

BRB Nos. 92-0878A
and 92-0878B

DOMINGO ALEXANDER)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 TRIPLE A MACHINE SHOP) DATE ISSUED: _____
)
 Self-Insured)
 Employer-Respondent)
 Cross-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATE DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Herman Ng (Hanna, Brophy, MacLean, McAleer & Jensen), San Francisco, California, for self-insured employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (91-LHC-1163) of Administrative Law Judge Alfred Lindeman 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).¹ 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).

Claimant was employed by Triple A and other employers as a sheetmetal worker, shipfitter and boilermaker from the 1940's until 1982; his last employment with Triple A was in early 1980. After leaving Triple A, claimant worked for Southwest Marine until September 1982, when he was laid off.² Claimant was next employed, starting in December 1982, by Pullman Power as a construction worker. He remained in this employment until February 1983 when he suffered a neck injury.

Claimant was diagnosed with asbestosis in 1978. On October 31, 1979, claimant filed the first of four claims for benefits under the Act, alleging injury due to exposure to asbestos and other industrial toxins and naming Triple A as one of the potentially responsible employers.³ Cl. Ex. 4. These claims were eventually referred to the Office of Administrative Law Judges, and a formal hearing was conducted on July 8, 1991, before Administrative Law Judge Alfred Lindeman. During these proceedings, claimant settled his claims pursuant to Section 8(i), 33 U.S.C § 908(i), with three employers: General Engineering, Service Engineering and Southwest Marine.

On December 12, 1991, the administrative law judge issued a Decision and Order awarding claimant permanent partial disability benefits. The administrative law judge also granted employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), but denied it a credit for payments received by claimant pursuant to the settlements with the other employers named in this claim. The administrative law judge also found that, while employer did not timely controvert the claim, claimant was not entitled to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), because he found that compensation was not due until 1989, years after the initial claim was filed. Decision and Order at 7.

¹The Director also appealed the administrative law judge's Decision and Order. By Order dated July 21, 1992, the Board, upon the Director's Motion, dismissed this appeal. *Alexander v. Triple A Machine Shop*, BRB No. 92-0878 (July 21, 1992)(Order). By letter, dated July 2, 1996, claimant moves the Board to retain jurisdiction over this appeal for the additional 60-day period provided in P.L. 104-134. In view of our decision in this case, we deny this request as moot.

²Triple A does not contest its designation as the last covered employer to have exposed claimant to asbestos and injurious substances.

³Claimant also filed a claim for benefits under the California State Workers' Compensation Act. On January 7, 1985, claimant was awarded benefits for a 38 percent permanent partial disability under state law, pursuant to which claimant received \$11,812.50, plus costs and less attorney's fees. Triple A Ex. Q.

In awarding benefits for claimant's pulmonary disability, the administrative law judge treated claimant as a voluntary retiree as of February 1983, and, applying Section 8(c)(23), 33 U.S.C. §908(c)(23), found that claimant suffered from a permanent impairment rated at 37.5 percent based on the medical evaluation of Dr. Raybin, who assessed a Class III disability under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides) as of 1989. Decision and Order at 5.

I. Nature and Extent of Disability

On appeal, claimant contests the administrative law judge's finding that he is a voluntary retiree. Claimant instead contends that he is entitled to permanent total disability benefits from as early as December 1982, or February 1983 at the latest. In support of these arguments, claimant cites medical opinions rating him as disabled under California workers' compensation guidelines based on his restrictive and obstructive lung diseases and which reported that these impairments precluded employment which would entail further exposure to industrial irritants. *See* Cl. Ex. 24 at 395-96. In the alternative, claimant asserts that the administrative law judge erred by not finding he had a loss in wage-earning capacity for the period between February 8, 1983, the date of his neck injury, and December 31, 1986, when he ceased work altogether at the age of 70 and became totally disabled.

These arguments are without merit. Claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 21 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985). To establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual employment. The diagnosis of asbestosis, without a concomitant loss in wage-earning capacity, does not satisfy claimant's burden in this regard. *Morin v. Bath Iron Works Corp.*, 28 BRBS 205, 208-210 (1994); *see Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 758, 26 BRBS 85, 103 (CRT)(1st Cir. 1992).

In this case, claimant has not shown that he was precluded from working as a result of his pulmonary impairment or that there was any causal connection between his pulmonary disease and his neck injury. He testified that he was laid off from Southwest Marine because of "lack of work." Cl. Ex. 2 at 98. In his Petition for Review and in his reply brief, claimant concedes that he suffered no loss of wage-earning capacity before his neck injury. *See* Petition for Review at 18; *Morin*, 28 BRBS at 208-210. As to that injury, claimant failed to prove that any pulmonary impairment he suffered caused him to hit his head on a steel scaffolding. Indeed, claimant testified that he walked into the scaffolding. H.T. at 34-35.

Further, the administrative law judge reasonably found that claimant's pulmonary problems did not force his retirement. A claimant may be entitled to total disability benefits if he can establish that his retirement was prompted by his occupational disease. *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181, 183 (1986); *see Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 83 (1989). In this instance, the administrative law judge found that claimant did not seek employment after the neck injury in 1983, and since he was already 67 years old, attributed non-employment to this factor. Decision and Order at 5. We thus affirm the administrative law judge's finding that claimant is a voluntary retiree as the administrative law judge's finding that claimant suffered no loss of wage-earning capacity as a result of his pulmonary problems and did not retire as a result of his pulmonary disease is rational and supported by substantial evidence. *See Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19, 21 (1989); 20 C.F.R. §702.601(c).

II. Onset of Disability

In the alternative, claimant assails the administrative law judge's finding that benefits should commence as of 1989, when Dr. Raybin assessed a Class III pulmonary impairment. Claimant avers that, if it is established that he is entitled only to a permanent partial disability award as a voluntary retiree, his pulmonary disability became permanent at least as early as 1983, when, according to Dr. Raybin in his 1989 report, he suffered from a Class II pulmonary impairment.

In occupational disease cases under the 1984 Amendments, because a voluntary retiree is one who leaves the workforce for reasons unrelated to his occupational disability, disability is defined under Section 2(10) of the Act, 33 U.S.C. §902(10)(1988), not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the *AMA Guides*. Claimant is therefore limited to a permanent partial disability award pursuant to Section 8(c)(23) based solely upon the degree of his physical impairment. *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71, 74 (1989).

An award under Section 8(c)(23) commences on the date the impairment becomes permanent. *Barlow v. Western Asbestos Co.*, 20 BRBS 179, 182-183 (1988). Dr. Raybin concluded in 1989 that at that time claimant suffered from a Class III pulmonary impairment. Reviewing claimant's medical records, Dr. Raybin also opined that claimant had suffered from a Class II pulmonary impairment in 1983. Cl. Ex. 25 at 429. Dr. Raybin's opinion, rendered in 1989, that claimant's pulmonary disease had progressed in 1983 to a Class II impairment, may, if credited, provide substantial evidence that claimant's asbestosis was permanent at that time, and that his award should therefore commence in 1983.

Because the administrative law judge failed to address this part of Dr. Raybin's opinion, *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 187 (1988), we vacate the administrative law judge's finding that the award should commence as of 1989, and remand this case to the administrative law judge for further consideration of the medical report of Dr. Raybin to determine the proper onset date of benefits. *Barlow*, 20 BRBS at 182-183. If claimant is deemed to have been disabled instead in 1983, as shown by Dr. Raybin's assessment of claimant's pulmonary condition at

that time, claimant's average weekly wage should be calculated under Sections 10(c) and 10(d)(2)(A), based on his actual earnings, rather than on the national average weekly wage in 1989. See *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); 33 U.S.C. §910(c), (d)(2), (i).

III. Section 14(e)

Claimant next contends that the administrative law judge erred in finding that employer is not liable for a Section 14(e) penalty, because benefits were not due until 1989. The administrative law judge also found that employer did not timely controvert the claim after receiving notice of the injury in 1979.

Section 14(e) provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion. *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 166 (1989). Section 14(b) provides that compensation is "due" on the 14th day after employer is notified pursuant to Section 12, or had knowledge of the injury. *Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184, 188 (1989)(*en banc*), *aff'd in part, part sub nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990). Employer in this case was not prevented from controverting the claim by the fact that benefits were not awarded until years after it received notice of the injury. Because the administrative law judge incorrectly determined that Section 14(e) is not applicable because the onset of disability was in 1989 and benefits were not payable until then, we vacate the administrative law judge's determination that Section 14(e) does not require the payment of a penalty in this case and direct that he reconsider this question on remand.⁴ See generally *Kocienda v. General Dynamics Corp.*, 21 BRBS 320 (1988); *DeRobertis v. Oceanic Container Service, Inc.*, 14 BRBS 284 (1981).

IV. Credit

In its cross-appeal, employer contends that the administrative law judge erred by not granting it an offset for amounts paid to claimant pursuant to settlements with three other employers in this claim. The administrative law judge granted employer a credit for amounts paid under the state award, but found that the credit provisions set forth at Sections 3(e) and 33(f), 33 U.S.C. §§903(e), 933(f), do not apply to the settlement recovery from parties in the "same Longshore action." The administrative law judge did not address the applicability of Section 14(j), which

⁴Because employer made payments for claimant's pulmonary impairment under the state act, Section 14(e) would apply only to the difference between those payments and payments made under the Act. See *Maddon v. Western Asbestos Co.*, 23 BRBS 55, 60 n.3 (1989). The correct period of assessment is from 14 days after the employer receives notice or knows of an injury until the date of the filing of the notice of controversion, or the date the Department receives notice of the facts which a proper notice of controversion would have revealed. See *Hearndon v. Ingalls Shipbuilding, Inc.*, 26 BRBS 17 (1992); *White v. Rock Creek Ginger Ale Co.*, 17 BRBS 75, 78 (1985).

provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." 33 U.S.C. §914(j). Employer contests the administrative law judge's conclusion, arguing that without an offset, claimant will receive a double recovery for the same disability.

We conclude that the application of the general credit doctrine, which functions to prevent a double recovery of benefits for the same injury or disability, applies to support a credit in this instance. This independent credit doctrine exists in case law and provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45 (CRT)(5th Cir. 1986)(*en banc*); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). Certainly, the avoidance of a double recovery would militate in favor of an offset, regardless of the source of the payment. Under the circumstances here, where claimant received Section 8(i) settlements based on the same pulmonary impairment for which he is receiving compensation from employer, we vacate the administrative law judge's denial of an offset, and direct that the administrative law judge reconsider this issue on remand as well, in light of the purposes of the credit doctrine and Section 14(j).

In view of the above, we vacate the administrative law judge's findings as to the commencement date of the permanent partial disability award under Section 8(c)(23) and claimant's average weekly wage, vacate the denial of a Section 14(e) penalty, and vacate the refusal to grant employer an offset for the net amount of claimant's recoveries in the Section 8(i) settlements. *See generally Jenkins v. Norfolk & Western Ry. Co.*, ___ BRBS ___, BRB No. 92-0102 (July 30, 1996). In all other respects, the Decision and Order is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated in part, and affirmed in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge