BRB No. 04-0316

SAMUEL B. TUCKER, JR. Claimant-Respondent v. THAMES VALLEY STEEL and HARTFORD INSURANCE COMPANY Employer/Carrier-Petitioners STANDARD STRUCTURAL STEEL and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 12/28/04 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Denying Special Fund Relief, the Errata, the Order Granting in Part and Denying in Part Motions for Reconsideration and Supplemental Decision and Order on Reconsideration, and the Order Denying Respondent Thames Valley Steel's Second Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Samuel B. Tucker, Waterford, Connecticut, *pro se*.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for Thames Valley Steel and Hartford Insurance Company.

Jean Shea Budrow (Latronico, Black, Cetkovic & Whitestone), Boston, Massachusetts, for Standard Structural Steel and Liberty Mutual Insurance Company.

Kathleen H. Kim (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Thames Valley Steel (TVS) appeals the Decision and Order Awarding Benefits and Denying Special Fund Relief, the Errata, the Order Granting in Part and Denying in Part Motions for Reconsideration and Supplemental Decision and Order on Reconsideration, and the Order Denying Respondent Thames Valley Steel's Second Motion for Reconsideration (2000-LHC-3381, 2000-LHC-3382, 2000-LHC-3383, and 2001-LHC-1667 through 2001-LHC-1676) of Administrative Law Judge Daniel F. Sutton rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the 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, through the union hall, worked as a welder/ironworker for a number of employers in the 1960's and 1970's. In the early 1980's, he became self-employed. In 1985, claimant was hospitalized between May 21 and August 26, suffering from a

[1]General Dynamics/Electric Boat Corporation and Insurance Company of North America and United States Steel were originally part of this case; however, the administrative law judge dismissed them from the case, and they did not respond to the appeal. Claimant, who, during the early proceedings was represented by three different attorneys at three different times but has been unable to retain counsel since 1999, is now proceeding without legal representation.

number of problems, including chronic ulcerative colitis, erosive gastritis, duodenal ulcer, recurrent fistula, rheumatoid arthritis, and diabetes. During the course of his stay, doctors discovered claimant also had splenomegaly, peritonitis, and a perforated cecum.[2] Additionally, claimant suffered from circulatory problems such as vasculitis and periarteritis nodosa. He underwent exploratory abdominal surgery, an appendectomy and a repair of the perforated cecum. Cl. Ex. 5rr; INA Ex. 4. Claimant did not return to any work, and he filed a claim with the Social Security Administration (SSA) for disability benefits. The SSA found claimant to be totally disabled due to chronic ulcerative colitis, arthritis and diabetes, and he began receiving benefits in 1986. Decision and Order at 10; Cl. Ex. 1ee, 2d; Tr. at 69.

Claimant has been hospitalized a number of times for colitis, arthritis, diabetes, sepsis, hypotension, cirrhosis, and splenomegaly. He testified that he began suffering from shortness of breath in 1985. Cl. Ex. 4a at 75. However, it was not until 1993 when he saw Dr. Cherniak, an occupational health specialist, that claimant first sought evaluation of his breathing problems. ALJ Ex. 62 at 80. Dr. Cherniak reported on April 1, 1993, that claimant's pulmonary function test results were consistent with a pattern of restrictive lung disease. He stated that claimant's x-rays revealed indisputable evidence of asbestos-related pleural disease with scarring on the lower lobe lining. INA Ex. 5.

Claimant filed a claim for disability and medical benefits against Electric Boat Corporation (EB) on May 18, 1993, alleging injury due to lung irritants, including asbestos. Cl. Ex. 1rr, vv. In March 2000, claimant filed additional claims against EB and other employers, including TVS, alleging he suffered from injuries to multiple organs related to exposure to asbestos and other hazardous substances, and from arthritis and thoracic outlet syndrome related to the use of vibrating tools and to crawling, kneeling, etc., during the course of his work. Claimant alleged he has been totally disabled from these occupational diseases since 1985. Decision and Order at 4-5; ALJ Ex. 1. The administrative law judge found that TVS is the employer responsible for permanent total disability benefits from May 21, 1985, and continuing, at the compensation rate of $298.39 per week, medical benefits, and interest. The administrative law judge dismissed the claims against EB, United States Steel (USS) and Standard Structural Steel (SSS). Decision and Order; Errata; Order on Recon; Order on 2nd M/Recon. TVS appeals the award, challenging a number of findings. SSS and the Director, Office of Workers' Compensation Programs (the Director), have filed response briefs.

[2]The bowel system diagnoses included inflammation and/or enlargement of the colon, stomach, spleen, walls lining the pelvis and abdomen, and intestines. Collectively, these ailments are called "inflammatory bowel disease" (IBD).

Coverage

TVS first contends the administrative law judge erred in finding claimant to be a maritime employee in 1977 when he last worked for TVS. Specifically, TVS argues that claimant was not working in maritime employment on a covered situs at that time and that the administrative law judge erred in relying on the Board's unpublished decision in *Bonin v. Thames Valley Steel Corp.*, BRB Nos. 93-1943/A (July 30, 1996), while rejecting the precedent set in *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting), *aff'd sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004). The administrative law judge found that claimant satisfied both the status and situs requirements during his employment at TVS. He found that claimant's work for TVS at the EB shipyard in Groton was covered and that, pursuant to *Bonin*, claimant's work in the fabrication shop in New London was also covered. Decision and Order at 13-14; Order on M/Recon at 8. He rejected TVS's assertion that *Cunningham* is controlling in this case. Order on M/Recon. at 8.

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee is a maritime employee under Section 2(3) and is not in an occupation specifically excluded by the Act. 33 U.S.C. §§902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996). The last employer covered under the Act to expose claimant to injurious stimuli is the employer responsible for the payment of benefits. *See, e.g., Newport News Shipbuilding & Dry Dock Co. v. Stilley* 243 F.3d 179, 35 BRBS 12(CRT)(4th Cir. 2001).

Claimant testified that he worked at TVS in two capacities: as a welder and as an ironworker. He worked both in TVS's fabrication shop at its facility in New London, Connecticut, and for TVS at the EB shipyard in Groton, Connecticut. At the shop, claimant worked as a welder fabricating components for placement on EB ships and submarines, and at the EB shipyard, he repaired overhead cranes. ALJ Ex. 26 at 57; Tr. at 185-186. He testified that his last work for TVS at EB occurred in 1973 and that his last work for TVS in 1977 was in the New London shop. ALJ Ex. 26 at 116; Tr. at 197. Claimant stated that he was exposed to asbestos stripheaters, as well as airborne substances from sanding, welding and grinding tools at the shop, ALJ Ex. 26 at 66, 86,

113-114, and he was exposed to asbestos at the EB facility from welding rods and paints.[3] ALJ Ex. 26 at 69-70, 73, 115.

Generally, an employee satisfies the "status" requirement if he is engaged in work integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96(CRT) (1989). In this case, claimant testified that he worked in TVS's shop fabricating tanks and other parts for EB to use in constructing submarines. ALJ Ex. 26 at 144-115; Tr. at 186-187, 198. The administrative law judge found that claimant was the only witness to give testimony regarding his work, Order on M/Recon. at 7; thus, this evidence is uncontested. As the fabrication of components used in shipbuilding constitutes maritime employment, we affirm the administrative law judge's finding that claimant's work in the TVS fabrication shop satisfies the Section 2(3) status requirement. *Alford v. American Bridge Div.*, 642 F.2d 807, 13 BRBS 268, *on reh'g*, 655 F.2d 86, 13 BRBS 837 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982); *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989); *Dennis v. Boland Marine & Manufacturing, Inc.*, 13 BRBS 528 (1981).

TVS also disputes the administrative law judge's finding that claimant worked on a maritime situs. Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

[3]There is no dispute over the administrative law judge's finding that claimant's work for TVS repairing cranes at EB is maritime employment. Decision and Order at 13 (citing *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977)); *see also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. INA v. United States Department of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). However, as the work at the fabrication shop was subsequent to his 1973 work repairing cranes at EB's facility, and claimant worked in other employment in the intervening years, the relevant employment for ascertaining coverage is the 1977 work at the New London fabrication shop.

33 U.S.C. §903(a). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). An area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Id.*; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *Cunningham*, 37 BRBS at 80.

With regard to the locale of the shop, claimant testified that it is located 200 to 300 feet from the Thames River, and the river is directly in front of the TVS facility. TVS's neighbors include a trash plant, a crane company, a beer distributor, and a residential neighborhood. Tr. at 182, 199-200. In addition, claimant testified that he did not know how the fabricated parts were transported from the TVS facility to EB, but he did know that no ships were built at the TVS facility, and he did not see any ships being loaded there. ALJ Ex. 26 at 130-132.

The administrative law judge found that claimant's work at the fabrication shop met the situs requirement, notwithstanding the mixed use of the area, pursuant to the Board's unpublished decision in *Bonin*. Decision and Order at 13-14. In his order on TVS's motion for reconsideration, the administrative law judge stated that there are some similarities between this case and *Cunningham*, but they are not sufficient to overcome the Board's holding in *Bonin* that TVS's fabrication shop is a covered situs. Order on M/Recon. at 7-8.

In *Bonin*, the claimant worked as a fitter for TVS in its steel fabrication shop. On appeal, the Board stated:

> the administrative law judge determined that the steel fabrication plant, which is across a street and some railroad tracks from the river, is a covered situs as it depended on its close proximity to the river for shipping the fabricated parts to General Dynamics, the site was not shown to be merely fortuitous, and the mixed use nature of the area does not necessarily prevent it from being a covered situs. We therefore affirm the administrative law judge's finding that the two sites [the plant and a waterfront storage area] where claimants' injury was alleged to have occurred are covered under Section 3(a) of the Act.

Bonin, slip op. at 4. Because *Bonin* discussed the same fabrication plant at issue in the current case, the administrative law judge considered it controlling.

Bonin is an unpublished decision, and the Board generally regards its unpublished decisions as lacking precedential value. *Lopez v. Southern Stevedoring*, 23 BRBS 275,

300 n.2 (1990). However, it was not unreasonable for the administrative law judge to have relied on the Board's holding in *Bonin* in this situation, as the same facility was at issue, claimant presented sufficient evidence to establish that his work was on a maritime situs because the shop is located in a maritime locale and the work performed therein is related to the construction of ships, and TVS did not put forth facts to establish that *Bonin* was wrongly decided. *See Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998).[4] Moreover, the administrative law judge properly found that the decision in *Cunningham* does not require a different result in this case.

In *Cunningham*, the claimant worked as a pipefitter at Bath Iron Works' East Brunswick Manufacturing Facility (EBMF), which is located in a mixed-use area 1,400 feet from the New Meadows River in Brunswick, Maine, and four to five miles from the main shipyard on the Kennebec River in Bath, Maine. Applying *Winchester* and *Herron*, and considering the decisions of the United States Court of Appeals for the First Circuit in *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), and *Stockman v. John T. Clark & Son*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), the Board held that EBMF is not an "adjoining area" within the meaning of Section 3(a).[5] Specifically,

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[4]In *Bonin*, the administrative law judge found that the TVS facility was dependent upon proximity to the Thames River to ship parts to EB. In this case, TVS submitted no evidence that it does not use the river at its facility. This case arises within the jurisdiction of the United States Court of Appeals for the Second Circuit and, under *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998), Section 20(a) applies to the facts relevant to coverage. Thus, if evidence of TVS's shipping arrangements were necessary, the burden would be on TVS to produce such evidence.

[5]In *Herron*, the United States Court of Appeals for the Ninth Circuit stated that consideration should be given to the following factors, among others, in determining if a site is an "adjoining area:"

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Herron, 568 F.2d at 141, 7 BRBS at 411; *see also Brown v. Bath Iron Works Corp.*, 22 BRBS 384, 387 (1989). The Ninth Circuit also stated that an "adjoining area" must have a functional relationship with navigable waters, but need not depend on physical

EBMF had a geographical relationship with the New Meadows River but had no functional relationship with that river, and it had a functional relationship with the shipyard on the Kennebec River, but it was "not within the perimeter of a general maritime area around the Kennebec River or the main shipyard[,]" so it had no geographical relationship with the Kennebec River. *Cunningham*, 37 BRBS at 82, 84. As a site must have a functional and a geographical nexus with the same body of navigable water, the Board held that EBMF was not a covered situs. *Id.* at 84-85.

The First Circuit affirmed the Board's decision. Although the court specifically rejected the United States Court of Appeals for the Fourth Circuit's restrictive definition of "adjoining area,"[6] and it "assumed without deciding" that the *Herron* approach is the correct one, the court agreed with the Board that EBMF is not a covered situs, as EBMF and the main shipyard are two separate facilities that do not exist in a common geographical area. Additionally, the court held that situs cannot be satisfied by establishing a functional relationship with one body of water and a geographical relationship with another. *Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT).

The administrative law judge here correctly noted that *Cunningham* is factually distinguishable. In *Cunningham*, there were two different bodies of water, whereas in the instant case both TVS and EB sit on opposite banks of the same river, the Thames River, and the fabrication shop is only 200 or 300 feet from that river. ALJ Ex. 26 at 130-132; Tr. at 198. In contrast to EBMF, the facility in question is in a common geographical area with the facility it supplies. Therefore, the shop satisfies the geographical element under *Winchester* and *Herron*.

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contiguity with those waters. Similarly, the United States Court of Appeals for the Fifth Circuit adopted an expansive test for determining whether an area is "adjoining." The Fifth Circuit stated that the perimeter of an area is to be defined by its function, that is, the area must be customarily used for maritime activity by any statutory employer, and that an area can be "adjoining" if it is "close to or in the vicinity of navigable waters, or in a neighboring area. . . ." *Winchester*, 632 F.2d at 514, 12 BRBS at 727. Thus, geography of the area and function of the area are of the utmost importance in determining whether a location is a covered situs. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 5 (2001) (*en banc*).

[6]The Fourth Circuit requires an "adjoining area" to be actually contiguous with navigable waters. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998); *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996).

Although the record in this case is not developed as to whether TVS itself used the Thames River at the time of claimant's employment, which would give TVS a functional relationship with the river on its own, the evidence is uncontradicted that the parts claimant fabricated in the TVS shop were transported to EB for use in EB's ship and submarine construction, and that EB's shipbuilding operation has a functional relationship with the Thames River. Thus, TVS has a relationship with the Thames River by virtue of its functional connection with EB on the same river. Under the law espoused in *Winchester*, *Herron* and *Cunningham*, TVS has both a functional and a geographic relationship with the same body of water and is a maritime situs. *See Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT); *see also Alford*, 642 F.2d 807, 13 BRBS 268; *Stockman*, 539 F.2d at 272, 4 BRBS at 315 (Army Base where claimant was injured while stripping a container offloaded at a terminal two miles away which had been transported by truck between the facilities was covered; both facilities adjoined the same navigable body of water and the work of the Base was significantly related to those waters); *Bonin*, slip op. at 4. Therefore, we affirm the administrative law judge's finding that claimant's work at TVS's fabrication shop in 1977 was on a covered situs.

Responsible Employer

TVS next contends it is not the employer responsible for claimant's benefits, alleging that claimant worked for SSS in 1978 in covered employment and was exposed to asbestos during that employment. SSS responds, arguing that claimant worked on a bridge in 1978, and that bridge workers are not covered by the Act. The administrative law judge found that claimant performed bridge work for SSS in 1978 and that bridge workers are not covered workers pursuant to *Crapanzano*, 30 BRBS 81. Decision and Order at 9, 14-15. Consequently, the administrative law judge found that claimant's work for TVS in 1977 was his last covered employment, such that TVS is the responsible employer under the Act. Decision and Order at 15.

TVS makes two arguments in favor of SSS being claimant's last longshore employer. First, it argues that the bridge work claimant performed in 1978 for SSS is covered because the Gold Star Bridge is a maritime structure aiding navigation, as there is no evidence it did not aid navigation. We reject this argument. The Supreme Court has held that a bridge, as a structure permanently affixed to land, is considered an extension of land and does not fall within pre-1972 jurisdiction. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *see Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). With regard to cases involving bridge workers following the 1972 amendments, the Board has generally held that such employees are not engaged in maritime work because bridges aid highway commerce. Only if the employees can establish either that their duties included working on or loading or unloading materials from vessels on navigable waters or that the bridge is being constructed to aid navigation could they be covered by the Act. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000); *Kehl v. Martin Paving Co.*, 34 BRBS 121

(2000); *Crapanzano*, 30 BRBS 81; *Johnsen*, 25 BRBS at 329; *Nold v. Guy F. Atkinson Co.*, 9 BRBS 620 (1979) (Miller, dissenting), *dismissed*, 784 F.2d 339 (9th Cir. 1986); *see LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983). Because the evidence established that the old and new spans of the bridge on which claimant worked were constructed to aid highway transportation, and there was no evidence to demonstrate that the bridge was built to aid navigation, the administrative law judge rationally found that claimant's bridge work is not covered employment. Decision and Order at 14.

TVS's second argument in favor of SSS's liability is that claimant welded ship components for EB while he was an employee of SSS, ALJ Ex. 26 at 67; therefore, because claimant worked for SSS after it worked for TVS, SSS should be the responsible employer. This argument is moot. The administrative law judge found, and TVS conceded it as likely, TVS Brief at 68, that claimant last worked on a bridge for SSS in 1978. As claimant's work in the TVS shop in 1977 is maritime employment, then, contrary to TVS's argument, only subsequent maritime work can relieve TVS of its liability; claimant's previous work for SSS at EB is irrelevant.[7] Because we have affirmed the administrative law judge's rational finding that claimant's 1978 work for SSS was non-maritime bridge work, that employment does not relieve TVS of liability. TVS remains claimant's responsible maritime employer. *Stilley*, 243 F.3d 179, 35 BRBS 12(CRT); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

Retirement and Disability

TVS alleges that the administrative law judge incorrectly labeled claimant's 1985 withdrawal from employment as "involuntary." It argues that there is no evidence to support the administrative law judge's finding that claimant's work-related lung condition played a role in claimant's departure from the workforce. Although claimant claimed that all of his medical conditions are related to his employment exposure to asbestos and other hazards and caused him to stop working, the administrative law judge found that only claimant's lung impairment is work-related.[8] Decision and Order at 16-

[7]For this reason, we need not address TVS's argument that the administrative law judge failed to recognize the vendor exclusion of Section 2(3)(D), 33 U.S.C. §902(3)(D). Claimant was not acting in the capacity of a "vendor" when he last worked for TVS.

[8]TVS contends that claimant's failure to attend scheduled medical evaluations, *see* discussion *infra*, deprived it of the ability to present medical evidence rebutting the presumption that claimant's lung condition is work-related, as the administrative law judge specifically noted that TVS failed to present rebuttal evidence. Nevertheless, the administrative law judge considered Dr. Teiger's report, submitted by EB, as potential rebuttal evidence, but he found that this report does not rebut the presumption that

19. On the record as a whole, the administrative law judge credited the opinion of Dr. Cherniak and found that claimant suffers from asbestos-related interstitial lung disease that was caused by his employment. Decision and Order at 22-23. Without a full explanation, however, he concluded that claimant cannot be considered a voluntary retiree because "the evidence establishes that he stopped work 'at least in part' " due to his occupational disease. Decision and Order at 24. TVS challenges this finding.

A claimant who is a voluntary retiree at the time he becomes aware of his condition is entitled to benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). *See* 33 U.S.C. §§902(10), 910(d)(2), (i). If claimant's condition played a role in causing his retirement, he is an involuntary retiree and entitled to the appropriate disability benefits for his loss in earning capacity. 33 U.S.C. §908(a), (b), (c), (e). Section 702.601(c) of the regulations defines the term "retirement" as occurring when a "claimant . . . has voluntarily withdrawn from the workforce and . . . there is no realistic expectation that [he] will return to the workforce." 20 C.F.R. §702.601(c); *see Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989). The Board has held that a claimant is a "voluntary retiree" if he withdraws from the workforce for reasons other than the condition that is the subject of the claim under the Act. *Hansen*, 31 BRBS at 157; *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990). Only if claimant's retirement were due, at least in part, to his occupational lung disease, would he be considered an involuntary retiree. *Hansen*, 31 BRBS at 157; *Pryor v. James McHugh Constr. Co.*, 18 BRBS 273 (1986).

Claimant ceased work in 1985. He was hospitalized from May 21 to August 26, 1985, due to his IBD. Cl. Ex. 5rr; INA Ex. 4.[9] A series of chest x-rays taken during his

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claimant's lung condition is work-related. Decision and Order at 22. He stated that "even if it is assumed that Dr. Teiger's opinion is sufficient to rebut the presumption[,]" then he gave greater weight to Dr. Cherniak's opinion. Decision and Order at 22. Even assuming Dr. Teiger's opinion was sufficient to rebut Section 20(a) since the administrative law judge weighed the evidence as a whole, any error he may have made on rebuttal is harmless. *See generally American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993).

[9]There are no respiratory disease diagnoses in the 1985 records. On examinations, claimant's throat and chest were found to be clear, and claimant denied having a sore throat, cough or chest pain.

stay revealed pneumonia and some pleural thickening.[10] Decision and Order at 11-12; Cl. Ex. 2s. The medical reports of record indicate that claimant continued to suffer from IBD throughout 1986 and 1987. INA Exs. 2-4. In 1986, claimant began receiving Social Security disability benefits after having been declared totally disabled by the SSA due to his chronic ulcerative colitis, arthritis, and diabetes. Decision and Order at 10; Cl. Ex. 1ee; Cl. Ex. 2d, t. The next medical records are from April 1992, when claimant underwent a chest x-ray showing calcified pleural plaques suggestive of asbestos exposure; in August, claimant was hospitalized for sepsis and hypotension. USS Ex. 6. Early in 1993, claimant underwent another x-ray, and his first visit to Dr. Cherniak was on April 1, 1993. Dr. Cherniak reviewed claimant's medical records, noted his history of exposure to asbestos, and diagnosed asbestos-related pleural disease based on claimant's low lung volumes and scarring on his left lower lobe lining. Cl. Ex. 1ff; INA Ex. 5. Over the next years, claimant underwent various tests and examinations involving his lungs, and on July 1, 1999, Dr. Cherniak concluded that claimant has 25 percent impairment to his lungs due to asbestos exposure. The administrative law judge credited the opinion of Dr. Cherniak. Decision and Order at 16-23.

As there is no evidence that claimant left his employment in 1985 due to his lung disease, we reverse the administrative law judge's conclusion that claimant was an involuntary retiree. The evidence in the record from 1985 consists of claimant's hospitalization and his SSA disability determination; nowhere does it state that claimant's work-related lung condition played any role in his retirement. There is no evidence establishing that the lung condition affected claimant's ability to perform his job, and the mere presence of pleural thickening in claimant's 1985 x-rays cannot support the administrative law judge's conclusion that claimant's retirement was in part due to his lung condition. *Ponder*, 24 BRBS at 51. Further, the SSA determination, while not controlling, was based on claimant's ulcerative colitis, diabetes and arthritis, and did not mention any level of lung impairment. Cl. Exs. 2d, 2t. Although claimant testified in 1996 as to his suffering from shortness of breath since 1985, and the administrative law judge credited this testimony, the record does not contain substantial evidence to support the administrative law judge's conclusion that claimant's work-related lung condition played a role in his decision to leave the workforce. Therefore, we hold that claimant is a voluntary retiree as a matter of law. *Morin*, 28 BRBS 205 (claimant was diagnosed with asbestos-related disease before his retirement but lack of evidence showing that he was medically impaired by the disease before his retirement made his retirement voluntary).

[10]The x-rays were taken of the chest and abdomen, and it appears claimant suffered a collapsed lung. Claimant's heart, diaphragm and abdominal organs were also addressed.

As claimant is a voluntary retiree, it follows that the administrative law judge's award of permanent total disability benefits also must be reversed, *see Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989), and claimant's entitlement determined under Section 8(c)(23). In this regard, TVS contends the administrative law judge erred in awarding benefits to claimant from May 21, 1985, as claimant's work-related disability did not commence on that date. As we have held that claimant's 1985 retirement was not related to his lung disease, we cannot affirm this onset date and must remand this case for reconsideration. Under Section 8(c)(23), claimant is entitled to benefits from the date his work-related permanent impairment commenced. *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998), and 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002); *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988). The mere diagnosis of an occupational disease does not constitute a disability, *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Morin*, 28 BRBS 205, and x-ray evidence showing pleural thickening does not establish the commencement date for a permanent partial disability, *Ponder*, 24 BRBS at 51. Because the administrative law judge did not address the onset date of claimant's impairment in relation to his status as a voluntary retiree, we remand this case for the administrative law judge for consideration of this issue.

Similarly, we agree with TVS that the administrative law judge erred in awarding permanent total disability benefits based on claimant's average weekly wage from the years 1979 and 1980. As a voluntary retiree whose occupational disease became manifest subsequent to his retirement, claimant's recovery under Section 8(c)(23) is limited to permanent partial disability benefits based upon the extent of medical impairment determined pursuant to the American Medical Association guidelines. 33 U.S.C. §§902(10), 908(c)(23); *Hansen*, 31 BRBS at 157; *Morin*, 28 BRBS at 208. On remand, the administrative law judge must use the National Average Weekly Wage in effect on claimant's date of awareness, as determined pursuant to Section 10(d)(2), (i), to compute claimant's permanent partial disability benefits. 33 U.S.C. §910(d)(2)(B), (i); *Lafaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS at 108(CRT) (2d Cir. 1989); *Stone v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 1 (1987).

Timeliness of the Claim against TVS

TVS also argues that the administrative law judge erred in finding that the claim against it was filed in a timely manner. Specifically, TVS argues that claimant knew of its potential liability long before he filed a claim against TVS in March 2000 because: claimant filed the claim against EB in 1993, Cl. Ex. 1rr; he was informed by the claims examiner in 1996 that other subsequent employers could have potential liability, Cl. Ex. 1q; he stated he was told by his attorney not to mention exposure at TVS in his 1996 deposition, ALJ Ex. 26 at 112-113; he filled out an LS-203 claim form against TVS (allegedly in 1997) but did not file it, Cl. Ex. 5ff; TVS Brief at 92; and, he discharged his

attorney in 1997 for failing to file claims against all potentially liable parties, Cl. Ex. 1aa. Therefore, TVS asserts that, pursuant to the holdings in *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986), claimant should have known to file a claim against it no later than 1997, making the claim filed in 2000 untimely.

Although claimant ceased working in 1985, the administrative law judge found that the earliest date claimant could have been aware of the full extent of his condition was April 1, 1993, when Dr. Cherniak first evaluated him and related a lung condition to claimant's asbestos exposure at his previous places of employment. Decision and Order at 12; Cl. Ex. 2e. The administrative law judge found that claimant's first claim for compensation was filed on May 18, 1993, against EB and that this claim was timely filed. Decision and Order at 12. He also found that a claim against TVS was not filed until March 2000. Nevertheless, he found the claim timely filed as none of the employers produced evidence to rebut the Section 20(b), 33 U.S.C. §920(b), presumption. Moreover, the administrative law judge rejected TVS's suggestion that the memorandum of the September 6, 1996, informal conference contained sufficient information to make claimant aware of TVS's potential liability.[11] He noted that TVS itself pointed out that the first specific reference to TVS as a potentially liable party was a November 23, 1999, letter, and because claimant filed a claim against TVS within two years of that date, the claim was timely. Order on Recon. at 5-6. The administrative law judge summarily denied the second motion for reconsideration on this issue.

Section 13(b)(2) of the Act provides:

> Notwithstanding the provisions of subsection (a) of this section, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in

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[11]The memo, Cl. Ex. 1q, stated in pertinent part:

> It was determined at the informal conference that there is still considerable information that needs to be gathered before a meaningful decision can be made in this case. A deposition of the claimant should take place to determine if the considerable subsequent work history has any effect on the Longshore claim. There needs to be an exploration of the type of employment since there appears to be some potential for one or more of the subsequent employers to have Longshore involvement. A more detailed history of all asbestos exposure at all employers may also prove to have value.

> 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*, or within one year of the date of the last payment of compensation, whichever is later.

33 U.S.C. § 913(b)(2) (emphasis added).[12] Under this section, the statute of limitations in an occupational disease case where claimant is a voluntary retiree begins to run on the date claimant knew or should have known of the relationship between his employment, his disease and his permanent impairment. *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989); *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). Pertinent to the date of awareness, Dr. Cherniak first diagnosed a lung disease in 1993, but he did not give claimant an impairment rating until 1999.

Claimant, therefore, could not have been aware of the relationship between his employment, his disease *and his disability*, *i.e.*, his permanent impairment, until July 1999 at the earliest. Therefore, he had two years from July 1, 1999, within which to file a claim, so his claim against TVS, filed in March 2000, was filed in a timely manner.[13] 33 U.S.C. §913(b)(2); *Love*, 27 BRBS 148; *Lombardi*, 22 BRBS 323; *Curit*, 22 BRBS 100. Consequently, we affirm the administrative law judge's determination that the claim was timely filed, albeit on grounds other than those expressed by the administrative law judge.

Section 8(f)

TVS next challenges the administrative law judge's denial of Section 8(f), 33 U.S.C. §908(f), relief. The administrative law judge found that TVS failed to prove the existence of medical records at the time of claimant's employment with TVS, as the earliest medical records in evidence date to May 21, 1985, when claimant was admitted

[12]The administrative law judge found that the respondents conceded the applicability of Section 13(b)(2) to this case. Decision and Order at 11. As only claimant's lung condition is work-related, Section 13(b)(2) is the applicable section.

[13]As the claim against TVS complies with Section 13(b)(2), it is unnecessary to address TVS's arguments regarding the *Smith* and *Osmundsen* holdings. Moreover, there is no evidence establishing that TVS filed a Section 30(a) first report of injury form. Where an employer fails to file such report the time for filing a claim for compensation is tolled. 33 U.S.C. §§913(b)(2), 920(b), 930(a), (f); *Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999); *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

to the hospital. Consequently, the administrative law judge found that TVS failed to establish that claimant had a pre-existing permanent partial disability manifest to it. Decision and Order at 26. On the motion for reconsideration, the administrative law judge again discussed the issue. He found that, although there are no medical records pre-dating the period of claimant's employment, there are references throughout the record of a long-standing colitis condition. However, he found this insufficient to establish a pre-existing disability because TVS did not show that claimant's condition was serious enough to satisfy the "cautious employer" test, and he again denied Section 8(f) relief. Order on M/Recon. at 6-7.

TVS argues that there are references in the record to claimant's pre-1985 history of IBD and that these references establish a long history of ulcerative colitis prior to claimant's work with TVS between 1973 and 1977, satisfying the elements necessary for Section 8(f) relief. Specifically, TVS states that the medical records refer to stomach and intestinal difficulties since claimant was a teen, USS Ex. 4 at 2, and this is supported by claimant's testimony, Cl. Ex. 4a at 50-51, 54. The Director responds, urging the Board to affirm the administrative law judge's denial of Section 8(f) relief.

Section 8(f) shifts the liability to pay compensation for permanent disability or death after 104 weeks from an employer to the Special Fund established in Section 44 of the Act. 33 U.S.C. §§908(f), 944. An employer may be granted Special Fund relief, in a case where a claimant is permanently partially disabled, if it establishes that the claimant had a manifest pre-existing permanent partial disability, and that his current permanent partial disability is not due solely to the subsequent work injury and "is materially and substantially greater than that which would have resulted from the subsequent work injury alone." 33 U.S.C. §908(f)(1); *Director, OWCP v. General Dynamics Corp. [Bergeron]*, 982 F.2d 790, 26 BRBS 139(CRT) (2d Cir. 1992); *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 26 BRBS 116(CRT) (1st Cir. 1992); *C&P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In a voluntary retiree case, the pre-existing condition must contribute to the compensable permanent impairment. *Director, OWCP v. Bath Iron Works Corp. [Johnson]*, 129 F.3d 45, 31 BRBS 155(CRT) (1st Cir. 1997); *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *see generally Bergeron*, 982 F.2d 790, 26 BRBS 139(CRT).

Because we have held that claimant is a voluntary retiree, his pre-existing condition must contribute to his compensable impairment in order for TVS to obtain relief pursuant to Section 8(f). *Id.* In this case, claimant's pre-existing condition is bowel-related, and it is related to neither the respiratory nor cardiac systems. Claimant's compensable impairment is respiratory in nature. There is no evidence establishing that claimant's current respiratory impairment is not due solely to the work injury and is materially and substantially worse as a result of his pre-existing IBD; thus, as a matter of

law, TVS cannot satisfy the contribution element regardless of whether his pre-existing IBD was manifest to TVS. *Johnson*, 129 F.3d 45, 31 BRBS 155(CRT); *Fineman*, 27 BRBS 104; *Adams*, 22 BRBS 78. As TVS cannot satisfy the contribution element needed for Section 8(f) relief, it is irrelevant whether TVS established the existence of a manifest pre-existing permanent partial disability, and there is no need to address those issues. Therefore, we affirm the administrative law judge's denial of Section 8(f) relief, albeit on grounds other than those he stated.

Failure to Attend Examination

TVS contends the administrative law judge erred in denying its motion to dismiss claimant's claim because claimant consistently failed to attend medical examinations arranged by EB, TVS and SSS. According to TVS, claimant refused to submit to medical examinations on at least five occasions between June 1, 1998, and January 30, 2002,[14] despite the transportation arranged by the employers, despite the administrative law judge's order, and despite claimant's assurances that he would attend. TVS Brief at 84-85; Cl. Ex. 4a at 80. TVS argues that claimant has acted in a dilatory manner and delayed the progress of this case, making dismissal the only suitable sanction. TVS also argues that the administrative law judge had the authority to dismiss the case with prejudice pursuant to *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), 29 C.F.R. §18.29(a), and Rules 37 and 41 of the Federal Rules of Civil Procedure.

Contrary to TVS's argument, the administrative law judge rationally denied the motion to dismiss. On March 5, 2002, the administrative law judge ordered claimant to show cause why his case should not be dismissed due to his failure to appear for the court-ordered medical examination. ALJ Ex. 89; Tr. at 52-57. Claimant responded to this order,[15] ALJ Ex. 69, and on April 9, 2002, the administrative law judge denied EB's motion to dismiss, in which TVS and SSS joined. ALJ Exs. 64-66, 92. The

[14]Claimant submitted to an examination by an orthopedist, Dr. Fisher, on December 21, 1998. TVS Brief at 84. Dr. Fisher's report dated February 1, 1999, is at EBC Ex. 12. However, the employers were not able to get claimant to submit to an examination by a doctor specializing in respiratory conditions. Decision and Order at 4; ALJ Ex. 93. Instead, Dr. Teiger reviewed claimant's medical records in July 2002 and offered his opinion based on these documents. EBC Ex. 26.

[15]Claimant stated that he was unable to attend the medical examination due to ill health, and he submitted medical documentation. Further, he stated that he was unclear as to whether the appointment was mandatory because the doctor was not a specialist in occupational health. He apologized for his mistake and indicated his willingness to submit to an evaluation. ALJ Ex. 69.

administrative law judge found that claimant's *pro se* status, medical condition and continuing treatment for his maladies explained his failure to attend the examination. The administrative law judge concluded that the evidence, including claimant's "current avowed willingness to participate in a future examination," did not establish egregious or contumacious conduct. However, in his order, the administrative law judge made clear that any future failure to appear for a court-ordered exam or hearing, absent medical certification of hospitalization, would result in dismissal of the claim. ALJ Ex. 92 at 2-3.

The Board has held that dismissal of a claim is permitted when the claimant fails to prosecute his claim or comply with the orders of the court and there is a clear record of delay or contumacious conduct or when less drastic sanctions have failed. *Harrison*, 24 BRBS 257; *Twigg v. Maryland Shipbuilding & Dry Dock Co.*, 23 BRBS 118 (1989). Although claimant did not appear at the court-ordered examination, the administrative law judge rationally concluded that claimant was proceeding without an attorney and that he explained his reasons for not attending the examination, continued to prosecute his claim, and did not behave egregiously. Claimant participated in two depositions as well as the formal hearing. Moreover, no "less drastic" sanctions had been attempted.[16] Therefore, we reject TVS's argument that the administrative law judge should have dismissed this case.

Motion for Reconsideration

Finally, TVS contends the administrative law judge abused his discretion in failing to grant its motion for reconsideration. TVS filed a motion for reconsideration of a number of findings made by the administrative law judge. The administrative law judge granted the motion as to the date on which claimant filed a claim against TVS, but remained of the opinion that the claim was timely filed. He also explained his reasons for denying Section 8(f) relief. Order on M/Recon. at 3-7. He summarily denied the motion with regard to claimant's disability, causation, retiree status, and asbestos exposure, finding that TVS's arguments merely represented its disagreement with his weighing of the evidence. *Id.* at 7. The administrative law judge subsequently summarily denied TVS's second motion for reconsideration of the timeliness issue, stating that TVS did not

[16]Section 7(d)(4) of the Act, 33 U.S.C. §907(d)(4), limits the "sanction" for "unreasonably refus[ing] to submit to . . . an examination by a physician selected by the employer" to a suspension of compensation during the period of refusal. *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002); *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989). Section 27(b) of the Act permits the administrative law judge to certify to the district court facts concerning a party's failure to comply with a lawful order, and it gives the district court the authority to sanction that party. 33 U.S.C. §927(b); *Goicochea v. Wards Cove Packaging Co.*, 37 BRBS 4 (2003).

produce substantial evidence showing that the claim was not timely. Order on 2nd M/Recon. at 2.

We review the administrative law judge's denials of reconsideration to determine if there was an abuse of discretion. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 13 (1993); *see generally Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989). The administrative law judge acknowledged the arguments in the motions for reconsideration, and he addressed them or gave reasons for declining to address them. That his findings may ultimately be reversed or vacated does not mean he abused his discretion in rendering a decision in the first instance or in denying the request to reconsider that decision. Therefore, we reject TVS's contention that the administrative law judge abused his discretion in denying the motions for reconsideration.

Accordingly, we reverse the administrative law judge's finding that claimant was an involuntary retiree, and we vacate the award of permanent total disability benefits commencing in 1985. The case is remanded for consideration of the onset of claimant's disability and the amount of benefits to which claimant is entitled in accordance with this opinion. We affirm the administrative law judge's conclusion that the claim was timely filed and his denial of Section 8(f) relief, albeit on grounds other than those given by the administrative law judge. In all other respects, we affirm the administrative law judge's decisions.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge