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| NOLAN BARRIOS | ) | BRB No. 12-0501 |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| HUNTINGTON INGALLS, INCORPORATED | ) | |
| | ) | DATE ISSUED: 06/17/2013 |
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| Self-Insured Employer-Respondent | ) | |
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| NOLAN BARRIOS | ) | BRB No. 12-0579 |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| HUNTINGTON INGALLS, INCORPORATED | ) | |
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| Self-Insured Employer-Petitioner | ) | DECISION and ORDER |

Appeals of the Decision and Order Denying Benefits and the Supplemental Decision and Order Approving Attorney's Fee of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John F. Dillon, Folsom, Louisiana, for claimant.

Susan F.E. Bruhnke (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and employer appeals the Supplemental Decision and Order Approving Attorney's Fee (2011-LHC-01019) of Administrative Law Judge Larry W. Price 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 was employed by employer from November 7 to November 27, 1972. Thereafter, claimant worked for various non-covered employers where he was exposed to asbestos. In February 2010, claimant was diagnosed with atrial fibrillation, asbestosis and chronic obstructive lung disease. Claimant was subsequently diagnosed with Binswanger's disease, a neurological condition which involves cardiovascular injury to the deep brain tissue. However, he remained employed by Hartford Steam Boiler Company until December 2010, when he was unable to obtain medical clearance to return to work. Claimant received a disability retirement on January 4, 2011. EX 19.

Claimant filed a claim for compensation under the Act for asbestosis on November 22, 2010, which employer controverted on December 3, 2010. In his decision, the administrative law judge found that claimant established he has pleural plaques related, in part, to his asbestos exposure with employer, but that claimant did not establish he has asbestosis. Decision and Order at 14-16. The administrative law judge found that claimant's pleural plaques do not prevent him from returning to his usual employment and thus concluded that claimant is not entitled to any disability benefits. *Id*. at 18. The administrative law judge found that claimant is entitled to future medical monitoring of his pleural plaques, but he denied reimbursement for past medical expenses totaling $138,193.24. *Id.* at 19 and n. 6.

Claimant's counsel subsequently requested an attorney's fee of $41,193.39. In his Supplemental Decision, the administrative law judge awarded counsel a fee of $17,168.81, which accounted for claimant's limited success.

On appeal, claimant challenges the administrative law judge's findings that he does not have asbestosis, that he did not establish he is unable to return to his usual employment due to his asbestos-related condition, and that he is not entitled to reimbursement for medical expenses incurred after the date the claim was filed. BRB No. 12-0501. Employer responds, urging affirmance of the administrative law judge's decision on the merits. Employer appeals the administrative law judge's fee award contending that this award should be held in abeyance until the Board issues its decision on the merits of claimant's appeal. BRB No. 12-0579. Claimant did not respond to this appeal.

Claimant first contends the administrative law judge erred by crediting the opinion of employer's expert witness, Dr. Jones, that claimant has only pleural plaques, over the opinions of Dr. Gomes and claimant's other treating physicians that he has asbestosis.[1] The administrative law judge stated he would weigh only the opinions of pulmonologists on issues relating to the diagnosis of asbestos-related lung diseases. Decision and Order at 13. This decision is rational, as the administrative law judge relied on the physicians who are best qualified to render a diagnosis of a respiratory condition. *See generally Mendoza v. Marine Personnel Co., Inc.,* 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). Therefore, we reject claimant's contention that the administrative law judge erred by discounting the opinions of Dr. Millet, Dr. Shamsnia, Dr. Nagy, and Dr. Aduli that claimant has asbestosis.[2] CXs 9, 11, 16.

With respect to the pulmonologists' opinions, Dr. Gomes found x-ray evidence of interstitial fibrosis and opined that claimant has asbestosis. CX 5 at 3-4. Dr. Jones opined that claimant's x-rays and CT scans do not show evidence of interstitial disease; therefore, he stated that claimant does not have asbestosis. EX 12 at 26-28. Dr. Kuebel, claimant's treating pulmonologist, opined that he could not state claimant has interstitial fibrosis, but it is a "strong possibility" he does. CX 25 at 5-8. The administrative law judge noted that Dr. Gomes and Dr. Jones disagree whether the x-rays shows interstitial fibrosis, which, they agreed, is a necessary component for an asbestosis diagnosis. The administrative law judge found that there is no mention of interstitial fibrosis in the x-ray and CT scan reports generated during claimant's hospitalization in February 2010 or a CT Calcium Scoring test conducted in March 2010. Decision and Order at 15; EX 9 at 3-4; CX 11 at 43. The administrative law judge thus found Dr. Jones's opinion "most convincing" as it is supported by the CT scan evidence. The administrative law judge also gave weight to Dr. Kuebel's opinion for showing uncertainty with regard to diagnosing asbestosis in this case in the absence of tissue sample analysis. The administrative law judge found that no other physician confirmed Dr. Gomes's finding of interstitial fibrosis and that Dr. Gomes did not address the CT scan evidence, which does not support his asbestosis diagnosis. Accordingly, the administrative law judge concluded claimant did not establish he has asbestosis. The administrative law is entitled to weigh the evidence and to determine the weight to be accorded to the medical opinions

[1]The administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that his pleural plaques are work-related as all three doctors stated that claimant has this condition, and claimant established exposure to asbestos at employer's facility in November 1972 that could have caused this condition. Decision and Order at 13-14. The administrative law judge concluded that employer did not rebut the presumption in this regard. *Id*. at 16.

[2]Dr. Millet is an internist. Dr. Shamsnia is a neurologist. Drs. Nagy and Aduli are cardiologists. CXs 9, 11, 16.

of record. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). The administrative law judge rationally found most credible the opinion of Dr. Jones that claimant does not have asbestosis on the basis that his opinion is supported by the CT scan evidence. *See Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998); *Brown v. Nat'l Steel & Shipbuilding Co.*, 34 BRBS 195 (2001). As this finding it supported by substantial evidence, we reject claimant's contention that the administrative law judge erred by finding that claimant did not establish he has asbestosis and we affirm the conclusion that claimant's only asbestos-related condition is pleural plaques.

Claimant next challenges the administrative law judge's finding that his work-related pleural plaques do not prevent him from returning to work where he was exposed to asbestos and dusty environments. Claimant contends that the administrative law judge erred by not considering: (1) the effect of his pleural plaques on his pre-existing conditions under the aggravation rule, *see generally Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc); and (2) 29 C.F.R. §1910.1001(a)(1),[3] which regulates work-related asbestos exposure. In its response brief, employer asserts that claimant is a voluntary retiree under the Act since he did not stop working due to pleural plaques; therefore, he is not entitled to recover compensation for any loss of wage-earning capacity.

We may address an issue raised in a response brief that provides an alternate avenue of affirming the administrative law judge's decision. *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004). The determination of whether a claimant's retirement is voluntary or involuntary is based on whether the work-related occupational disease forced the claimant to leave the workforce. If his departure is due solely to considerations other than the work injury, his retirement is voluntary, and claimant is limited to a permanent partial disability award based on his degree of permanent physical impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). 33 U.S.C. §§902(10), 908(c)(23); *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997); *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986); 20 C.F.R. §702.601(c). If claimant's work-related disease played a

[3]This section provides that no worker may be exposed to asbestos in excess of 0.1fiber per cubic centimeter of air. An employee must wear a respirator if asbestos exposure would exceed this limit. Claimant contends that he is unable to wear a respirator due to his lung and cardiovascular conditions and thus he is unable to perform his job as a boiler inspector as a result of his work-related pleural plaques. Cl. Br. at 25 n.29.

role in causing his retirement, the retirement is "involuntary" and claimant is entitled to disability benefits for the loss in earning capacity caused by the occupational disease. 33 U.S.C. §908(a), (b), (c), (e); *R.H. [Harvey] v. Baton Rouge Marine Contractors Inc.*, 43 BRBS 63 (2009), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Director, OWCP [Harvey]*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010). In *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994), as here, the claimant was diagnosed with asbestos-related pleural disease prior to his retirement. The administrative law judge, in *Morin*, found that the claimant's pulmonary problems did not cause any disability and that he was a voluntary retiree. The Board affirmed the administrative law judge's finding that the claimant was a voluntary retiree as there was substantial evidence that the claimant's asbestos-related pulmonary condition did not contribute to his leaving the workforce. *Morin*, 28 BRBS at 208-209.

In this case, we have affirmed the administrative law judge's finding that claimant did not establish he has asbestosis and, moreover, there is no evidence that claimant was medically impaired by pleural plaques while working or that pleural plaques contributed to his retirement. The administrative law judge discounted Dr. Gomes's opinion that claimant was totally disabled by the combination of his pulmonary condition, consisting of chronic obstructive pulmonary disease and asbestosis, and his neurological condition of Binswanger's disease, based on the administrative law judge's finding that claimant does not have asbestosis. Drs. Kuebel and Shamsnia opined that claimant was totally disabled by his Binswanger's disease. CX 9 at 10; EX 13 at 13. Dr. Nagy completed disability forms on January 11 and February 8, 2011, on which he proscribed claimant from driving, bending and kneeling; he diagnosed atrial fibrillation, hypertension, and asbestosis. EX 9 at 21-25. In the absence of any evidence that claimant retired, even in part, due to his work-related pleural plaques, we agree with employer that claimant is a voluntary retiree under the Act. *See Morin*, 28 BRBS 205; *Johnson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 160 (1989). Accordingly, any recovery for claimant's pulmonary disability is limited to the voluntary retirement provision of Section 8(c)(23) of the Act, which provides that claimant is entitled to an award based on the degree of his permanent impairment under the AMA *Guides*. *Ponder v. Peter Kiewit Sons' Company*, 24 BRBS 46 (1990).

In this regard, there is no evidence that claimant has any measurable impairment. Dr. Jones stated that pleural plaques "have no significant effect on the individual's lung function," EX 8 at 2, and he testified in his deposition that pleural plaques "have a trivial effect, if you can detect one at all, on lung function." EX 12 at 40. Dr. Kuebel testified at his deposition that "experts" opine that pleural plaques do not impair lung function. EX 13 at 21-24. The AMA *Guides* provide that, "[I]n the absence of pulmonary fibrosis, asbestos pleural plaques are not associated with pulmonary impairment unless extensive, diffuse, massive pleural thickening causes lung entrapment." AMA *Guides* at 82 (6th ed. 2008); *see also Ponder*, 24 BRBS 46. The administrative law judge credited the opinion of Dr. Jones that claimant does not have pulmonary fibrosis, Decision and Order at 14-15, and there is no

record evidence of lung entrapment. Since the record does not contain any impairment rating for pleural plaques under the AMA *Guides*, or any basis for such an award, claimant has not established a basis for a compensation award as a voluntary retiree under Section 8(c)(23). *Id*. Accordingly, we affirm on other grounds the administrative law judge's denial of disability compensation; therefore, we need not address claimant's contentions that the administrative law judge erred in not addressing the aggravation rule and claimant's alleged inability to wear a respirator due to his pleural plaques.[4] 33 U.S.C. §908(c)(23); *Ponder*, 24 BRBS at 50-51.

Lastly, claimant contends that all medical expenses related to his pleural plaques incurred after the date of the claim on November 22, 2010, are compensable since employer controverted the claim and therefore employer constructively refused to provide treatment.[5] In his decision, the administrative law judge found that claimant is entitled to medical monitoring of his pleural plaques, but he denied reimbursement for medical expenses totaling $138,193.24. Decision and Order at 19 and n. 6. The administrative law judge found there is no indication which medical expenses are related to claimant's asbestos exposure or any evidence that claimant sought authorization from employer prior to obtaining treatment. *Id*.

Section 7(d) provides requirements which must be met in order for employer to be held liable for medical treatment. The statute states:

> (d) Request of treatment or services prerequisite to recovery of expenses; ...
>
> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless—

[4]Claimant submitted exhibits to the administrative law judge with his Post-Hearing Brief. Employer filed a motion to strike with the administrative law judge. In his decision, the administrative law judge found the evidence untimely, and he stated that he would not consider it. Decision and Order at 1 n.1. Claimant references these exhibits in his Petition for Review and brief to the Board, and employer, therefore, has filed a Motion to Strike Exhibits. As the Board's review is limited to documents admitted into the record by the administrative law judge, *see generally Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985), and claimant has not shown that an exception to this rule is warranted, *see Hill v. Avondale Shipyards, Inc.*, 32 BRBS 186 (1998), *aff'd sub nom Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000), we grant employer's motion to strike.

[5]Claimant does not challenge the administrative law judge's denial of medical expenses incurred prior to the filing of the claim

> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) and the applicable regulations; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. §907(d)(1). Under Section 7(d), an employee must request authorization for treatment before employer may be held liable for it. *Maryland Shipbuilding & Dry Dock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979). If employer refuses the request, and the treatment thereafter procured on the employee's own initiative is reasonable and necessary for treatment of the work injury, employer is liable for the treatment. *See Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *see also Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79(CRT) (5th Cir.), *cert. denied*, 479 U.S. 826 (1986); 33 U.S.C. §907(c)(2). Employer's mere knowledge of claimant's condition does not create an obligation to pay for medical care in the absence of a request for treatment. *See Parklands, Inc. v. Director, OWCP*, 877 F.2d 1030, 22 BRBS 57(CRT) (D.C. Cir. 1989).

Claimant filed a Form LS-203 claim for compensation under the Act for asbestosis on November 22, 2010, which employer controverted on December 3, 2010; the claim, generically, is for "disability and medical benefits." CX 1; EX 3. One of the grounds on which employer controverted the claim was a lack of a causal relationship between the injury and employment. EX 3. Claimant argues that, by controverting the claim on this ground, employer constructively refused to authorize medical treatment and that his request for treatment would have been futile after employer controverted the claim.

In this case, claimant had last worked for employer in November 1972. The November 2010 claim form apprised employer of a potential work-related injury, but it did not include a request for any specific medical treatment or reimbursement of past medical expenses. CX 1. On the facts of this case, we decline to hold that claimant's bare claim constituted a request for authorization of medical treatment. The administrative law judge's finding that claimant did not otherwise seek authorization for medical treatment is supported by substantial evidence. In the absence of such a request, employer cannot be held liable for any past medical expenses incurred related to the monitoring of claimant's pleural plaques.[6] *See Ranks v. Bath Iron Works Corp.*, 22

[6]Moreover, the administrative law judge's finding that claimant did not provide a detailed accounting of his specific medical expenses is supported by substantial evidence. There is no evidence that the past medical expenses totaling $138,193.24 include

BRBS 301 (1989). The administrative law judge's award of future medical monitoring is affirmed. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

In its appeal, employer contends only that the administrative law judge's fee award should be held in abeyance until the Board issues its decision on the merits of claimant's appeal. BRB No. 12-0579. The administrative law judge may enter a fee award while an appeal is pending; however, fee awards do not become effective, and thus are not enforceable, until all appeals have been exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *see also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Williams v. Halter Marine Serv., Inc.*, 19 BRBS 248 (1987). As we have ruled on the merits of claimant's appeal and as employer has not challenged the amount of the fee awarded, we affirm the administrative law judge's fee award.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and the Supplemental Decision and Order Approving Attorney's Fee 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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JUDITH S. BOGGS
Administrative Appeals Judge

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monitoring of claimant's pleural plaques between the date of employer's notice of controversion on December 3, 2010, and the administrative law judge's decision on June 21, 2012.