BRB Nos. 99-0355
and 99-0355A

JOSEPH T. FLANAGAN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
McALLISTER BROTHERS, INCORPORATED	)	DATE ISSUED: Dec. 23, 1999
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Benefits, the Order Denying Employer/Carrier's Request for Reconsideration, and the Decision and Order Awarding Attorney Fees and Expenses of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Donald E. Wallace (MacDonald & Wallace), Quincy, Massachusetts, for claimant.

Keith L. Flicker and Robert N. Dengler (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

Mark Reinhalter (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: SMITH and BROWN, Administrative Appeals Judges, and NELSON,

Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order-Awarding Benefits, the Order Denying Employer/Carrier's Request for Reconsideration, and the Decision and Order Awarding Attorney Fees and Expenses (97-LHC-1848) of Administrative Law Judge Lawrence P. Donnelly 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).

Claimant began work for employer in 1964 as a dockhand aboard tugboats primarily operating out of New York Harbor. In 1969, he was promoted to assistant port captain and given an office in employer's shipyard. His work took him to the dock areas almost every day as well as into old buildings in the shipyard which had exposed pipes covered by deteriorating material which appeared to be asbestos. He also inspected the results of repairs of vessels and installations of new equipment on vessels at the shipyard and was present during the removal of old materials from the vessels, some of which was asbestos. His duties remained the same after he was promoted to port captain at the shipyard. He left employer's employ in December 1973. Subsequently, claimant went to work as a mate and then a captain on tugboats for several other employers and as a third mate on ocean-going vessels through the American Maritime Officers Association. After he left work with employer, the administrative law judge found that any exposure to asbestos claimant may have had would have been as a member of a ship's crew. Claimant has not worked since he took ill in February 1996 on his arrival at a port in England to assume duties as a ship's officer. He was diagnosed at that time with bronchitis and subsequently received a doctor's report of an x-ray indicating pleural asbestosis. Claimant sought permanent total disability benefits under the Act.

In his decision, the administrative law judge found the evidence sufficient to establish invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant suffers from a work-related respiratory condition. In weighing the evidence as a whole, the administrative law judge accorded Dr. Baker's opinion that claimant suffers from work-related asbestosis, as well as from chronic obstructive pulmonary disease (COPD) due to cigarette smoking, greater weight than the opinion of Dr. Morris that claimant does not have asbestosis and suffers only from smoking-related COPD. The administrative law judge also found that the uncontested evidence of record establishes that claimant is permanently totally disabled from any form of gainful employment. The administrative law judge found that employer was the

last covered employer to expose claimant to injurious stimuli and thus is the responsible employer. In addition, the administrative law judge found that claimant filed suit against third parties for his asbestos-related condition and settled these claims without the prior written approval of employer, and that, as the amounts received in settlement were considerably less than claimant would be entitled to under the Act,[1] claimant has forfeited his right to disability benefits under the Act pursuant to Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). However, the administrative law judge held that medical benefits are not forfeited pursuant to Section 33(g)(1). Thus, the administrative law judge awarded reasonable and necessary medical expenses associated with claimant's work-related respiratory condition pursuant to Section 7(a) of the Act, 33 U.S.C. §907(a).

Upon employer's motion for reconsideration, the administrative law judge again found that claimant's entitlement to medical benefits is not forfeited pursuant to Section 33(g)(1). Thereafter, the administrative law judge awarded claimant's counsel an attorney's fee of $10,500, plus $1,219.25 in expenses. The attorney's fee awarded represented two-thirds of the amount requested by claimant's counsel, based on claimant's limited success.

On appeal, employer contends that the administrative law judge erred in finding that claimant's entitlement to medical benefits was not also forfeited by his failure to comply with Section 33(g)(1). Employer further contends that the administrative law judge erred in finding that claimant's pulmonary disability is due at least in part to exposure to asbestos, and in finding that employer is the responsible employer. Lastly, employer contends that claimant's counsel is not entitled to an attorney's fee and costs if the award of medical benefits is reversed. Claimant responds, urging affirmance of the administrative law judge's decision on these issues.

On cross-appeal, claimant contends that the administrative law judge erred in finding that his compensation benefits are forfeited pursuant to Section 33(g)(1), averring that employer did not establish that it did not approve the third-party settlements and that the third-party suits were for exposure to asbestos claimant sustained while in employer's employ. In addition, claimant contends that employer is liable for a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), if the Board agrees that claimant should have been awarded permanent total disability benefits. The Board ordered the Director, Office of Workers'

[1]On August 27, 1996, claimant received $1,200 from the Babcock & Wilcox Company (Babcock), and on March 4, 1997, received $400 from UNR Asbestos-Disease Claims Trust (UNR).

Compensation Programs (the Director), to file a brief addressing the Section 33(g) issues in this case. He contends that employer did not satisfy its burden of establishing that Section 33(g) bars claimant's claim, and that, at a minimum the case should be remanded for a determination of whether claimant was a "person entitled to compensation" at the relevant time.

SECTION 33

On appeal, employer contends that the administrative law judge erred in finding that medical benefits are not subject to the forfeiture provisions of Section 33(g)(1). On cross-appeal, claimant contends that the administrative law judge erred in finding Section 33(g)(1) applicable at all in the instant case, as he contends employer did not satisfy its burden of proof in establishing that claimant did not obtain written approval of the settlements. The Director agrees with employer's position on the issue it raises, but contends that Section 33(g) is not applicable in this case, as employer did not establish the elements of its affirmative defense.

Section 33 is generally designed to foreclose injured employees from double recoveries where they receive both benefits under the Act and civil damages from a successful negligence action. Section 33(g) provides a bar to claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining employer's prior written consent.[2] 33 U.S.C. §933(g); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469,

[2]Specifically, Section 33(g) provides:

> (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 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.

26 BRBS 49(CRT) (1992). The section is intended to ensure that employer's rights are protected in a third-party settlement and to prevent claimant from unilaterally bargaining away funds to which employer or its carrier might be entitled under 33 U.S.C. §933(b)-(f). *See I.T.O Corp. of Baltimore v. Sellman*, 954 F.2d 239, 25 BRBS 101(CRT) (4th Cir.), *modified on reh'g*, 967 F.2d 971, 26 BRBS 7 CRT) (4th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993).

In *Barnes v. Liberty Mutual Ins. Co.*, 30 BRBS 193 (1996), the Board addressed the issue of which party bears the burden of proof under Section 33(g). The Board noted that in *Mallott & Peterson v. Director, OWCP [Stadtmiller]*, 98 F.3d 1170, 30 BRBS 87(CRT) (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1824 (1997), the United States Court of Appeals for the Ninth Circuit placed the burden on employer of proving that an attorney was in fact acting as the claimant's agent for purposes of entering into a third-party settlement. Moreover, the burden is on employer to establish apportionment of any third-party settlement for purposes of its credit under Section 33(f), 33 U.S.C. §933(f). *See Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998)*; Sellman*, 967 F.2d at 971, 26 BRBS at 9(CRT); *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991). The Board thus concluded in *Barnes* that employer bears the burden of proving that claimant entered into fully executed settlements without its prior written approval in order to bar claimant's receipt of future benefits as Section 33(g) is an affirmative defense. *Barnes*, 30 BRBS at 196.

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33 U.S.C. §933(g)(1), (2)(1994).

In the instant case, the administrative law judge found that there is no evidence of record and no allegation by claimant that he obtained written approval from employer prior to executing the third-party settlements. This finding places the burden of proof on claimant to establish compliance with Section 33(g) rather than on employer to establish claimant's non-compliance. *Id.* As the administrative law judge properly found, however, although there is evidence that claimant entered into settlement agreements with Babcock and UNR, as well as testimony that he received the funds from those settlements, there is no affirmative evidence that employer did not approve the settlements. The sole evidence of record on this issue is claimant's testimony; when asked whether employer's written approval was obtained, claimant testified that he had "no knowledge" of that issue. H. Tr. at 68. Employer submitted no other evidence to establish that it did not give written approval of the settlement agreements. Thus, there is a complete lack of evidence that claimant did not obtain employer's written approval of the third-party settlements. Employer's argument that it cannot be made to prove a "negative fact" is not persuasive in the instant case. As the Director notes, employer failed to utilize routine discovery tools on the approval issue, or to produce its own witnesses to testify that approval was not sought or given. As the applicability of Section 33(g) is an affirmative defense for which employer produced no evidence, we reverse the administrative law judge's finding that the claim for compensation benefits is barred pursuant to Section 33(g).[3] *See generally Barnes*, 30 BRBS at 196.

SECTION 20(a)

Employer next contends that the administrative law judge erred in finding that claimant suffers from a work-related respiratory condition, namely asbestosis. Section 20(a), 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment if claimant established a *prima facie* case by proving that he suffered a harm and that working conditions existed which could have caused the harm. *See generally Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). In the instant case, the administrative law judge found that the evidence was sufficient to invoke the Section 20(a) presumption of a work-related respiratory condition based on Dr. Baker's diagnosis of asbestosis and claimant's credible and uncontroverted testimony that he was exposed to asbestos at employer's work place. This finding is not contested on appeal.

[3]As we reverse the administrative law judge's finding that the claim is barred by Section 33(g)(1), we need not address the additional contentions regarding Section 33(g) raised by the parties. *But see Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Goody v. Thames Valley Steel Corp.*, 31 BRBS 29 (1997), *aff'd mem. sub nom. Thames Valley Steel Corp. v. Director, OWCP*, 131 F.3d 132 (2d Cir. 1997) (table).

Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The administrative law judge stated that employer "has presented no evidence rebutting the Claimant's allegations of asbestos exposure while in the employ of McAllister Brothers," Decision and Order at 11, but nonetheless went on to weigh the conflicting medical evidence of record to determine whether claimant has a work-related component to his respiratory disability. *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). In this regard, employer challenges the administrative law judge's decision to give greater weight to the opinion of Dr. Baker than to that of Dr. Morris.

In the instant case, the administrative law judge recognized that Dr. Morris disagreed with Dr. Baker's conclusion that claimant suffers from asbestosis, as well as from COPD due to smoking. Dr. Morris opined that claimant does not have any restrictive lung disease or any asbestos-related condition, and is disabled due to COPD from heavy smoking. The administrative law judge resolved the conflict between the x-ray reading by Dr. Schonfeld, which was relied on by Dr. Baker, and the reading Dr. Morris made of chest x-rays taken at Brockton Hospital, by according greater weight to the reading by Dr. Schonfeld, as he is a NIOSH B-reader.[4] In addition, the administrative law judge was not convinced by Dr. Morris's opinion that the pulmonary function tests show no indication of a restrictive component to claimant's lung disease. The administrative law judge found that his opinion is outweighed by that of the administering physician, Dr. Goldstein, who found a restrictive component, and of claimant's treating physician, Dr. Ashburn, who diagnosed severe COPD and asbestos-related pleural lung disease after reviewing pulmonary function test results. Inasmuch as Dr. Baker's opinion that claimant suffers from restrictive lung disease secondary to asbestos exposure, as well as from COPD, is predicated on the credited x-ray reading and pulmonary function studies, the administrative law judge accorded greater weight to his opinion than to that of Dr. Morris.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to weigh the evidence. He is not bound to accept the opinion or theory of any particular medical examiner, but may draw his own inferences and conclusions from the

[4]Moreover, the administrative law judge noted that while Dr. Schonfeld is not a radiologist, he is a Board-certified in pulmonary disease and internal medicine in addition to his designation as a NIOSH B-reader. The administrative law judge found that Dr. Morris is neither a radiologist nor a B-reader.

evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). As the administrative law judge thoroughly reviewed the evidence of record and his finding is supported by substantial evidence, we affirm the administrative law judge's finding that claimant suffers from work-related asbestosis based on the opinions of Drs. Baker, Goldstein and Ashburn. Therefore, as Section 33(g) does not bar the claim and as the administrative law judge's finding that claimant is permanently totally disabled is not contested on appeal, we hold that claimant is entitled to permanent total disability benefits, as well as to the medical benefits awarded by the administrative law judge.[5]

RESPONSIBLE EMPLOYER

[5]Claimant contends on cross-appeal that if he is awarded disability compensation, he is entitled to an additional assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), which provides for employer's liability for an additional 10 percent of the award if employer did not timely pay benefits or controvert the claim. The parties stipulated that employer obtained knowledge of claimant's injury on October, 5, 1996, that it did not pay benefits or controvert the claim, and that an informal conference was held on April 19, 1997. In view of these stipulations, claimant may make application for assessment of a Section 14(e) penalty before the district director.

Employer lastly contends that it is not the responsible employer. The standard for determining the responsible employer was enunciated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), in which the court held that the last employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation. It is well-settled that employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that claimant was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *See, e.g., General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Maes v. Barrett & Hilp*, 27 BRBS 128, 131 (1993). That claimant may have been exposed to asbestos in subsequent employment does not affect employer's liability, as there is no contention that this employment was covered under the Act. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). As employer did not meet its burden of establishing it is not the last employer covered by the Act to expose claimant to injurious stimuli, we affirm the administrative law judge's finding that employer is liable for claimant's benefits.[6]

[6]In view of this decision, we reject employer's contention that it is not liable for claimant's attorney's fee. As claimant was successful on appeal, he is entitled to an attorney's fee for work performed before the Board. 33 U.S.C. §928. However, in order to be awarded a fee, counsel must file an application which conforms to the requirements of 20 C.F.R. §802.203.

Accordingly, the administrative law judge's finding that claimant's claim is barred pursuant to Section 33(g) is reversed. In all other respects, his decision is affirmed, and in light thereof, his decision is modified to reflect employer's liability for permanent total disability benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge