

CLYDE STAUBLEY)	
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Claimant-Petitioner)	
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v.)	
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ELECTRIC BOAT CORPORATION)	DATE ISSUED: 03/24/2010
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2008-LHC-00614) of Administrative Law Judge Colleen A. Geraghty 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 exposed to asbestos during the course of his employment for employer as an electrician. Claimant retired on March 29, 1996. On December 16, 1991, Dr. Cherniak diagnosed claimant as having pleural plaques consistent with asbestos exposure. In January 2001, claimant was referred to Dr. Matarese by his primary care physician. Dr. Matarese monitored claimant's lung condition and function at that time and in subsequent years. In his July 31, 2007 report, Dr. Matarese opined that claimant

has a 20 percent lung impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). Claimant filed a claim for benefits under the Act for a work-related lung impairment.

In her decision, the administrative law judge found that claimant's work-related asbestos exposure contributed to a mildly reduced lung diffusion capacity and restrictive lung disease. The administrative law judge averaged the zero percent impairment rating of Dr. Teiger and Dr. Matarese's 20 percent rating to find that claimant has a 10 percent permanent lung impairment. The administrative law judge found that claimant's lung impairment reached maximum medical improvement in January 2008 based on the opinion of Dr. Matarese and the improvement shown in some of claimant's pulmonary function test (PFT) results between 2005 and 2008. Accordingly, the administrative law judge awarded claimant compensation for a 10 percent impairment commencing January 31, 2008. 33 U.S.C. §§902(10), 908(c)(23).

On appeal, claimant challenges the administrative law judge's finding that he has a 10 percent lung impairment and the commencement of benefits on January 31, 2008. Claimant contends that he is entitled to an award for a five percent lung impairment from the date he retired on March 26, 1996 to January 30, 2001, and to an award for a 20 percent lung impairment as of January 30, 2001, when he was first examined and tested by Dr. Matarese. Employer responds, urging affirmance.

The parties agreed that claimant voluntarily retired in March 1996. Decision and Order at 15. As a voluntary retiree, claimant's benefits are payable pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23), based on the percentage of permanent impairment assessed according to the AMA Guides. 33 U.S.C. §902(10). 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).

Claimant contends that the PFT results noted in the December 1991 report of Dr. Cherniak, as well as his February 1992 report stating that claimant has a five percent lung impairment, establish that claimant is entitled to compensation for a five percent impairment from the date of his retirement in March 1996. Dr. Cherniak noted in December 1991 that claimant's chest x-ray showed significant bilateral pleural plaques but a 0/0 "B-reading." He interpreted claimant's PFT as showing normal lung function. CX 3. On February 27, 1992, Dr. Cherniak completed an Attending Physician's Report in which he diagnosed "asbestotic pleural disease," with no disability from work, and he assigned claimant a five percent permanent impairment rating. CX 5. Claimant argues that the administrative law judge should have relied upon Dr. Cherniak's finding of a five

percent impairment and not his interpretation of the data as normal and showing no disability, because these interpretations are inconsistent with those of the *AMA Guides*.

In her decision, the administrative law judge found that Dr. Cherniak did not provide an explanation for his impairment rating and there is no evidence that his rating was based upon the *AMA Guides*' analysis of pulmonary function test results. Decision and Order at 14 n.9. Because the *AMA Guides* were not submitted into the record, the administrative law judge rejected claimant's contention that she should rely upon the finding of a five percent impairment. *Id.* The administrative law judge also addressed claimant's contention that the raw data recording claimant's diffusing capacity (DLCO) supports a five percent rating notwithstanding Dr. Cherniak's interpretation of the data as showing a normal DLCO. *Id.* at 16. She credited the uncontradicted testimony of Drs. Teiger and Pulde that pleural plaques are not a basis for an impairment rating under the *AMA Guides*. EXs 7 at 13, 28-29, 48-50; 9 at 7-8, 16, 28-29. Thus, the administrative law judge concluded that she could not credit Dr. Cherniak's five percent impairment rating as the record does not reflect the basis for this rating. Decision and Order at 16.

We affirm the administrative law judge's finding that claimant failed to establish that he had a five percent impairment when he voluntarily retired in March 1996. In a Section 8(c)(23) claim filed by a voluntary retiree, the Act requires impairment ratings to be based on medical opinions using the criteria contained in the *AMA Guides*.¹ See 33 U.S.C. §§902(10); 908(c)(23); 910(d)(2); *Alexander*, 34 BRBS 34. The mere diagnosis

¹ Section 2(10) of the Act, 33 U.S.C. §902(10), states:

“Disability” means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23), states:

Notwithstanding paragraphs (1) through (22), with respect to a claim for permanent partial disability for which the average weekly wages are determined under section 910(d)(2) of this title, the compensation shall be 66^{2/3} per centum of such average weekly wages multiplied by the percentage of permanent impairment, as determined under the guides referred to in section 902(10) of this title, payable during the continuance of such impairment.

of an occupational disease does not establish that the claimant is disabled. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). The administrative law judge rationally found that Dr. Cherniak's diagnosis of asbestos-related pleural disease in February 1992 does not support his finding of a five percent impairment, as she credited the opinions of Drs. Matarese and Teiger that claimant's pleural plaques are benign and do not cause any reduction in claimant's pulmonary diffusion capacity. Decision and Order at 11; see CX 9 at 6, 10; EX 7 at 49-50; see also EX 9 at 15. Thus, the administrative law judge also did not err in finding that the chest x-ray evidence of bilateral pleural plaques does not support a permanent impairment under the AMA Guides. See *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990) (x-ray evidence showing pleural thickening does not establish the commencement date for a permanent partial disability).

Moreover, the administrative law judge rationally rejected claimant's contention that his 1991 DLCO results support a finding of impairment. Claimant would have the administrative law judge apply the raw DLCO number recorded in the 1991 PFT result to a table in the AMA Guides, which, claimant contends, establishes a ratable impairment. The administrative law judge declined to do so because claimant did not offer the AMA Guides into evidence, and because Dr. Cherniak interpreted this PFT as showing "normal flow rates, no acute bronchodilator response, normal lung volumes and a normal DLCO." CX 3 (emphasis added). Dr. Cherniak reported that claimant's DLCO was 94 percent of the predicted value. *Id.* As a result of claimant's normal PFT results, the administrative law judge rejected Dr. Cherniak's subsequent five percent impairment rating, noting, moreover, that Dr. Cherniak did not state that he applied the AMA Guides. Decision and Order at 16. The administrative law judge also credited the opinions of Drs. Teiger and Pulde that Dr. Cherniak's five percent impairment rating is not consistent with the AMA Guides. EX 7 at 28-29; 9 at 24-28. Although the administrative law judge erred in requiring claimant to introduce the AMA Guides into the record to support his argument, as she may take administrative notice of this publication, consistent with Sections 2(10) and 8(c)(23) of the Act, the administrative law judge's rejections of claimant's contention and Dr. Cherniak's opinion are rational. As her finding that claimant did not establish a ratable impairment as of the date he retired in 1996 is supported by substantial evidence, we affirm the administrative law judge's denial of benefits as of that time. See *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.*, 303 F.App'x 928 (2^d Cir. 2008); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

Claimant next argues that the raw DLCO number of 24.8 recorded by Dr. Matarese in January 2001 and the opinion of Dr. Pella establish that claimant had a 20 percent respiratory impairment under the AMA Guides at that time. Initially, we note that the record does not include a medical report or testimony by Dr. Pella. Moreover, in

his deposition testimony, Dr. Matarese stated that claimant's examination on January 30, 2001, showed "no signs of any significant respiratory issues" and that all of the PFT results were normal. CX 9 at 3. Thus, the administrative law judge did not err in finding that claimant was not entitled to benefits as of January 2001. *See Tucker*, 41 BRBS 62; *Alexander*, 34 BRBS 34; *Donnell*, 22 BRBS 136.

Claimant's final contention is that the administrative law judge erred in averaging the results of claimant's impairment ratings. Claimant contends that he is entitled to benefits for a 20 percent impairment based on Dr. Matarese's opinion. The administrative law judge found that Drs. Matarese and Teiger agree that claimant has no functional limitations due to his pulmonary condition. Decision and Order at 15; *see CX 9* at 11-12; *EX 7* at 7-11. The administrative law judge relied on Dr. Teiger's uncontradicted testimony that the edition of the *AMA Guides* in effect when he rendered his zero percent impairment rating states that an examiner should document the patient's respiratory symptoms and use the effect these symptoms have on the patient's ability to perform activities of daily life in assessing the degree of impairment. Decision and Order at 15. Dr. Teiger, who examined and tested claimant on October 26, 2007, opined that, under the Fifth Edition of the *AMA Guides*, claimant does not have any pulmonary impairment. *EXs 1* at 6, *7* at 17-18, 27-28. Dr. Matarese opined that, based on claimant's 2005, 2006 and 2008 PFT results, he has a 20 percent restrictive pulmonary impairment under the Fourth Edition of the *AMA Guide*. Based on prior fluctuations in claimant's PFT results, Dr. Matarese stated claimant's condition was permanent as of the date he last examined claimant in January 2008. *CX 1* at 3, 5; *CX 9* at 6-7. He stated that his 20 percent impairment rating under the *AMA Guides* is predominately based on claimant's reduced DLCO result. *Id.* The administrative law judge found that Dr. Matarese's impairment rating overstates the degree of claimant's pulmonary impairment since it is based solely on claimant's DLCO result and does not consider claimant's activity level or his symptomless clinical examination. The administrative law judge found that Dr. Teiger's impairment rating understates claimant's pulmonary impairment since it does not consider claimant's reduced DLCO. The administrative law judge found, based on the totality of the evidence, that an impairment rating representing the average of the ratings assigned by Drs. Matarese and Teiger under the *AMA Guides* of 10 percent is reasonable.

We affirm the administrative law judge's award of benefits for a 10 percent pulmonary impairment. The administrative law judge gave a rational reason for averaging the ratings, as she found that the two opinions together take into account both claimant's reduced PFT results and his clinical presentation. *See generally Alexander*, 34 BRBS 34; *Larrabee v. Bath Iron Works Corp.*, 25 BRBS 185 (1991); *Donnell*, 22 BRBS 136. In addition, the administrative law judge's finding that claimant's condition became permanent on January 31, 2008, is supported by the opinion of Dr. Matarese. *See Tucker*,

41 BRBS 62. The administrative law judge is entitled to weigh the medical evidence and to draw rational inferences therefrom. *See generally Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28 (CRT) (D.C. Cir. 1994). As claimant has not demonstrated error in the administrative law judge's weighing of this evidence, and as her decision is supported by substantial evidence, we affirm the award of benefits for a 10 percent pulmonary impairment as of January 31, 2008.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge