

BRB No. 98-1481

GEORGE A. GLADNEY )  
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 Claimant-Respondent )  
 )  
 v. )  
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 INGALLS SHIPBUILDING, ) DATE ISSUED: August 4, 1999  
 INCORPORATED )  
 )  
 Self-Insured )  
 Employer-Petitioner )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT )  
 OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Employer's Motion to Dismiss and Granting Claimant's Motion for Withdrawal, and Order of Clarification and Denial of Employer's Petition for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Hayden S. Dent (Scruggs, Millette, Bozeman & Dent, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Joshua T. Gillelan II (Henry L. Solano, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.  
PER CURIAM:

Employer appeals the Decision and Order on Remand Denying Employer's Motion to Dismiss and Granting Claimant's Motion for Withdrawal, and the Order of Clarification and Denial of Employer's Petition for Reconsideration (93-LHC-7050) of Administrative Law Judge Richard D. Mills 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).

This is the second time this case is before the Board. To recapitulate, this case was one of approximately 3,000 cases filed by claimants who were allegedly exposed to asbestos during the course of their employment with employer. After the cases were transferred to the Office of Administrative Law Judges, employer filed a motion for summary judgment for the consolidated cases, and claimants were ordered to show cause why the motion should not be granted. Employer contended that claimants entered into third-party settlements without its prior approval and that, therefore, all were barred from seeking compensation under the Act pursuant to Section 33(g) of the Act, 33 U.S.C. §933(g). Claimants and the Director, Office of Workers' Compensation Programs (the Director), responded to the motions, arguing that there were issues of fact which needed to be resolved before it could be determined whether Section 33(g) could be invoked to bar claimants from seeking benefits under the Act. Specifically, they asserted that the administrative law judge needed to determine whether each claimant was a "person entitled to compensation" under Section 33(g) and whether each claimant received third-party settlement proceeds in amounts more or less than the amount to which each is entitled under the Act. Alternatively, the Director asked the administrative law judge to hold the cases in abeyance until various cases pending before the Board could be decided.

Relevant to the group of 750 of which the instant case was the lead, Administrative Law Judge C. Richard Avery granted employer's summary judgment motion based on the affidavit of William Jordan, a Senior Staff Attorney for employer, which averred that, without prior approval, each claimant entered into third-party settlements for less than the amount of compensation to which he would be entitled under the Act. Although claimants responded to employer's motion, they filed no rebuttal affidavits, and Judge Avery concluded that the facts of each case were as employer averred. He then purported to apply the law as set forth in *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49 (CRT)(1992), *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*,

512 U.S. 1219 (1994), and *Villanueva v. CNA Ins. Companies*, 868 F.2d 684 (5th Cir. 1989), and determined that each claimant forfeited his right to compensation and medical benefits under the Act by virtue of the failure to comply with the requirements of Section 33(g). Consequently, Judge Avery granted employer's motion for summary judgment.

Claimants filed a motion for reconsideration, attaching the affidavit of Hayden S. Dent, counsel for claimants, who testified that claimants could be categorized into four different groups: those who have been diagnosed with a pulmonary disease but who have no disability; those who have a disability; those who died from causes relating to their pulmonary condition; and those who died from causes unrelated to their pulmonary condition. Based on the affidavit, claimants argued that there were unresolved issues of fact affecting the applicability of Section 33(g) to each claimant. Judge Avery summarily denied claimants' motion for reconsideration, concluding there was no compelling reason to alter the original decision.

On appeal, the Board, relying on its decision in *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS 254 (1994), *aff'd and modified on recon. en banc*, 30 BRBS 5 (1996)(Brown and McGranery, JJ., dissenting), held that it was improper for Judge Avery to grant employer's summary judgment motion, as there were unresolved issues of material fact in the cases before the Board. Specifically, the Board held that there were questions as to whether each claimant was a "person entitled to compensation" under Section 33(g) and whether each settled a third-party claim for less than or more than the amount of compensation to which he is entitled under the Act. The Board remanded the case for factual determinations as to whether each claimant was a "person entitled to compensation" under Section 33(g), and computations of the amount for which each claimant settled his third-party cases as compared with the workers' compensation entitlement for each claimant, exclusive of medical benefits, in order to determine the applicability of the Section 33(g)(1) bar. *Gladney v. Ingalls Shipbuilding, Inc.*, 30 BRBS 25 (1996)(McGranery, J., concurring).

Subsequent to the Board's decision, a pre-hearing conference was held, where Administrative Law Judge Richard D. Mills (the administrative law judge) decided, with the consent of the parties, that the instant case, along with 16 other cases, would proceed with a bifurcated hearing with the fundamental issue of whether the claimants were "persons entitled to compensation" under Section 33(g) to be decided prior to all other issues. At the hearing, the administrative law judge accepted the parties' stipulations, *inter alia*, that claimant worked for employer as a painter from 1967 to 1973, and again from 1982 to 1990, that he was diagnosed with an asbestos-related lung disorder on or about November 5, 1987, that claimant has

not been assigned a permanent impairment rating for this disorder, and that claimant does not at this time suffer from a loss of wage-earning capacity due to his occupational disease.<sup>1</sup> Jt. Ex. 1. It is undisputed that claimant, who filed a claim under the Act in 1988, entered into third-party settlements with various asbestos manufacturers and distributors from 1988 through 1991, without the written approval of employer. In his Decision and Order On Remand Denying Employer's Motion to Dismiss and Granting Claimant's Motion for Withdrawal (Decision and Order on Remand), the administrative law judge found that claimant is not a "person entitled to compensation" as he has not suffered a disability as a result of his work-related exposure to asbestos, and therefore, the Section 33(g)(1) bar is not applicable to his claim for benefits. In rendering his decision, the administrative law judge rejected employer's contention that the act of filing a claim for benefits causes one's right to benefits to vest. In addition, the administrative law judge rejected employer's contention that pursuant to the United States Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997), wherein the Court held that a claimant may be entitled to a nominal award under the Act even when he has not suffered a present loss in wage-earning capacity, claimant would be classified as a "person entitled to compensation" under Section 33(g). The administrative law judge found that *Rambo II* was meant to apply only to traumatic injury cases, not occupational injury cases, and moreover, that *Rambo II* was distinguishable since, unlike the claimant in *Rambo II*, claimant herein has not sustained a physical disability, much less established the likelihood of future economic harm therefrom. Next, pursuant to the Board's previous holdings in *Gladney* and *Harris*, the administrative law judge found that claimant's entitlement to medical benefits did not make him a "person entitled to compensation" under Section 33(g). Lastly, the administrative law judge granted claimant's request that his claim be withdrawn without prejudice, finding that claimant's request had met the criteria set forth in 20 C.F.R. §702.225 of the regulations.<sup>2</sup>

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<sup>1</sup>Employer conceded that there were asbestos products at its shipyard during claimant's periods of employment, but reserved the right to dispute that claimant was exposed to these products until such time that the claim proceeded to a hearing on the merits. See Jt. Ex. 1.

<sup>2</sup>In an Order of Clarification and Denial of Employer's Petition for Reconsideration, the administrative law judge corrected his previous statement in his Decision and Order on Remand that "for an occupational disease claimant to be considered 'disabled,' he must first be retired." In his subsequent Order, the administrative law judge found that an occupational disease claimant is only entitled to benefits, and thus becomes a "person entitled to compensation," when he either had a permanent impairment or an economic loss. The administrative law judge

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again rejected application of *Rambo II* to the instant case, finding that *Rambo II* can only apply to occupational disease claimants who would recover under a theory of permanent impairment without a loss of wage-earning capacity. Lastly, the administrative law judge rejected employer's argument that equity should require that claimant be deemed a "person entitled to compensation," finding that a plea to equity was insufficient to override the principle that courts must give effect to the clear meaning of statutes as written. See Order of Clarification and Denial of Employer's Petition for Reconsideration at 1-2.

On appeal, employer challenges the administrative law judge's determination that claimant is not a "person entitled to compensation" within the meaning of Section 33(g). Specifically, employer contends that although claimant has alleged no loss in wage-earning capacity, under *Rambo II*, claimant became a "person entitled to compensation" at the moment he sustained his work-related occupational injury, as claimant's occupational injury triggers his entitlement to a nominal award. In this regard, employer asserts that contrary to the administrative law judge's reasoning, Section 2(2) of the Act, 33 U.S.C. §902(2), makes no distinction between traumatic and occupational injuries, and that in either case, it is claimant's injury that vests claimant with his entitlement to benefits under the Act. Employer further asserts that the administrative law judge erred in finding, pursuant to the Board's holdings in *Gladney* and *Harris*, that entitlement to medical benefits does not make a claimant a "person entitled to compensation" pursuant to Section 33(g). Lastly, employer contends that equity requires that claimant be considered a "person entitled to compensation" in order to fulfill the purpose of providing employer with protection against low third-party settlements through the application of Section 33(g).

Claimant responds, urging affirmance of the administrative law judge's determination that he is not a "person entitled to compensation" under Section 33(g) of the Act; specifically, claimant contends that *Rambo II* is inapposite to the instant case. In the alternative, claimant challenges the constitutionality of Section 33(g), asserting that this section violates claimant's right to due process and equal protection. The Director also has filed a response brief, contending that pursuant to the law of the case doctrine, the Board's previous decision in this matter establishes that absent a finding that claimant suffered from a disability at the time he entered into the third-party settlements, claimant is not a "person entitled to compensation." The Director asserts that employer's reliance on *Rambo II* is misplaced, as that case stands for the proposition that an employee may have a permanent partial disability under the Act without a current loss in wage-earning capacity where he has demonstrated a likelihood of future harm, a showing which has not been made here. Alternatively, the Director argues that even if a diagnosis of an occupational disease alone would entitle claimant to a nominal award pursuant to *Rambo II*, Section 33(g) would not bar the instant claim as there has been no showing that the amount claimant received from his third-party settlements was less than the amount of a nominal award extended through his life expectancy. Employer replies to both claimant's and the Director's responses, reiterating its arguments raised in its appeal brief, asserting that claimant's constitutional challenges are without merit, and contending that the Director's application of the law of the case doctrine is in error since *Rambo II* constitutes an intervening change of law.

At the outset, we disagree with the Director's contention that the Board need

not consider the merits of employer's appeal of the administrative law judge's Decision and Order on Remand based on the "law of the case" doctrine. Under this doctrine, an appellate tribunal generally will adhere to its initial decision on an issue when a case is on appeal for the second time, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates that the initial decision was erroneous, or the first result was clearly erroneous and allowing it to stand would result in manifest injustice. *Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). In its previous decision in the instant case, the Board held that the administrative law judge erred in granting summary judgment without a determination in each of the cases as to whether claimant was a "person entitled to compensation" under Section 33(g). In arriving at its decision, the Board discussed *Harris*, a case where the Board held that with respect to occupational disease cases, a claimant who is a voluntary retiree does not sustain an "injury" until he is aware of the relationship between his disease, his employment, and his permanent physical impairment, and that a claimant who is not such a retiree must be aware of a work-related disease which has caused a loss in his wage-earning capacity. The Board held in *Harris* that this awareness must occur before one can be considered a "person entitled to compensation," thereby potentially invoking the Section 33(g) bar.<sup>3</sup> In *Gladney*, the Board concluded that resolution of this issue requires findings

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<sup>3</sup>The administrative law judge appears to have misunderstood the Board's decisions in *Harris* and *Gladney*. In his Decision and Order on Remand, the administrative law judge stated that in these decisions, the Board equated the sustaining of an injury with entitlement to compensation. See Decision and Order on Remand at 7-8. This is not the case. In fact, in discussing the time of injury in occupational disease cases, the Board held that an injury does not occur merely because a person has been exposed to an injurious substance, but occurs when the claimant is aware of the relationship between his employment, his disease and his disability, which in the case of a retiree is a permanent physical impairment. *Harris*,

of fact, and that the administrative law judge's failure to ascertain these facts and granting employer's motion for summary judgment was erroneous. *Gladney*, 30 BRBS at 27.

At the hearing on remand, the parties stipulated that claimant, who is not a voluntary retiree, has not been assigned an impairment rating and does not suffer from a loss in wage-earning capacity due to his asbestos-related occupational disease. See Decision and Order on Remand at 4. On appeal, employer contends that claimant became entitled to compensation, and thus a "person entitled to compensation," at the time of his alleged exposure to injurious stimuli. In essence, employer contends that *Harris* and *Gladney* were wrongly decided by the Board, and thus should be overruled, a contention which employer maintains is supported by the Supreme Court's decision in *Rambo II*, issued subsequent to the Board's decision in *Gladney*. As it did before the administrative law judge on remand, employer contends that *Rambo II* constitutes an intervening contrary decision which requires a determination that claimant is a "person entitled to compensation" under Section 33(g). In view of the fact that the law of the case doctrine is not a rule of law but, rather, a discretionary rule of practice used to promote finality in the adjudication process, see *Williams*, 22 BRBS at 237, and in light of employer's contentions on appeal, we will address employer's contentions raised on appeal, including its assertion that the Supreme Court's holding in *Rambo II* compels a determination that Section 33(g) bars claimant's claim for benefits.

Section 33(g), as amended in 1984, states:

(1) If the person entitled to compensation .... enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed ....

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer

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30 BRBS at 11; see also *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (CRT)(4th Cir. 1998).

of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. §933(g)(1), (2)(1994). In his Decision and Order on Remand, the administrative law judge reasoned that the purpose of *Rambo II* was to extend the time limit for applying for benefits under the Act for employees who suffered traumatic injuries and are likely to suffer economic loss in the future. The administrative law judge concluded that *Rambo II* was not meant to be applied to occupational injury cases, since there is no need to stretch the filing time until economic loss or disability is realized as a claimant with an occupational disease injury does not need to file for benefits until a disability is realized. See Decision and Order on Remand at 9-10; 33 U.S.C. §913(a), (b)(2).<sup>4</sup> Moreover, the administrative law judge determined that in order for claimant to be entitled to a nominal award, he must at least have a permanent impairment that has the potential to cause economic loss. In the instant case, the administrative law judge acknowledged that claimant has not yet been assigned an impairment rating and on his LS-203 claim form, answered "not applicable" in response to the question of whether he was disabled due to his injury. See Cl. Ex. 1. Lastly, the administrative law judge rejected employer's contention that claimant's right to compensation has vested by virtue of the fact that his injury entitles him to medical benefits, noting that Section 33(g)(1) uses only the term "compensation," while Section 33(g)(2) applies to both compensation and medical benefits. For the reasons set forth below, we affirm the

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<sup>4</sup>Under Section 13(a) of the Act, a claim for a traumatic injury must be filed within one year after the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. 33 U.S.C. §913(a). For occupational injury cases, a claim is timely filed within two years after the employee becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. §913(b)(2).

administrative law judge's determination that claimant is not a "person entitled to compensation," and therefore, that Section 33(g) does not bar claimant's claim for benefits.

Initially, we reject employer's assertion that claimant became a "person entitled to compensation" at the time of his alleged exposure to harmful materials at employer's facility. In its initial decision in *Harris*, the Board addressed application of the Supreme Court's decision in *Cowart*, which addressed Section 33(g) in the context of a traumatic injury which immediately resulted in disability, to occupational disease cases, in which there is no specific date of injury. The Board discussed the case law developed prior to the 1984 Amendments that attempted to provide a specific date of injury in cases of occupational diseases resulting from long-term exposure to injurious stimuli with long latency periods. See, e.g., *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (1981)(Smith, C.J., concurring)(Miller, J., dissenting); *Stark v. Bethlehem Steel Corp.*, 6 BRBS 600 (1977), *aff'd on recon.*, 10 BRBS 350 (1979). In *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), the United States Court of Appeals for the Ninth Circuit held that an "injury" occurs for purposes of calculating the average weekly wage at the time that the disease manifests itself through a loss in earning capacity. Thereafter, the statutory changes in 1984 codified this manifestation definition of "time of injury." See 33 U.S.C. §910(i);<sup>5</sup> see also *SAIF Corp./Oregon Ship Repair v. Johnson*, 908 F.2d 1434, 23 BRBS 113 (CRT)(9th Cir. 1990). Thus, the Board in *Harris* rejected the argument that an injury occurs upon exposure to an injurious substance; the Board held that in occupational cases, the employee does not sustain an injury under the Act until he is aware of the relationship between the disease, the disability and the employment, and that in order to be "aware" of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity, or, if he is a voluntary retiree, a permanent physical impairment. See *Harris*, 28 BRBS at 262, *aff'd on recon.*, 30 BRBS at 9.

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<sup>5</sup>In computing average weekly wage for death or disability due to occupational disease, Section 10(i) provides:

For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reasons of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. §910(i)(1994).

The intervening case law supports the holding that a claimant sustaining an occupational disease is not a “person entitled to compensation” until he or she has sustained a disability. In addressing the meaning of this phrase in *Cowart*, the Supreme Court held that an employee becomes a person entitled to compensation at the moment his right to recovery vests, and not when an employer admits liability. *Cowart*, 505 U.S. at 477, 26 BRBS at 52 (CRT). The Court stated that the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the rights have been acknowledged or adjudicated, but only upon the person’s satisfying the prerequisites attached to the right. *Id.* Sustaining a disability as defined in the Act, 33 U.S.C. §902(10), is a necessary prerequisite to an award of compensation. Under *Cowart*, therefore, a person cannot be considered to be a “person entitled to compensation” until he has a loss in earning capacity or, in the case of a voluntary retiree, a permanent impairment.

Since the Board issued its decisions in *Harris*, the Supreme Court has revisited Section 33(g), reaching a result consistent with this analysis. Applying *Cowart*, in *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5 (CRT)(1997), the Court held that a widow was not a “person entitled to compensation” prior to the date of her husband’s death, as only then did she satisfy the necessary prerequisites to an award of death benefits. In describing its holding in *Cowart*, the Court stated that Cowart had “satisfied the prerequisites for obtaining permanent disability benefits in that case when he was injured,” and thus was a “person entitled to compensation” at the time of the third-party settlements. *Id.*, 519 U.S. at 256-257, 31 BRBS at 8 (CRT). By contrast, in the present case, claimant has not satisfied the prerequisites to an award of permanent disability benefits, as the parties have stipulated that he has no loss in earning capacity or permanent impairment rating as a result of his occupational disease.

Most recently, in *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205 (CRT)(4th Cir. 1998), the United States Court of Appeals for the Fourth Circuit considered when a claimant who had suffered an occupational disease became a “person entitled to compensation.” In that case, the employee was exposed to asbestos during the course of his employment with the employer. In 1988, he was diagnosed with asbestosis and filed a civil suit against several asbestos manufacturers, but continued to work full time until his retirement in 1993 and part-time thereafter. In 1994, the employee was diagnosed with advanced mesothelioma and died later that year. Between 1988 and 1994, the employee and his wife entered into several third-party settlements without the written approval of employer. The court rejected the employer’s contention that the employee became a “person entitled to compensation” either at the time of his last exposure to asbestos in 1976,

or at the time of his asbestosis diagnosis in 1998. First, the court, citing *Harris*, held that the Act provides a right of recovery not for mere exposure to a potentially harmful stimulus, but only for an actual disability arising from such exposure. Since the employee had suffered no injury at the time of his last exposure in 1976, his right to recovery had not vested and thus, he could not have become a “person entitled to compensation” in 1976. *Sain*, 162 F.3d at 816, 32 BRBS at 207 (CRT). Second, the court rejected the employer’s assertion that the employee became a “person entitled to compensation” at the time he was diagnosed with asbestosis in 1988, holding that the employee’s mesothelioma was distinct from his asbestosis. Accordingly, for the reasons set forth in these opinions, employer’s contention herein that claimant became a “person entitled to compensation” at the time of his exposure to injurious stimuli is rejected.

Employer further asserts that claimant’s exposure to injurious stimuli triggered his entitlement to medical benefits, and thus, claimant became a “person entitled to compensation” in this respect. We disagree. In *Harris*, the Board held that receipt of medical benefits alone does not make a claimant a “person entitled to compensation,” noting that Section 33(g)(1) uses the term “compensation” alone, while the forfeiture provision in Section 33(g)(2) refers to compensation and medical benefits, indicating that the two terms have different meanings.<sup>6</sup> This usage of terms in Section 33(g) is consistent with long-standing precedent that the term “compensation” in various sections of the Act is generally used to describe periodic monetary payments for disability, and it does not include medical payments. See *Marshall v. Pletz*, 317 U.S. 383 (1943); *Bethlehem Steel Corp. v. Mobley*, 920 F.2d 558, 24 BRBS 49 (CRT)(9th Cir. 1990), *aff’g* 20 BRBS 239 (1988). Thus, while a claimant need not be disabled to be entitled to medical benefits, see, e.g., *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993),<sup>7</sup> such an employee is not a “person entitled to compensation.”

This construction also finds support in *Sain*. Under Section 33(g), in order for

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<sup>6</sup>The Board held in *Harris* that the plain language of Section 33(g)(1) refers to a person entitled to *compensation* and requires comparison of the amount of *compensation* to the settlement amount in order to determine whether the Section 33(g)(1) bar applies, whereas Section 33(g)(2) requires a forfeiture of *compensation and medical benefits* where an employee fails to notify the employer of a third-party settlement. *Harris*, 30 BRBS at 12.

<sup>7</sup>A claimant does, however, have to establish some physical harm, *i.e.*, that something has gone wrong with the human frame. See *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

a claimant's entitlement to compensation to be barred, the amount of the third-party settlement must be less than claimant's compensation entitlement. Thus, in *Harris*, the Board held that a comparison must be made between the gross amount of the claimant's aggregate third-party settlement recoveries and the amount of compensation, exclusive of medical benefits, to which he would be entitled under the Act. In an occupational disease case similar to *Harris* and the instant case, the Fourth Circuit in *Sain* adopted the Board's reasoning in *Harris*. Applying the canon of statutory construction that inclusion of particular language in one section of a statute suggests that omission of such language in another section was intentional, the court held that medical benefits are not to be taken into account in the Section 33(g)(1) calculation, since the term "medical benefits" is used in Section 33(g)(2) but not in Section 33(g)(1).<sup>8</sup> *Sain*, 162 F.3d at 818-819, 32 BRBS at 209 (CRT). Accordingly, employer's contention that claimant's entitlement to medical benefits makes claimant a "person entitled to compensation" is rejected.

Lastly, employer contends that pursuant to the reasoning of *Rambo II*, claimant's exposure to injurious stimuli triggered his right to a nominal award, and therefore, claimant's right to recovery vested. Although the parties stipulated that claimant has not suffered a loss in wage-earning capacity, employer contends that under the reasoning of *Rambo II*, claimant is a "person entitled to compensation" as his diagnosis of an occupational disease alone entitles him to a nominal award of compensation as well as to medical benefits. Employer's contention fails, however, as it rests on a fundamental mischaracterization of the holding in *Rambo II*.

In *Rambo II*, the Supreme Court considered the case of an employee who had suffered work-related injuries to his back and leg, and was eventually given a 22.5 percent permanent partial disability rating, but was subsequently able to obtain employment with a higher salary. The Court discussed the factors to be addressed under Section 8(h) of the Act, 33 U.S.C. §908(h), which includes "the effect of disability as it may naturally extend into the future." Giving effect to this provision,

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<sup>8</sup>The court in *Sain* rejected the employer's contention that the net amount of the third-party settlements, not the gross amount, should be used in the Section 33(g)(1) calculation. See also *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52 (CRT) (3d Cir. 1995), *aff'g and rev'g* 28 BRBS 20 (1994); *Harris*, 30 BRBS at 16.

the Court held that although the employee's injuries had not diminished his present wage-earning capacity, he could be entitled to a nominal award if there is evidence of a significant potential that the injury will cause diminished earning capacity under future conditions. *Rambo II*, 521 U.S. at 138, 31 BRBS at 61 (CRT).

In his response brief, the Director agrees with the administrative law judge's conclusion that *Rambo II* was not meant to be applied to occupational disease cases, arguing that occupational disease cases that have not yet resulted in any disability should not be treated the same as traumatic injury cases where a permanent impairment has been established. According to the Director, *Rambo II* was meant to protect traumatic injury claimants who had a likelihood of a future loss in wage-earning capacity from the effects of Section 22, who, if not for an on-going nominal award, would not be allowed to file a motion for modification more than one year after the denial or termination of benefits. While this interpretation of the underlying policy concerns may well be correct, the fact is that nominal awards have been available to claimants suffering occupational diseases in cases with the appropriate facts. See *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989) (where claimant sustained a permanent injury in the form of a progressive obstructive lung disorder and continued to work with no current economic loss, the court held that a *de minimis* award must be considered). The central issue in determining whether a claimant is entitled to a nominal award is not the specific type of injury but rather, whether there is evidence that claimant will likely suffer future economic loss as a result of the injury.

In *Sain*, the Fourth Circuit considered the effect of *Rambo II* on whether an employee who had suffered an occupational injury was considered a "person entitled to compensation" at the time he entered into unauthorized third-party settlements. Rejecting the employer's contention, the court held that *Rambo II* was unavailing to the employer as it had failed to establish that, at the time of the diagnosis of the employee's asbestosis, there was a significant potential that the injury would cause diminished wage-earning capacity in the future, as required by *Rambo II*. *Sain*, 162 F.3d at 817, 32 BRBS at 207-208 (CRT). Because the employee was not entitled even to a nominal award under the Act at the time of his asbestosis diagnosis, the court held that the employee did not become a "person entitled to compensation" until his diagnosis of mesothelioma in 1994. *Id.* Thus, the settlements entered into prior to this date did not bar the claim.

In the present case, as in *Sain*, employer has not established that claimant is entitled to a nominal award. Contrary to employer's contention, the mere diagnosis of an occupational disease does not entitle claimant to a nominal award; this argument, in fact, is clearly contrary to the holding in *Rambo II*. Rather, pursuant to

*Rambo II*, in order to be entitled to such an award, the proponent must prove that there is a significant possibility of a future economic harm. In the instant case, the parties stipulated that claimant has not at this time suffered any loss of wage-earning capacity as a result of his asbestos-related occupational injury. Employer cites no evidence which would establish the significant possibility that claimant's injury will cause diminished wage-earning capacity in the future as required by *Rambo II*. See, e.g., *Buckland v. Department of the Army/NAF/CPO*, 32 BRBS 99 (1997). Rather, the fact that claimant has yet to be assigned even an impairment rating based on asbestos exposure indicates that employer cannot make such a showing.<sup>9</sup> For these reasons, claimant's right to recovery has not vested, and therefore, employer's assertion that the Supreme Court's holding in *Rambo II* compels a determination that claimant is a "person entitled to compensation" within the meaning of Section 33(g) is rejected.<sup>10</sup>

Lastly, we reject employer's assertion that since the purpose of Section 33(g) is to protect employer, equity dictates that claimant be deemed a "person entitled to compensation." As the administrative law judge determined, a plea to equity is insufficient to override the principle that courts must give effect to the plain meaning

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<sup>9</sup>It is noted that claimant herein was terminated by employer after being out of work for 17 months due to tuberculosis, and is still unable to return to work due to this disease. Cl. Ex. 4 at 14-17.

<sup>10</sup>The Director contends that assuming *Rambo II* would define claimant as a "person entitled to compensation," employer has not shown that a nominal award, over the course of claimant's life expectancy, is greater than the amount of the proceeds of the third-party settlements, and thus, Section 33(g)(1) would not bar claimant's claim in any event. See Director's Brief at 5. Inasmuch as we affirm the administrative law judge's determination that claimant is not a "person entitled to compensation" under Section 33(g), we need not address the Director's contention.

of Section 33(g).

We note that upon rejecting employer's contention that claimant's claim is barred by Section 33(g), the administrative law judge granted claimant's motion to withdraw his claim without prejudice. 20 C.F.R. §702.225. This finding is not challenged on appeal, and therefore is affirmed. See generally *Ingalls Shipbuilding, Inc. v. Director, OWCP [Boone]*, 102 F.3d 1385, 31 BRBS 1 (CRT)(5th Cir. 1996).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Employer's Motion to Dismiss and Granting Claimant's Motion for Withdrawal, and Order of Clarification and Denial of Employer's Petition for Reconsideration are affirmed.<sup>11</sup>

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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<sup>11</sup>In light of our decision herein, we decline to address claimant's challenge to the constitutionality of Section 33(g).