BRB Nos. 99-288, 00-232
and 02-345

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| PAUL BUTLER | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| INGALLS SHIPBUILDING, INCORPORATED | ) | DATE ISSUED: Jan. 24, 2003 |
| and | ) | |
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| MISSISSIPPI INSURANCE GUARANTY ASSOCIATES | ) | |
| | ) | |
| Self-Insured Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeals of the Decision and Order - Denying Benefits, Decision and Order Denying Motion for Modification, and Decision and Order Denying Second Motion for Modification of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Leslie Roussell, Laurel, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits, Decision and Order Denying Motion for Modification and Decision and Order Denying Second Motion for Modification (94-LHC-2284, 97-LHC-2628) of Administrative Law Judge David DiNardi 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 was exposed to asbestos while working for employer during several periods of time between 1958 and 1967. EX 44 at 25. On May 5, 1965, claimant injured his back while working as a shipfitter, and subsequently underwent a laminectomy and spinal fusion, and was thereafter placed on light duty at his regular wage. Employer voluntarily paid claimant temporary total disability compensation based upon an average weekly wage of $92.25, until he reached maximum medical improvement on March 2, 1967, and permanent partial disability compensation at a weekly rate of $18.45 thereafter. Claimant filed a claim for his back injury on December 19, 1967, ALJ EX 18, and the parties thereafter agreed that employer would pay claimant continuing permanent partial disability benefits at an increased rate. The deputy commissioner memorialized this agreement in a Memorandum of Informal Conference dated August 26, 1968. On July 18, 1978, employer suspended compensation payments, as the payments to claimant had exceeded the maximum amount of $24,000 allowed under the Act at the time the injury occurred. On August 3, 1978, the assistant deputy commissioner forwarded correspondence to the claimant stating that his file was being closed since the $24,000 compensation ceiling had been reached. EX 14. On November 21, 1988, claimant sustained a non work-related injury when he slipped and fell after stepping on a coat hanger.

Claimant filed a separate claim for asbestosis on December 6, 1989. EXs 33-35. On July 28, 1992, claimant began pursuing a claim for additional compensation as a result of his 1965 back injury, seeking benefits from 1978, when employer made its last payment, until the present. EX 27. The Mississippi Insurance Guaranty Association, on the risk at the time, controverted the claim on June 24, 1992. EX 28; JX 2. An informal conference was held in the fall of 1992, CX 1 at 11, during which time the parties stipulated to an average weekly wage of $92.25, at the time of the back injury.

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[1]The term deputy commissioner has been replaced by the term district director. *See* 20 C.F.R. ' 702.105. This decision will use the term deputy commissioner, as that title was in effect during the time period at issue.

[2]Prior to the 1972 Amendments there was a $24,000 limit for permanent partial disability awards. 33 U.S.C. ' 914(m) (1970) (repealed 1972).

[3]Employer is self-insured with respect to the asbestos-related claim.

The claims for both the back injury of May 5, 1965, and asbestosis were consolidated and a hearing before the administrative law judge was held on April 23, 1998. In a Decision and Order - Denying Benefits dated October 26, 1998, the administrative law judge found that claimant's claim for additional benefits for his work-related back injury was barred by the statute of limitations or, alternatively, by the doctrine of laches. The administrative law judge further found that even if not barred as untimely, claimant's non work-related fall in 1988 constituted an intervening cause, severing the causal connection between claimant's 1965 work injury and his present back complaints. The administrative law judge thus denied further benefits. The administrative law judge also denied claimant's asbestosis claim, finding that claimant had no impairment and was not entitled to any medical benefits. Claimant appealed this decision to the Board in November 1998. BRB No. 99-288. While the case was pending before the Board, claimant filed a motion for modification. In light of this motion, the Board remanded the case to the administrative law judge. On October 12, 1999, the administrative law judge issued a Decision and Order Denying Motion for Modification. Claimant thereafter appealed to the Board and additionally reinstated his prior appeal with the Board. BRB No. 00-232. Claimant then filed a second motion for modification while the case was pending before the Board. The Board again remanded the matter to the administrative law judge for modification proceedings. On October 11, 2001, the administrative law judge issued a Decision and Order Denying Second Motion for Modification. Claimant appealed this decision to the Board on December 27, 2001. BRB No. 02-345.

Claimant appeals the administrative law judge's decision denying him benefits under the Act. Employer responds, urging affirmance.

Claimant first argues that the administrative law judge erred in finding his request for additional benefits for his back condition untimely. Claimant contends that the parties stipulated that the claim was originally timely filed, *see* October 26, 1998 Decision and Order, Stipulation 6, and that, as his claim was never closed because it was not fully adjudicated until the administrative law judge did so in this case on November 3, 1998, it remained open and pending. We agree. Section 13(a) of the Act, 33 U.S.C. §913(a), provides that a claim for benefits for a traumatic injury must be filed within one year of the time the claimant was aware, or should have been aware, of the relationship between his injury and his employment. In *Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3

[4]By order dated February 15, 2002, the Board reinstated claimant's appeals in BRB No. 99-288 and BRB No. 00-232, and consolidated them with BRB No. 02-345.

(1975), the United States Supreme Court held that where a claim is timely filed under Section 13 of the Act, but is never adjudicated, it remains open and pending until a compensation order is issued.

In *Intercounty,* the Court construed Section 22 of the Act, 33 U.S.C. §922, as applying only where a compensation order resolving a claim has been issued. Thus, once an Order is entered, claimant has until one year after a final order issues or the last payment of compensation is made in which to seek additional benefits under Section 22. Applying *Intercounty* to this case, since the last payment of compensation was made in 1978, and claimant did not seek additional benefits within one year, determining whether claimant may now do so turns on whether his prior timely claim remains open and pending or was closed by order of the deputy commissioner.

The administrative law judge found that claimant's claim for additional compensation for his back injury is barred, finding that the deputy commissioner's August 26, 1968, Memorandum of Informal Conference was a final adjudication of claimant's pending claim. The administrative law judge reasoned that prior to the 1972 Amendments to the Act, the deputy commissioner had the power to adjudicate disputes and issue formal compensation orders, in addition to his role in investigating claims and recommending informal resolutions. 33 U.S.C. §919 (1970) (amended 1972). The administrative law judge found that the Memorandum of Informal Conference issued by the deputy commissioner was the equivalent of a current administrative law judge's issuance of consent findings, and that claimant's back injury claim thus had been finally "adjudicated" as of August 26, 1968. Decision and Order at 21. For the following reasons, we reverse the administrative law judge's finding that the deputy commissioner's Memorandum of Informal Conference constituted a final compensation order. *See Seguro v. Universal Maritime Service Corp.,* 36 BRBS 28 (2002).

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[5]Although the administrative law judge stated that the claim was barred by Section 13, the parties stipulated that claimant filed a timely claim under Section 13 in 1967. If this claim was closed as the administrative law judge found, then claimant's subsequent claim would be barred by Section 22, rather than Section 13.

[6]Section 19(d) of the 1972 Amendments removed from the deputy commissioner the authority to hold hearings after November 26, 1972. 33 U.S.C. '919(d). Subsequent to the amendments, the deputy commissioner retained his administrative and investigatory functions, while the authority to hold hearings and adjudicate claims was transferred to administrative law judges.

Claimant injured his back on May 5, 1965. The parties stipulated that claimant gave timely notice and filed a timely claim for this injury, which employer timely controverted. Decision and Order at 3. An informal conference was held initially on September 14, 1967, and continued on August 21, 1968, during which the parties agreed that claimant, who had returned to light duty employment, was entitled to permanent partial disability benefits at a rate greater than that which employer had previously been paying. Following this conference, the deputy commissioner issued the Memorandum of Informal Conference, which detailed the parties' agreement. Employer paid claimant benefits pursuant to this agreement until July 1978. On August 3, 1978, the associate deputy commissioner wrote to claimant that as the maximum benefits had been paid, his file was being closed, subject to the limitations of the Act, and he enclosed a copy of Form BEC 208A, a notice that compensation payments have ceased. EX 14 at 2. In June 1992, claimant again sought to pursue a claim based on the May 5, 1965, back injury.

Prior to the 1972 amendments to the Longshore Act, the regulations at 20 C.F.R. §31.8 provided for prehearing conferences in order "amicably to dispose of controversies wherever possible." 20 C.F.R. §31.8(b)(1968). Specifically, this subsection of the Act's implementing regulations stated that:

> At the termination of such conferences the person in charge thereof shall prepare stipulations, . . .covering agreements as to all or part of the facts, admissions . . . . Such stipulations when signed by the parties in interest shall be made and become part of the formal record of the case. . . .[T]he person in charge . . . may by letter. . . make his recommendations . . . to dispose of the matter in controversy. Every such letter should advise the interested parties that the purpose thereof is to recommend a basis for agreement, . . . and that such

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[6]Employer stopped payments to claimant in July 1978, reasoning that the Section 14(m) $24,000 ceiling had been reached. The administrative law judge, in his first decision, correctly found that this limitation does not apply to claimant because claimant reached the ceiling after the effective date of the 1972 Amendments to the Act, which repealed Section 14(m). *See O'Berry v. Jacksonville Shipyards, Inc.,* 21 BRBS 355 (1988), *aff'd and modified on recon*., 22 BRBS 430 (1989). Accordingly, claimant may be entitled to additional compensation for disability related to the initial 1965 back injury, subsequent to July 18, 1978, the date of employer's last payment.

[8]This form is similar to the current LS-208, and both state that a claim for compensation must be filed in writing within one year of the date of injury or date of last payment of compensation in order to be valid. EX 14 at 2.

> recommendation is not a "decision" in the case and will not affect or prejudice the rights of any party . . . should the recommendation not be accepted by such parties and a later hearing be found necessary.

20 C.F.R. §31.8 (1968). In contrast to these provisions for informal resolution, the regulations also describe the procedures for entering a compensation order stating:

> Orders adjudicating claims for compensation . . . shall be designated by the term "compensation order" followed by a descriptive phrase designating the particular type of such order, such as "award of compensation." . . . . [and] shall contain . . .a statement for the basis for the order. . . and whether a hearing was held . . . findings of fact, an award, rejection, or other appropriate paragraph containing the action of the deputy commissioner, and appended thereto shall be a paragraph headed "proof of service," containing the certification of the deputy commissioner that a copy of the compensation order was on a date stated sent by registered mail . . . Compensation orders shall be signed by the deputy commissioner at two places.

20 C.F.R. §31.12(a) (1968). These regulations thus distinguish between the recommendations made at the end of an informal conference and a formal compensation order, providing specific requirements where a formal compensation order is issued. *See also* 33 U.S.C. §919 (1970)(amended 1972).

The document at issue is titled "Memorandum of Informal Conference," listing the issue as "Extent of Disability" and indicating that attorneys for claimant and employer/carrier, but not claimant himself, were present. The memorandum begins by stating, "This is a continuation of a conference previously held on September 14, 1967." It states that a claim was made that claimant had disability in excess of what the insurance carrier had been paying voluntarily and that "it was agreed" that $40 per week would be a reasonable rate for permanent partial disability compensation, that "it was agreed" that the agreement would be retroactive, and that "it was further agreed" that the insurance carrier would pay certain medical bills. In addition, it provides that the carrier "shall" continue to pay claimant $40 per week "subject to the limitations of the Act or until further recommendation by the Deputy Commissioner." EX 12 at 1. This document is signed by the deputy commissioner and indicates copies were provided to the parties.

Viewed under the regulations applicable at the time it was issued, it is clear that this document lacks the indicia of a formal compensation order. On its face,

the document memorializes an informal conference and the agreement reached by the parties at that conference. While it does not specifically state it is not a "decision," as Section 31.8 suggests it should, the document provides for the continuance of benefits "until further *recommendation"* by the deputy commissioner. Moreover, it does not meet the requirements for a formal compensation order contained in Section 31.12(a), as it does not commence with the title "compensation order" or include the descriptive term "award of compensation." Significantly, there is no certificate of service certifying that the parties were served by registered mail, nor is the document signed in two places as required by the regulation. Finally, there is no indication that the document was filed as a compensation order in the office of the deputy commissioner as required by the statute, 33 U.S.C. §919(e). This document therefore is not a final compensation order under Section 19 or the applicable regulations. As the deputy commissioner did not issue a compensation order pursuant to 20 C.F.R. §31.12(a), the initial claim for benefits was never the subject of a final formal compensation order prior to the adjudication by the administrative law judge. As claimant's back claim was not previously adjudicated, it remains open and pending. *Intercounty,* 422 U.S. 1, 2 BRBS 3; *Seguro,* 36 BRBS at 31. We therefore reverse the administrative law judge's finding that claimant's claim for his back condition is barred by the statute of limitations, 33 U.S.C. §§913, 922.

The administrative law judge, in the alternative, found that even if claimant's back injury claim is not barred by Section 13 of the Act, the claim is barred by the doctrine of laches pursuant to the Board's decision in *Rodriguez v. California Stevedore & Ballast Co.*, 16 BRBS 371 (1984). The Board has held, however, that since the Act contains a statutory limitation period for filing a claim under Section 13, the doctrine of laches does not apply and has expressly limited *Rodriquez* to its facts. *See, e.g., Norton v. Nat'l Steel & Shipbuilding Co.,* 27 BRBS 33 (1993) (Brown, J., dissenting), *aff'g on recon. en banc* 25 BRBS 79 (1991); *Lewis v. Norfolk Shipbuilding & Dry Dock Co.,* 20 BRBS 126 (1987). For the reasons set forth in detail in *Norton,* 27 BRBS at 40-41, we reverse the administrative law judge's finding that claimant's claim is barred by the doctrine of laches. Accordingly, we will now review the administrative law judge's alternate findings with respect to claimant's back condition.

Initially, the administrative law judge did not address claimant's entitlement to benefits prior to 1988, the date that he found an intervening cause of claimant's disability occurred. Even if the 1988 event was an intervening cause, it does not affect claimant's entitlement to benefits prior to that date, and employer's last payment was made in 1978. Accordingly, the case must be remanded for the administrative law judge to address claimant's entitlement to

benefits prior to the occurrence of the 1988 incident.

Where causation is at issue, Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his disabling condition is causally related to his employment. Under Section 20(a), the burden shifts to employer to produce substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter,* 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Conoco, Inc. v. Director,* OWCP, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Employer can rebut the presumption by producing substantial evidence that claimant's disabling condition was caused by a subsequent non work-related event which was not the natural or unavoidable result of the initial work injury. *See Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129 (CRT)(5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994). If the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence in the record and resolve the causation issue based on the record as a whole. *See Port Cooper*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden,* 135 F.3d 1066, 32 BRBS 59 (CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Where a subsequent injury or aggravation is not a natural or unavoidable result of the work injury, but is due to an intervening cause, employer is relieved of that portion of the disability attributable to the subsequent injury. *See Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991).

Claimant challenges the administrative law judge finding that the causal relationship between his present back complaints and his 1965 work-related injury was severed by his subsequent non work-related accident of November 21, 1988. In finding that this 1988 accident, in which claimant slipped and fell, was an intervening cause, the administrative law judge gave little weight to claimant's testimony that he continued to have back problems from 1965 until November 21, 1988. Rather, the administrative law judge found that both Drs. Enger and Wiggins attributed claimant's present back problems to an independent intervening aggravation of his original condition, *see* EXs 23, 26; that there is no evidence in the record that claimant suffered any back problems between 1972 and 1989; that Dr. Wiggins, after reviewing claimant's medical records, found no history of significant back problems between 1972 and 1989; and that claimant told several doctors that he did not have back problems between the original

injury and his 1988 slip and fall incident. *See* Decision and Order at 29. EX 19 at 1-2, 7, 11.

Based on the evidence on which he relied, primarily the opinions of Dr. Enger and Dr. Wiggins, the administrative law judge's denial of all benefits cannot be affirmed. As summarily stated by the administrative law judge, both Drs. Enger and Wiggins attributed claimant's increased back problems to an independent intervening aggravation of his original condition. *See* EXs 23, 26. The credited evidence thus supports the conclusion that any increased disability thereafter is due to the 1988 event. However, the credited medical evidence recognizes that the aggravation rests on claimant's prior underlying condition; thus, claimant's present back complaints may be due, in part, to his underlying 1965 work-injury. While any disability attributable to the aggravation is not compensable, the administrative law judge must determine whether claimant retains any continuing disability as a result of his underlying work-related injury. As the administrative law judge did not make this determination, *supra* at p. 7, we vacate his denial of all benefits. The case is remanded for the administrative law judge to reconsider the evidence relative to the cause of claimant's present back complaints and determine the extent of disability attributable to his work-related injury. *See generally Bass,* 28 BRBS at 15-16; *Merrill,* 25 BRBS at 144-145.

Claimant next contends that he is entitled to payment for medical expenses related to his back. Section 7 of the Act, 33 U.S.C. §907, generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injuries. The Act does not require that an injury be economically disabling in order for a claimant to be entitled to medical expenses, but only that the injury be work-related. *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990). In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary for the treatment of claimant's work-related injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Under Section 7(d), claimant must request prior authorization for the medical services performed by any physician, including claimant's initial choice, in order for the expenses to be compensable. *See Maguire v. Todd Shipyards Corp.,* 25 BRBS 299 (1992). Where a claimant's request for authorization is refused by employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer's expense. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989).

In the instant case, the administrative law judge noted that employer paid for claimant's back-related expenses until 1971, that there is no evidence in the record that claimant sought treatment for his back between 1971 and 1988, and that employer was not liable for any medical bills incurred after the 1988 accident because that injury was due to an intervening cause. Alternatively, the administrative law judge determined that even if the medical expenses incurred by claimant for the treatment of his back after 1988 were work-related, claimant would still not be entitled to reimbursement because he did not comply with the authorization provision of Section 7. Claimant does not challenge the administrative law judge's finding that he did not seek prior authorization for the his treatment post-1988, nor does claimant contend that he sought and was denied such authorization. Accordingly, we

affirm the administrative law judge's decision on this issue.

Claimant also contends that the stomach problems which he developed are a result of the medication he was taking for his work-related back condition, and that therefore he is entitled to payment for related medical expenses. In denying the compensability of medical bills for a stomach disorder, the administrative law judge observed that Dr. Enger concluded that all of claimant's problems other than his back condition were unrelated to the May 5, 1965, injury, and that Dr. Fox concluded that claimant's gastroparesis and gastroesophageal reflux diseases were unrelated to the medication being taken for the back injury. Decision and Order at 30; EX 23 at 28-29, CX 4 at 263. The administrative law judge further noted that medical records establish that claimant's stomach condition is based on an unrelated January 24, 1966, injury, EX 5, and that none of the physicians who examined claimant during the late 1980s or early 1990s ever connected claimant's stomach problems to his May 1965 injury. We hold that the administrative law judge acted within his discretion in crediting the opinions of Drs. Enger and Fox, which affirmatively establish rebuttal of the Section 20(a) presumption, and we therefore affirm his finding that based on the medical evidence of record, claimant's stomach problems are not work-related. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.,* 22 BRBS 94 (1988). Moreover, as entitlement to medical benefits is contingent upon a finding of a casual relationship between the injury and claimant's employment, we affirm the administrative law judge's finding that employer is not liable for claimant's medical expenses which are related to his stomach condition. *See generally Wendler v. American Red Cross,* 23 BRBS 408 (1990)(McGranery, J., dissenting on other grounds).

Claimant lastly appeals the administrative law judge's denial of benefits based on his condition resulting from asbestos exposure. Specifically, claimant alleges that the administrative law judge erred in finding that he has no impairment as a result of his asbestos

exposure, and in denying medical benefits related to this condition. In the instant case, the administrative law judge initially determined that as claimant's

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[9]Claimant would be entitled to any future medical benefits necessary for treatment of the initial injury rather than for the 1988 non-work-related aggravation, subject to the requirements of Section 7(d).

[7]As employer has not challenged the administrative law judge's finding that claimant's diagnosed pleural thickening is related to his asbestos exposure while working for employer, that determination is affirmed.

asbestos-related condition did not become manifest until after claimant retired in 1988 due to an unrelated condition, claimant is a voluntary retiree with respect to his asbestos-related claim. The administrative law judge therefore concluded that claimant was limited to an award for permanent partial disability based on the extent of his medical impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), but that claimant had not submitted any evidence providing a disability rating. Moreover, the administrative law judge determined that the medical evidence overwhelmingly demonstrates that claimant's pleural thickening, secondary to asbestos exposure, has resulted in absolutely no impairment. Decision and Order at 44-45. For the reasons that follow, we affirm the administrative law judge's decision to deny the benefits requested by claimant.

Retirement is defined as a situation wherein a claimant has voluntarily withdrawn from the workforce with no realistic expectation of return. *See* 20 C.F.R. §702.601(c). Under the Act as amended in 1984, when an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability based on the extent of medical impairment under the AMA *Guides* and is not based on economic factors. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2) (1994); *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989); *McLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988). Claimant is a voluntary retiree if he withdraws from the workforce for reasons other than the condition which is the subject of the claim. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990). Claimant may be considered a voluntary retiree and receive benefits under Section 8(c)(23) even if a medical condition or other factor provided the impetus for his retirement as long as the occupational disease for which benefits are sought did not cause claimant's withdrawal from the workforce. *Hansen v. Container Stevedoring Co.,* 31 BRBS 155 (1997); *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988).

Claimant on appeal does not challenge the administrative law judge's determination that he is a voluntary retiree; accordingly, we affirm that finding. Since claimant is a voluntary retiree, he must establish an impairment rating under the AMA *Guides* in order to obtain benefits under the Act. 33 U.S.C. §908(c)(23). *See Morin v. Bath Iron Works Corp.,* 28 BRBS 205 (1994); *Carver v. Ingalls Shipbuilding, Inc.,* 24 BRBS 243 (1991). In finding that claimant had not met his burden in this regard, the administrative law judge determined that while Dr. Neese stated that the pleural findings could be contributing to claimant's restrictive abnormality, pulmonary function studies performed by by Dr. Wallace in 1993, CX 4 at 270, did not show any restrictive abnormality. The

administrative law judge further found that this opinion was later rejected by Dr. Pinkston's well-reasoned report, as well as Dr. Neese's testimony that claimant did not have asbestosis, that the general view is that pleural thickening and plaques do not generally result in impairment or disability, and that claimant does not have any disability associated with the pleural findings alone. CX 4 at 270; EXs 45a at 3, 6, 8; 45b at 23-24. A review of the record reveals no evidence that claimant has sustained an impairment as a result of his exposure to asbestos As the medical evidence contains no impairment rating, we affirm the administrative law judge's denial of disability benefits. 33 U.S.C. §§902(10); 908(c)(23); 910(d)(1), (2) (1988).

Claimant also seeks medical benefits for the treatment of his asbestos-related pleural disease. The administrative law judge found that claimant filed his LS-203 form on December 3, 1989, for this condition, and as he did not seek prior approval for any related medical treatment before that time, he was not entitled to benefits. Subsequently, the administrative law judge noted that, after December 3, 1989, claimant's medical expenses were limited to monitoring and testing for asbestos exposure. The administrative law judge found that both Dr. Neese and Dr. Pinkston concluded that claimant did not require medical treatment for his pleural disease. *See* Decision and Order at 45; EX 45a at 8; EX 45b at 26, 35-36. The administrative law judge then concluded that further medical monitoring is a treatment not reasonable or necessary and denied claimant's request for medical benefits. On modification, the administrative law judge accepted additional medical evidence, but reitereated his finding that medical treatment was not necessary. Claimant challenges this finding, asserting that his need for continuing treatment is documented by his more recent records. Dr. McFadden, in a report dated January 4, 2000, which was admitted on modification, opined that claimant did not need treatment for his pleural plaques, and the administrative law judge found this report consistent with the other medical experts, who found claimant did not currently require treatment for his condition. His finding on modification and in his initial decision that claimant did not establish the necessity of treatment is affirmed. However, Dr. McFadden's report also states that claimant should be followed "on a periodic basis with C/Ts of the chest to determine if any further plaquing should develop and a biopsy would be indicated should there be suggestion of this developing into a malignant process of a mesothelioma." As periodic medical monitoring is compensable and this evidence could establish it is necessary, *see Ingalls Shipbuilding v. Director,*

[8]Dr. Neese deposed that he believed claimant's restrictive abnormality on the pulmonary function test is probably more likely related to his obesity and possibly from the pleural thickening. EX 45b at 23.

*Office of Workers' Compensation Programs,* 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993); *Romeike*, 22 BRBS 57, on remand the administrative law judge should consider whether claimant is entitled to periodic medical monitoring.

Claimant's former attorney, David Goff, who represented claimant for a period of time, filed an attorney's fee petition with the Board, requesting $22,374.84, for 172.4 hours of services at $120 per hour, and .6 hours at $100 per hour, rendered between May 2, 1997, and January 5, 1999, and $1,626.84 in expenses. As claimant has not yet been found entitled to benefits, a fee is denied at this time. If claimant is successful in obtaining benefits on remand, his former counsel may resubmit his petition.

Accordingly, the administrative law judge's finding that the claim for claimant's 1965 back injury is barred is reversed, and the case is remanded for reconsideration of his entitlement to benefits for this injury. His finding that the November 1988 incident was an independent intervening cause which ended all entitlement with regard to claimant's back is vacated, and the case is remanded for further consideration of this issue consistent with this opinion. On remand, the administrative law judge must consider claimant's entitlement to periodic monitoring of his asbestos-related condition. In all other respects, the administrative

[9]Mr. Goff stated that he represented claimant and filed his notice of appeal on November 25, 1998, and that claimant dismissed him and he withdrew on January 6, 1999, prior to filing a supporting brief. We note that only fees for work before the Board may be awarded by this body. Fees for work while the case was before the administrative law judge must be sought from that office.

law judge's Decision and Order – Denying Benefits, Decision and Order Denying Motion for Modification, and Decision and Order Denying Second Motion for Modification are affirmed.

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