 58(CRT). The Court reasoned that in cases where an employee sustained an injury that would not presently entitle him to disability compensation pursuant to Section 8(c)(21) but would affect his future employability, there are compelling reasons to treat that employee as

² As set forth *infra*, in cases such as this one wherein claimant is a voluntary retiree, the Act defines disability as a permanent impairment as determined pursuant to the *AMA Guides*. See 33 U.S.C. ' 902(10).

presently disabled under the statute.

Specifically, the Court wrote that A[b]ecause an injured worker who has a basis to anticipate wage loss in the future resulting from a combination of his injury and job-market opportunities must nonetheless claim promptly, it is likely that Congress intended Adisability@ to include the injury-related potential for future wage loss.@ 521 U.S. at 129, 31 BRBS at 57(CRT). Such a finding, the Court continued, would support Congress=s likely intention that such an employee obtain some award of benefits in anticipation of the future potential loss; otherwise, a losing employee would lose for all time after one year from the denial or termination of benefits. *Id.* Awarding a nominal award would therefore further the Act=s mandate to account for the future effects of disability.

³ Moreover, the Court determined that such a nominal award would allow full scope to the mandate to consider the future effects of disability, would promote accuracy, would preserve administrative simplicity by obviating cumbersome enquiries relating to the entire range of possible future states of affairs, and would avoid imputing to Congress the unlikely intent to join a wait-and-see rule for most cases with a predict-the-future method when the disability results in no current decline in what the worker can earn. 521 U.S. at 135, 31 BRBS at 60(CRT).

The United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, similarly relied upon a combination of factors in addressing the propriety of nominal awards in claims under Section 8(c)(21). Specifically, in *LaFaille*, 884 F.2d 54, 22 BRBS 108(CRT), the court wrote that A[b]ecause of the >potentially harsh effect of [the] short statute of limitations,= where a physically impaired worker=s potential right to compensation for the substantial loss of future earnings is a predictable probability, . . .*de minimis* awards have been approved in order to avoid the short statute of limitations.@ The court thereafter concluded that claimant, who suffered from a progressive lung disorder, was entitled to a *de minimis* award under Section 8(c)(21) since the denial of such an award would prevent the claimant from filing for future benefits for loss in earning capacity occurring after the one year limitation of Section 22.

³ In this regard, the Court noted that a disability whose substantial effects are only potential is nonetheless a present disability, albeit a presently nominal one. *Rambo II*, 521 U.S. at 135, 31 BRBS at 60(CRT).

Although the Supreme Court in *Rambo II* and the multiple circuit courts of appeals to address the propriety of nominal awards have not been presented with the issue of whether such an award may be entered on behalf of a claimant when a claim is made for benefits pursuant to Section 8(c)(23) of the Act, it follows from those courts' analysis that such an award may be appropriate should claimant affirmatively establish a significant possibility that his medical condition, while not presently compensable, will progress or deteriorate in the future so as to render it compensable under the Act. Awards rendered pursuant to Section 8(c)(23) of the Act are similar to those entered pursuant to Section 8(c)(21) of the Act in that both subsections include forward-looking concepts in the formulation of an award. While Section 8(c)(23) does not rest on the statutory base of Section 8(h) with its explicit directive to consider the future effects of the disability, awards under Section 8(c)(23) compensate occupational diseases which do not arise until after a claimant's retirement. The impairments being compensated are latent in nature, which means that the full effects of the disease develop over a period of time. Consideration of the future effects of a disease is thus consistent with the Act's provisions allowing compensation for occupational diseases. Similarly, the AMA Guides, whose use is required by the Act and its implementing regulations in determining the extent of a retiree's impairment, contain a forward-looking element in that they state that the prognosis of an employee's condition should be considered when establishing a specific impairment percentage. See AMA Guides at 88. In addition, subsections 8(c)(21) and (c)(23) both entail the payment of ongoing permanent partial disability benefits to an employee.⁴ Further, the policy rationale espoused by the Supreme Court in *Rambo II*, i.e., that nominal awards exchange finality for accuracy, account for the future effects of a disability, and avoid the potential that a losing employee would lose for all time after one year from the denial of his claim for benefits, supports the conclusion that a *de minimis* award may be appropriate in a claim arising under Section 8(c)(23) of the Act. As the availability of a nominal award in a claim filed under Section 8(c)(23) complies with the statute and the rationale of the Supreme Court in *Rambo II*, we reject employer's argument that *de minimis* awards are not available in cases arising under that subsection.

We hold, however, that in the present case, the administrative law judge's finding that claimant is entitled to such an award must be vacated. A nominal award may be appropriate once a claimant with an occupational disease affirmatively demonstrates that while he does not have a present compensable loss, there is a significant possibility that his medical condition will progress or deteriorate in the future so as to entitle him to benefits at that time. See *Rambo II*, 521 U.S. at 126, 31 BRBS at 61(CRT); see also *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001); *LaFaille*, 884 F.2d 54, 22 BRBS 108(CRT); *Randall*, 725 F.2d 791, 16 BRBS 56(CRT); *Hole*, 640 F.2d 769, 13 BRBS 237. As the administrative law judge must apply this standard when

⁴ In contrast, awards rendered under the schedule contained at 33 U.S.C. ' 908(c)(1)-(20) do not encompass future effects as they run for a statutorily limited number of weeks and are akin to liquidated damages. See *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002)(wherein the Board held that a nominal award is not available in claims covered by the schedule).

determining whether claimant is entitled to a nominal award, we vacate the administrative law judge=s \$1 per week award to claimant. If on remand the administrative law judge once again determines that claimant has not established a present impairment pursuant to Section 8(c)(23), he must consider the medical evidence of record under the standard enunciated herein in determining whether claimant is entitled to a nominal award.

Lastly, employer challenges the attorney=s fee awarded to claimant=s counsel by the administrative law judge; specifically, employer argues that the awarded fee is unreasonable and irrational in light of claimant=s limited success in obtaining benefits under the Act. We will not address employer=s specific contentions. As the administrative law judge stated in his Supplemental Decision and Order, employer did not file objections to the fee petition with the administrative law judge. As employer did not raise its objections to the fee before the administrative law judge, it is not permitted to raise them now for the first time on appeal. See, e.g., *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Cf. *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001)(wherein the court affirmed an award of a counsel=s Afull fee@ B with no Alimited success@ reduction B where counsel succeeded in establishing jurisdiction and obtaining a de minimis award and medicals). The attorney=s fee awarded to claimant=s counsel by the administrative law judge is therefore affirmed.

Accordingly, the administrative law judge=s Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion. The administrative law judge=s Supplemental Decision and Order Granting Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge