BRB No. 89-6002

JOHN CLARK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
NATIONAL STEEL AND SHIPBUILDING COMPANY	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Diane L. Middleton, San Pedro, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff & Tichy), San Diego, California, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (88-LHC-1473) of Administrative Law Judge Henry B. Lasky 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 for employer continuously from 1963 to 1986. From 1963 until 1981, claimant worked as a pipefitter, and from 1981 until 1986, he was a chief shop steward. Tr. at 27-29,

42. During the course of his employment, claimant was exposed to asbestos, fumes, dust, noise, and solvents. He states that he stopped working on May 16, 1986, because he suffered from stress, breathlessness, and ear and chest pains. Tr. at 30, 32-34, 41, 45-47, 49-50. On July 18, 1986, claimant filed a claim for compensation under the Act due to exposure to toxic and noxious substances, extreme noise, tension, pressure, and harassment. Emp. Ex. 1. He was officially retired from employment on September 4, 1987, and, in August 1988, employer initiated payment of permanent partial disability benefits under the Act, as calculated from October 7, 1987. Emp. Exs. 7, 9-10, 20. Additionally, between 1980 and 1987, claimant's third-party litigation resulted in settlements with 14 asbestos manufacturers and suppliers for a total of $42,850, of which he received $26,741.92.[1] Cl. Ex. 10. During this time, claimant was diagnosed with asbestosis, small airways disease, glaucoma, cognitive impairment, hypertension, and possibly Parkinson's disease. Tr. at 56, 60, 90-93; Cl. Ex. 11 at 10-11; Emp. Exs. 11, 17.

On May 23, 1989, the administrative law judge conducted a formal hearing, wherein claimant and employer disputed, *inter alia*, the date of injury, the cause, nature and extent of claimant's disability, whether Sections 12, 13 and/or 33(g) of the Act, 33 U.S.C. §§912, 913, 933(g), bar the claim, and whether employer is entitled to a credit against claimant's net third-party settlements. The administrative law judge determined that the date of injury was May 16, 1986, and that the claim filed on July 18, 1986, was not barred by either Section 12 or 13. Decision and Order at 8. Further, he found that claimant suffers from work-related pulmonary problems, which forced him to retire, and, given his overall condition, he is permanently totally disabled from working and is entitled to medical benefits and to compensation based upon his average weekly wage of $515. *Id.* at 7, 11-12, 14-15. The administrative law judge also awarded employer Section 8(f), 33 U.S.C. §908(f) (1988), relief but held it liable for a Section 14(e), 33 U.S.C. §914(e), penalty and an attorney's fee. *Id.* at 13-15. With regard to employer's Section 33(g) contention, the administrative law judge concluded that, as claimant was not a "person entitled to compensation" at the time he settled his third-party claims, in that employer was not then paying benefits, *see Dorsey v. Cooper Stevedoring, Inc.*, 18 BRBS 25 (1986), Section 33(g) does not bar the claim. Decision and Order at 8. However, as the record contains evidence of over $26,000 in net settlement proceeds, he determined that employer is entitled to a Section 33(f), 33 U.S.C. §933(f), credit. *Id.* at 8-9.

Employer now appeals the decision, and claimant responds, urging affirmance. Employer contends the administrative law judge erred in failing to find that the claim is barred by Sections 12 and/or 13 of the Act. It also argues, in light of the decision of the Supreme Court of the United States in *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 26 BRBS 49 (CRT) (1992), that Section 33(g) bars the claim for compensation. Additionally, employer contends the administrative law judge erred in crediting claimant's testimony in concluding that claimant's job-related condition, as opposed to his non-industrial conditions, prevents him from continuing to work and in finding that employer failed to establish the availability of suitable alternate employment.

[1]Claimant recovered $11,584.50 from 10 settlements prior to May 16, 1986, the date he stopped working. Cl. Ex. 10.

Initially, employer contends this claim is barred by Sections 12 and/or 13 of the Act. It asserts that claimant was aware of the relationship between his employment, his disease, and his disability as early as 1981, and, consequently, the claim filed in 1986 is untimely. In a case involving an occupational disease which does not immediately result in death or disability, Section 12(a) of the Act, 33 U.S.C. §912(a) (1988), requires an employee to notify his employer of the injury within one year of the time he becomes "aware, or by the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability." Similarly, in occupational disease cases, Section 13(b)(2) requires the employee to file a claim for compensation within two years after the date of awareness. 33 U.S.C. §913(b)(2) (1988).

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the present case arises, has held that the limitations periods do not commence until the employee becomes aware "that his injury has resulted in the impairment of his earning power." *Abel v. Director, OWCP*, 932 F.2d 819, 821, 24 BRBS 130, 134 (CRT) (9th Cir. 1991) (citing *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir. 1982), *cert. denied*, 459 U.S. 1034 (1982)); *see also Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT) (D.C. Cir. 1987). Further, the Ninth Circuit has held that an employee is not "injured for the purposes of the statute of limitations until `he [becomes] aware of the full character, extent and impact of the harm done to him.' " *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 183, 23 BRBS 127, 129 (CRT) (9th Cir. 1990) (quoting *Allan*, 666 F.2d at 401, 14 BRBS at 429). Pursuant to these decisions, the Board has held that the time limitations in Sections 12 and 13 do not begin to run until an employee is aware or should have been aware of the relationship between his employment, his disease and an actual, not a potential, disability which impairs his wage-earning capacity. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *see also Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); 20 C.F.R. §§702.212(b), 702.222(c).

In this case, claimant worked as a pipefitter until 1981 when he became a chief shop steward. Employer contends that claimant became aware of the relationship between his employment, disease, and disability at this time. To support its contention, employer offers the report of Dr. Hughson, dated October 16, 1987, wherein the doctor noted in his background summary that claimant became a chief shop steward in order to obtain a less physically demanding job. Emp. Ex. 17 at 1. Additionally, employer argues that the record contains ample evidence of claimant's history of pre-1986 breathing problems. *See* Emp. Exs. 11, 19. Claimant maintains that he was appointed shop steward in 1981 and that he was elected chief shop steward thereafter. He states he declined to run for the position again and he quit his job in 1986 because of his breathing difficulties.[2] Tr. at 42, 49-51.

[2]Employer argues that claimant's retirement is based on a disability caused by glaucoma. Emp. Ex. 24; Tr. at 209-210.

The administrative law judge determined that claimant's condition did not impair his earning power until May 1986 when he stopped working. Decision and Order at 8. This finding is supported by substantial evidence in the record. Although claimant became a chief shop steward in 1981 and no longer performed the duties of a pipefitter, he was still classified as a pipefitter until his retirement and the administrative law judge found that there is no evidence of a loss in claimant's wage-earning capacity prior to May 1986. *See generally Morin v. Bath Iron Works Corp.*, ___ BRBS ___, BRB No. 92-947 (Aug. 22, 1994); Tr. at 28-29. As the limitations periods of Sections 12 and 13 do not begin to run until an employee knows the full character, extent, and impact of the harm done to him, *i.e.* when he knows of an actual and not a potential impairment to his earning power, *see Harris v. Todd Pacific Shipyards Corp.*, ___ BRBS ___, BRB No. 93-2227 (Oct. 25, 1994); *Love*, 27 BRBS at 152-153, the administrative law judge rationally found that, although claimant was aware of the relationship between his employment and his disease in 1980, his "customary job was not hampered until May 16, 1986." Decision and Order at 6. Therefore, we reject employer's statute of limitations argument, and we affirm the administrative law judge's determination that claimant's claim is not barred by either Section 12 or 13.

Next, employer contends that claimant's claim is barred by Section 33(g) of the Act. Citing the Supreme Court's decisions in *Harper v. Virginia Dep't of Taxation*, ___ U.S. ___, 113 S.Ct. 2510 (1993), and in *Cowart*, 112 S.Ct. at 2589, 26 BRBS at 49 (CRT), employer argues that the *Cowart* holding should be applied to this case. Specifically, it asserts that, because claimant failed to obtain its prior written approval of numerous third-party settlements, as required by Section 33(g)(1), and because he failed to give timely notice of the settlements, as required by Section 33(g)(2), claimant should be barred from receiving compensation under the Act.

The Board has recently addressed the issue of the retroactivity of the *Cowart* decision to cases pending at the time of the its issuance. In *Kaye v. California Stevedore & Ballast*, ___ BRBS ___, BRB No. 93-1085 (Oct. 19, 1994), the Board held that the decision in *Cowart* is to be applied in pending cases. *Kaye*, slip op. at 11; *see also Linton v. Container Stevedoring Co.*, ___ BRBS ___, BRB No. 93-427 (Oct. 27, 1994). Consequently, the Supreme Court's decision in *Cowart* applies to this case.

In this regard, employer argues that the administrative law judge erred in determining that claimant is not a "person entitled to compensation." The Supreme Court defined a "person entitled to compensation" as one whose rights to compensation have vested and rejected the Board's definition of such a person as set forth in *Dorsey*, 18 BRBS at 25. *Cowart*, 112 S.Ct. at 2595, 26 BRBS at 51-52 (CRT). More specifically, the Court stated:

> Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event yet to happen.

Id. The Board has interpreted the Court's language as indicating that a claimant's right to compensation vests at the "time of injury," making the claimant a "person entitled to compensation"

from that time forward. *Harris*, slip op. at 7; *Glenn v. Todd Pacific Shipyards Corp.*, 27 BRBS 112 (1993)(Smith, J., concurring in the result), *aff'g* 26 BRBS 186 (1993). The Board also determined that, in cases involving occupational diseases, the "time of injury" occurs when the employee is aware of the relationship between the disease, the disability and the employment. *Harris*, slip op. at 9; *Glenn*, 27 BRBS at 115; *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). Because the decision in *Cowart* was issued after the administrative law judge's decision in this case, we vacate his finding that claimant is not a "person entitled to compensation," and we remand the case for further consideration of this issue in accordance with *Cowart*, 112 S.Ct. at 2593, 2597, 26 BRBS at 51, 53 (CRT). *See Linton*, slip op. at 5-7; *Harris*, slip op. at 12-14; *Krause v. Bethlehem Steel Corp.*, ___ BRBS ___, BRB No. 89-3165 (Dec. 30, 1992).

Although this case must be remanded for further consideration of the applicability of Section 33(g), we nonetheless shall address employer's remaining contentions on appeal. Employer challenges the administrative law judge's finding that claimant is permanently totally disabled. It argues that claimant's testimony should not be credited because it contains numerous discrepancies.[3] Further, it argues that the administrative law judge erred in finding that claimant's inability to return to his usual work is prevented by his work-related pulmonary condition as opposed to his non-industrial glaucoma, and, alternatively, that it presented sufficient evidence of suitable alternate employment such that, at most, claimant is only permanently partially disabled.

In this case, claimant testified he stopped working and is unable to return because of his breathing problems. Tr. at 49. Dr. Dahlgren, claimant's physician, determined that claimant stopped working because of shortness of breath, and he found that claimant has work-related asbestosis. Cl. Ex. 1 at 1, 11. Dr. Dahlgren also noted that claimant's pulmonary function studies revealed a normal vital capacity but impaired flow rates in the small airways, and his chest x-rays showed arteriosclerosis compatible with chronic obstructive pulmonary disease, pleural plaques compatible with pleural asbestosis, and parenchymal changes compatible with interstitial fibrosis and asbestosis. Dr. Dahlgren concluded that claimant has a "Class III or moderate to greater than moderate impairment[,]" requiring him to be restricted to "semi-sedentary to light work" free from "atmospheres of respiratory irritants. . . ." *Id.* at 9-12. Dr. Hughson, on whose testimony employer relies, stated in his report that claimant stopped working because of his respiratory and visual difficulties; however, he detected no evidence of restrictive lung disease. Emp. Ex. 17 at 1, 10. Although Dr. Hughson found evidence of pleural plaques due to asbestos exposure, he found no evidence of interstitial fibrosis or restrictive lung disease, and he concluded that claimant's small airways disease is not disabling. He opined that claimant is a Class II individual with a 10 percent permanent impairment of the whole person due in part to industrial exposures, but that claimant does not yet have a need for medical treatment for his lung condition. *Id.* at 9-11.

[3]For example, employer alleges there are discrepancies between claimant's deposition and trial testimony concerning the number of hours per week claimant spent on inspections, the number of packs of cigarettes claimant smoked per day, the degree of claimant's vision problems, and whether claimant had been informed of his asbestosis. The administrative law judge did not discuss these in his decision, but relied primarily on the physicians' opinions of record.

The administrative law judge accepted the similarities between the two doctors' opinions regarding the existence of pulmonary disease and concluded that claimant ceased working on May 16, 1986, because of his pulmonary disease, rejecting employer's argument that claimant's non-industrial conditions, specifically his end-stage glaucoma, forced his retirement.[4] Decision and Order at 11. We also reject employer's contention. Questions of witness credibility, including those involving medical witnesses, are for the administrative law judge as the trier-of-fact. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). It is solely within his discretion to accept or reject all or any part of any testimony according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Because both doctors agree that claimant left work, at least in part, due to his pulmonary problems, it is rational for the administrative law judge to have so concluded. Therefore, contrary to employer's arguments, claimant is not a voluntary retiree limited to a permanent partial disability award based on his percent of impairment pursuant to Section 8(c)(23). 33 U.S.C. §§908(c)(21), (23), 910(d)(2) (1988); *see generally Morin*, slip op. at 3-4.

Employer further contends that, if only his pulmonary condition is considered, claimant is able to return to his usual work. Claimant testified he cannot return to work. Dr. Dahlgren concluded that claimant cannot return to his work at the shipyard and that if he cannot be rehabilitated into the labor market, he is permanently totally disabled from all work. Cl. Ex. 1 at 12-13, 16. Dr. Hughson opined that claimant's pulmonary condition does not prevent him from returning to work as a pipefitter, but that the combination of claimant's other conditions may prevent such a return. Emp. Ex. 18. On this matter, the administrative law judge credited the testimony of claimant and his physician over the testimony of employer's witnesses. As the record contains evidence to support this credibility determination, we affirm the finding that claimant cannot return to his usual work. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). Thus, claimant has established a *prima facie* case of total disability. *Chong v. Todd Pacific Shipyards Corp.*, 22 BRBS 242 (1989), *aff'd mem. sub nom. Chong v. Director, OWCP*, 909 F.2d 1488 (9th Cir. 1990).

Once a claimant demonstrates total disability, the burden shifts to the employer to establish the availability of specific jobs the claimant can realistically secure and perform given his age, education, physical restrictions and vocational history. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). In this case, employer presented a labor market study, dated November 29, 1988, as evidence of the availability of suitable alternate employment. The study located seven positions: golf starter, signal operator, gate tender, fast food worker, telephone interviewer, answer service operator, and taxi dispatcher. Emp. Ex. 22. The administrative law judge determined that these positions are unsuitable for claimant given his physical and cognitive

[4]The administrative law judge gave little weight to the evidence showing that claimant "officially" received a disability retirement due to glaucoma, and he found no evidence to corroborate the clinic physicians' statement that claimant is "legally blind," in light of claimant's continued ability to drive his car. Decision and Order at 11.

limitations.[5] Decision and Order at 12; *see also* Cl. Exs. 1, 6, 11 at 36; Emp. Ex. 28. For example, he noted that the golf starter position requires some knowledge of golf, the signal operator position requires keyboard skills, and the gate tender position requires the prospective employee to pass a guard test. Decision and Order at 12; Emp. Ex. 22. The administrative law judge also determined that the fast food position is unsuitable for claimant because the report indicates he may be exposed to some strong or toxic odors which would not be beneficial for him. We affirm the administrative law judge's finding that these positions do not constitute suitable alternate employment as the administrative law judge rationally found the positions unsuitable given claimant's abilities and restrictions. *See generally Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3 (CRT)(9th Cir. 1990) *cert. denied*, 111 S.Ct. 1582 (1991).

With regard to the remaining positions identified by employer, the administrative law judge gave no specific reason for finding them unsuitable, stating merely: "The last three positions are similarly not suited for the Claimant." Decision and Order at 12. Because the administrative law judge did not specifically explain his reasons for finding the telephone interviewer, answer service operator, or taxi dispatcher positions unsuitable, we remand the case for him to reconsider the suitability of these jobs in light of claimant's age and abilities. *See generally Bryant v. Carolina Shipping Co.*, 25 BRBS 294 (1992). If the administrative law judge finds that suitable alternate employment is established, he must determine claimant's post-injury wage-earning capacity and award benefits pursuant to Section 8(c)(21) and (h), 33 U.S.C. §908(c)(21), (h).

Accordingly, the administrative law judge's finding that Section 33(g) is inapplicable and his award of permanent total disability benefits are vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____

NANCY S. DOLDER
Administrative Appeals Judge

[5]Drs. Boone and Baser, licensed psychologists consulted by claimant and employer, respectively, determined that claimant's battery of cognitive tests revealed memory problems and difficulties learning new skills and retaining that information over a period of time. Cl. Ex. 6; Emp. Ex. 28.

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REGINA C. McGRANERY
Administrative Appeals Judge