

BRB Nos. 90-1549
and 1549A

LEO SPADA)
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 SELBY BATTERSBY AND COMPANY))
)
 and)
) DATE ISSUED:
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Cross-Petitioners)
 Respondents)
)
 MARINE CONTRACTORS,)
 INCORPORATED)
)
 and)
)
 AMERICAN MUTUAL LIABILITY)
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Cross-Respondents)

DECISION AND ORDER

Appeals of the Decision and Order on Remand of Chester Shatz, Administrative Law Judge,
United States Department of Labor.

William H. Troupe (Hislop, Carney and Troupe), Boston, Massachusetts, for claimant.

Joseph F. Manes, Tarrytown, New York, for Selby Battersby and Travelers Insurance
Company.

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

PER CURIAM:

Claimant appeals, and Selby Battersby and Travelers Insurance Company (employer) cross-appeal, the Decision and Order on Remand (84-LHC-2607, 84-LHC-2608) of Administrative Law Judge Chester Shatz 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 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 worked as a longshoreman for a subcontractor from July through September 1942 at Bethlehem Steel Corporation's East Boston shipyard where he was exposed to asbestos. Claimant's Social Security records show that he received \$238.20 from Selby Battersby and \$29.94 from Marine Contractors during that time. Claimant served in the Army from October or November 1942 until 1946 when he began working for the United States Postal Service as a mail handler. In 1966, claimant ruptured a disc at work, underwent surgery, and was unable to work due to his back injury. Since 1967, claimant has been receiving permanent total disability benefits for his back disability under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §8101 *et seq.*

In 1973, claimant was informed by Dr. Fleishman that he had work-related asbestosis. Claimant entered into a third-party settlement for \$3,000 with Bethlehem Steel sometime thereafter, without the benefit of counsel, because his attorney at the time withdrew in objection to the settlement amount. Claimant testified he contacted a second attorney in 1983 because his respiratory problems worsened. On March 31, 1983, claimant filed a claim for asbestosis under the Act against Selby Battersby and Marine Contractors. Based on his examination of claimant on April 26, 1983, Dr. Baker opined that claimant is disabled due to many problems including asthma and obstructive lung disease, and that claimant's asbestosis is a contributing factor to his disability.

In the original Decision and Order in this case, Administrative Law Judge William H. Dapper dismissed the claim, finding it barred under Section 33(g), 33 U.S.C. §933(g)(1988), as claimant did not obtain employer's written approval prior to entering into the third-party settlement with Bethlehem Steel. Claimant appealed this decision to the Board. Marine Contractors responded, urging affirmance, and, in a protective cross-appeal, contended the administrative law judge erred in identifying it as the responsible employer.

In *Spada v. Marine Contractors*, BRB Nos. 85-1851/A (May 31, 1988)(unpublished), the Board reversed the administrative law judge's decision, finding the claim was not barred by Section 33(g).¹ The Board remanded the case for the administrative law judge to address all remaining issues. In the Decision and Order on Remand, Administrative Law Judge Chester Shatz found that Selby Battersby is the responsible employer. He nonetheless denied the claim, finding that claimant's notice of injury and claim were untimely filed pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, §913.² The administrative law judge awarded claimant medical benefits, noting that such benefits are never time-barred. In the alternative, in the event that claimant's notice and claim were timely filed, the administrative law judge found that claimant was an involuntary retiree, that he became aware he had work-related asbestosis in April or May 1973 when Dr. Fleishman so told him, and that claimant would be entitled to a permanent partial disability award under Section 8(c)(23), 33 U.S.C. §908(c)(23), for a 60 percent respiratory impairment commencing May 1, 1973.³ Applying Section 10(d)(2) and (i), 33 U.S.C. §910(d)(2), (i), the administrative law judge found that claimant would be entitled to weekly compensation based on the national average weekly wage in May 1973. The administrative law judge also found that claimant's receipt of an award under FECA would not preclude an award under the Longshore Act because FECA compensates claimant for non-maritime injuries.

On appeal, claimant contends that the administrative law judge erred in finding that his notice of injury and claim were untimely filed pursuant to Sections 12 and 13, as he was not aware of a work-related disability until 1983. BRB No. 90-1549. Claimant also contends that his average weekly wage should be the national average weekly wage on his date of awareness in 1983. Selby Battersby responds, urging affirmance of the finding that the claim is time-barred, but on cross-appeal, addressing the administrative law judge's alternative findings, contends that the administrative law judge erred in finding it to be the responsible employer, erred in finding claimant to be an involuntary retiree, and in failing to calculate claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), as of the year preceding claimant's retirement. Lastly, employer contends that the administrative law judge erred in finding that claimant's award under the Act would not be subsumed in the permanent total disability award claimant is receiving under FECA. BRB No. 90-1549A.

¹The Board noted that Judge Dapper did not make a finding as to which employer is the responsible employer but merely stated the claim was brought against "Marine Contractors (employer)." The Board noted that both potentially responsible employers, Marine Contractors and Selby Battersby, remained parties to the case with their respective carriers, American Mutual and Travelers. *Spada*, slip op. at 4 n.1.

²Apparently claimant never gave formal notice pursuant to Section 12, and his claim was treated as a notice of his injury.

³Dr. Baker stated that claimant has a 50 to 55 percent respiratory impairment, and Dr. Wainer stated that claimant has a 50 to 70 percent respiratory impairment. The administrative law judge averaged the lowest and highest ratings to arrive at a 60 percent impairment.

Claimant contends that his notice of injury and claim were timely filed pursuant to Sections 12 and 13 because the statutes of limitations do not begin to run until the employee is aware that his work-related injury is disabling. Claimant contends that he was first informed that his asbestosis was disabling in April 1983 by Dr. Baker, and therefore his claim filed in March 1983 is timely.

Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease, to be filed within one year after the employee becomes aware of the relationship between the employment, the disease, and the disability. 33 U.S.C. §912(a)(1988). Section 13(b)(2) requires a claim for compensation, in a case involving an occupational disease, to be filed within two years after the date of injury, and, as in Section 12(a), the time begins to run upon the employee's awareness of the relationship between the employment, the disease, and the disability. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148, 150 (1993); 33 U.S.C. §913(b)(2)(1988). The regulations provide that the time limitations do not begin to run until the employee is disabled; in the case of a retiree, disability means a permanent physical impairment. 33 U.S.C. §902(10); 20 C.F.R. §§702.212(b), 702.222(c); see *Lombardi v. General Dynamics Corp.*, 22 BRBS 323, 326 (1989); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100, 102 (1989); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20, 22-23 (1986).

Under the 1984 Amendments, in occupational disease cases, a voluntary retiree is one who voluntarily leaves the workforce for reasons unrelated to his occupational disability. A claimant's retirement is termed "voluntary" based on whether his disability due to his disease caused the termination of his employment rather than on economic or other considerations of claimant or employer. *Manders v. Alabama Dry Dock & Shipbuilding Corp.*, 23 BRBS 19, 21 (1989); 20 C.F.R. §702.601(c). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides), and claimant is 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).

In the instant case, the administrative law judge mischaracterized claimant as an involuntary retiree. Claimant is a voluntary retiree because he stopped working for reasons unrelated to his asbestosis. *Manders*, 23 BRBS at 21. As a voluntary retiree, the time limitations of Sections 12 and 13 did not begin to run until claimant was aware that his occupational disease caused a permanent physical impairment. *Lombardi*, 23 BRBS at 326. The uncontradicted evidence of record establishes that claimant first became aware his asbestosis was disabling on April 26, 1983, when Dr. Baker so stated based on his examination of that date. The proper date of awareness is therefore April 26, 1983. The administrative law judge's finding that claimant's date of awareness is April or May 1973 is erroneous as it was based on the date Dr. Fleishman told claimant his respiratory condition was work-related. We therefore hold that claimant's notice and claim filed in March 1983, prior to April 26, 1983, are timely pursuant to Sections 12 and 13, and we reverse the administrative

law judge's finding that claimant's claim is time-barred.⁴

Similarly, as claimant contended, his date of awareness for average weekly wage purposes also is April 26, 1983, pursuant to Section 10(i). *See Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1987). Contrary to employer's contention, inasmuch as claimant was voluntarily retired for more than one year as of the time of injury, Section 10(d)(2) mandates the use of the national average weekly wage in effect on the date of injury, and Section 10(c) is inapplicable. The national average weekly wage in effect on April 26, 1983 was \$262.35. *See A BRBS 4-89.*

Finally, we note that the administrative law judge found that claimant's award would commence on May 1, 1973, the date he was told his asbestosis was work-related. An award under Section 8(c)(23) commences on the date the claimant's impairment becomes permanent. *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). As the first evidence of a permanent impairment due in part to asbestosis is Dr. Baker's opinion of April 26, 1983, and as the administrative law judge's finding that claimant has a 60 percent impairment under the *AMA Guides* is unchallenged, we modify the administrative law judge's decision to reflect claimant's entitlement to permanent partial disability benefits under Section 8(c)(23) commencing on April 26, 1983, based on an average weekly wage of \$262.35. *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

We next address employer's contention that claimant's award should be offset against the award claimant is receiving under FECA. Section 3(e) of the Act, 33 U.S.C. §903(e), provides that

any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this chapter.

The legislative history of the 1984 Amendments referring to Section 3(e) specifically states that the credit would "apply not only to instances where the employee received State workers' compensation [for the same injury], but also where he received benefits under the Federal Employees' Compensation Act..." 130 Cong. Rec. H9733 (daily ed. Sept. 18, 1984) (statement of Rep. Erlenborn). Section 3(e) is written in the disjunctive, and employer is entitled to a credit in this case if the awards under FECA and the Act are for the same injury *or* disability. *See D'Errico v. General Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24 (CRT) (1st Cir. 1993).

In *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT)(9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989), the Ninth Circuit affirmed the Board's holding that where claimant is receiving an award for pneumoconiosis under

⁴We need not, therefore, address claimant's alternative contentions that the claim is not barred by Section 12, as employer was not prejudiced by the late notice pursuant to Section 12(d)(2), or by Section 13 for employer's failure to comply with the requirements of Section 30(a). *See* 33 U.S.C. §930(a), (f).

the Black Lung Act, employer is not entitled to an offset against the award for a work-related back injury under the Longshore Act because the award under the Longshore Act is not for the same injury or disability. Similarly, in this case, claimant is seeking compensation under the Longshore Act for asbestosis, and the award he is receiving under FECA is for his back disability. The administrative law judge therefore properly found that employer would not be entitled to an offset, as the claims under the two acts are not for the same injury or disability.

Lastly, we address Selby Battersby's contention that if claimant is entitled to disability benefits, Marine Contractors is the responsible employer. The administrative law judge found that Selby Battersby is the responsible employer based on claimant's testimony that he worked for six or seven weeks in the third quarter of 1942, that claimant knew at all times that Bethlehem Steel was not his actual employer but that he worked for a subcontractor, that claimant did not remember the name of his employer but remembered being paid by checks containing a Pennsylvania address, where Selby Battersby was located at the time, and that claimant testified he has no recollection of ever having worked for Marine Contractors. The administrative law judge also considered a statement from Selby Battersby attached to its Form LS-202, Employer's First Report of Injury, dated February 13, 1984 indicating that Selby Battersby employed claimant at the shipyard from August 24, 1942 to September 29, 1942. The administrative law judge acknowledged that while it is possible that claimant may have worked for Marine Contractors on September 30, 1942, the preponderance of the credible evidence demonstrates that Selby Battersby is the responsible employer. Decision and Order at 4.

In its cross-appeal, Selby Battersby contends since the Social Security records show that claimant worked for both Marine Contractors and Selby Battersby in the third quarter of 1942, and claimant performed only one job function which makes it impossible to tell for whom he last worked, justice would be best served by dividing responsibility between Selby Battersby and Marine Contractors.

The responsible employer is the employer during the last covered employment in which claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment.⁵ *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991), the Ninth Circuit addressed a case in which the decedent was exposed to asbestos while employed by two different maritime employers during the last quarter of 1944, the last year of decedent's exposure to asbestos while working in the shipyards. The evidence did not

⁵The assignment of joint liability generally has been limited to those situations where the employee worked for two employers at the same time, and not to those situations where there is no definitive evidence as to which employer the employee last worked. See *Oilfield Safety & Machine Specialties, Inc. v. Harmon Unlimited, Inc.*, 625 F.2d 1248 (5th Cir. 1980), *aff'g Hanson v. Oilfield Safety, Inc.*, 8 BRBS 835 (1978) and 9 BRBS 490 (1979); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result).

indicate the employer for which decedent last worked. The court held that where the record did not clearly reflect the covered employer for which decedent last worked, the purposes of the Longshore Act are best served by assigning liability to the employer who is claimed against. *Id.*, 938 F.2d at 962, 25 BRBS at 25 (CRT). Similarly, there also was an issue as to the identity of the responsible carrier, as there was a gap in coverage documentation for the period of October 1 to December 31, 1944. The court noted that "the paper trail in this case, as in many asbestos cases, is incomplete due to the passage of time," and that administrative law judges must draw reasonable inferences based on the evidence before them. *Id.*, 938 F.2d at 962, 25 BRBS at 25-26 (CRT). The court found that the administrative law judge's inference that the carrier who had covered employer in August 1944, May 1945 and September 1945 was the liable carrier was reasonable especially where the carrier in question had presented no evidence to the contrary. *Id.*

In this case, the evidence is silent as to whether claimant was employed by Marine Contractors on September 30, 1942, which employer states was a Wednesday. We hold that the administrative law judge rationally relied on claimant's testimony that he received a paycheck with a Pennsylvania address, and Selby Battersby's statement that claimant worked for it on September 29, 1942, to determine that Selby Battersby is the last maritime employer. In the absence of evidence to the contrary, the administrative law judge drew inferences as to the identity of claimant's last employer which are reasonable and based on substantial evidence. *Id.* We therefore affirm the administrative law judge's finding that Selby Battersby is the responsible employer.

In summary, we reverse the administrative law judge's finding that claimant's claim is time-barred. We hold that claimant is entitled to benefits under Section 8(c)(23) for a 60 percent permanent partial disability based on an average weekly wage of \$262.35, commencing April 26, 1983. Selby Battersby is liable for these benefits and is not entitled to a credit under Section 3(e) for the benefits claimant receives under FECA for his back disability.⁶

Accordingly, the administrative law judge's Decision and Order on Remand -- Denying Benefits is reversed. The decision is modified to reflect claimant's entitlement to benefits consistent with this decision. The administrative law judge's findings that Selby Battersby is the responsible employer and that it is not entitled to a Section 3(e) credit are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

⁶The administrative law judge properly found that employer is entitled to a credit under 33 U.S.C. §933(f) for the \$3,000 third-party settlement, and claimant so concedes. Cl. Brief at 27.

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge