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| GENE M. FERGUSON |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| NORTHROP GRUMMAN |) | DATE ISSUED: 12/22/2011 |
| SHIPBUILDING, INCORPORATED, fka |) | |
| NEWPORT NEWS SHIPBUILDING AND |) | |
| DRY DOCK COMPANY |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Disability Compensation Benefits and Awarding Medical Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Jennifer W. Stevens (Patten, Wornom, Hatten & Diamonstein), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Disability Compensation Benefits And Awarding Medical Benefits (2009-LHC-01932) of Administrative Law Judge Alan L. Bergstrom rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a non-smoker, was exposed to airborne asbestos during the course of his employment for employer as a sheet metal/machinery installation worker from 1959 until 1961. Afterwards, claimant worked in non-covered employment until he voluntarily retired. On November 18, 2008, Dr. Cooper diagnosed claimant with diffuse pleural thickening, which claimant contends is related to his asbestos exposure with employer. Specifically, Dr. Cooper opined that claimant has a 55 percent whole body impairment due to his respiratory impairment caused by asbestos exposure, pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 6th ed. (AMA *Guides*). Thereafter, claimant filed a timely claim under the Act, seeking benefits pursuant to 33 U.S.C. §§902(10), 908(c)(23). Employer controverted the claim.

The parties stipulated that claimant was exposed to airborne asbestos while working for employer – his last maritime employer. In finding claimant entitled to the Section 20(a) presumption, the administrative law judge found that claimant’s harm is pleural plaques and not diffuse pleural thickening.¹ The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption and found that employer failed to establish rebuttal thereof. Thus, he found that claimant established he has a work-related lung ailment, pleural plaques, and he awarded claimant medical benefits therefor. 33 U.S.C. §907. Nonetheless, the administrative law judge denied disability benefits because he found insufficient evidence to establish the existence of any lung impairment related to the pleural plaques. Claimant appeals the administrative law judge’s denial of disability benefits, and employer responds, urging affirmance.

The parties agree that claimant voluntarily retired from employment. As a voluntary retiree, any benefits to which a claimant may be entitled are payable pursuant to Section 8(c)(23) of the Act. Section 8(c)(23) requires impairment ratings to be based on medical opinions using the criteria contained in the AMA *Guides*. See 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2). The mere diagnosis of an occupational disease does not establish that claimant is disabled. *Liberty Mutual Ins. Co. v. Commercial Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). The claimant has the burden of establishing that he has a permanent impairment due to his work injury. See generally *Frawley v. Savannah Shipyard Co.*, 22 BRBS 328 (1989).

Dr. Cooper, claimant’s treating physician, opined that claimant has a 55 percent impairment to his whole body due to diffuse pleural thickening. The administrative law judge rejected Dr. Cooper’s diagnosis that claimant has diffuse pleural thickening

¹The administrative law judge rationally gave dispositive weight to the fact that eight doctors of record diagnosed only pleural plaques. See EXs 1, 3, 5, 8, 10, 12, 20.

resulting in a 55 percent impairment. The administrative law judge gave greater weight to the opinions of Drs. Henry, Shepherd, and Donlan. CX 2; EXs 4, 6, 10. They specifically disagreed with Dr. Cooper's diagnosis and stated that claimant does not have diffuse pleural thickening or any asbestos-related lung impairment.

Claimant argues that the administrative law judge erred by failing to credit the opinion of Dr. Cooper, his treating physician, because he was in the best position to understand claimant's medical condition. We reject this contention. It is well-established that an administrative law judge is not bound to accept the opinion or theory of any particular medical examiner but may, instead, draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 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 (2^d Cir. 1961). Claimant's assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside the Board's scope of review. *See Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Moreover, after fully reviewing the evidence of record and the qualifications of the professionals involved, the administrative law judge rationally found that the consistent opinions of the other doctors are entitled to greater weight than is Dr. Cooper's opinion. As these physicians state that pleural plaquing is not a disabling lung condition, and as a great majority of the doctors opined that claimant has only pleural plaquing, the administrative law judge rationally concluded that the "overwhelming medical opinion" is that claimant does not have a work-related lung impairment. *See generally Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In addition, no physician other than Dr. Cooper assigned claimant any impairment rating under the *AMA Guides*. *Frawley*, 22 BRBS 328. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's findings that claimant failed to establish that he has a work-related disability and is not entitled to disability compensation.² As employer does not challenge claimant's entitlement to necessary medical benefits for his work-related lung injury, we affirm that award.

²We reject claimant's contention that the administrative law judge did not did not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as he extensively set forth and discussed the evidence of record, Decision and Order at 4-11, and provided an evidentiary basis for his findings of fact.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge