

PAUL L. LAVOIE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
GENERAL DYNAMICS)	DATE ISSUED
CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

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

Edward J. Murphy, Jr. (Murphy & Beane), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision on Motion for Reconsideration (90-LHC-2754) of Administrative Law Judge David W. 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 if they 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, a shipfitter, was exposed to asbestos while working for employer from 1952 until 1981, at which time claimant's worsening pulmonary condition resulted in his reassignment to full-time light duty work in employer's office. On August 30, 1985, claimant retired due to ongoing breathing problems. On May 25, 1989, claimant was diagnosed as suffering from asbestosis, occupational asthma, and chronic lung disease arising from his exposure to, and inhalation of, asbestos and other injurious stimuli. CX 8. Claimant filed a claim for permanent total disability benefits for the period August 31, 1985 and continuing.

In his Decision and Order dated September 3, 1991, the administrative law judge determined

that claimant involuntarily retired due to his work-related pulmonary problems, that claimant was totally disabled and that claimant reached maximum medical improvement on May 25, 1989; thus, the administrative law judge awarded claimant temporary total disability benefits from August 31, 1985, through May 24, 1989, and permanent total disability benefits thereafter. 33 U.S.C. §908(a), (b). In his Decision on Motion for Reconsideration dated October 1, 1991, the administrative law judge reiterated his conclusion that claimant's pulmonary condition became permanent as of May 25, 1989, and that, accordingly, permanent total disability benefits should commence as of that date.

On appeal, employer challenges only the administrative law judge's finding as to the date claimant's condition became permanent; specifically, employer contends that claimant's pulmonary condition was permanent in nature as of August 31, 1985, the day after he involuntarily retired. Claimant responds, agreeing with employer his condition became permanent as of August 31, 1985.

The permanency of any disability is a medical rather than an economic concept. *See generally Eckley v. Fibrex and Shipping Co., Inc.*, 21 BRBS 120 (1988). A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if it has continued for a lengthy period and it appears to be of a lasting or indefinite duration. *See Mills v. Marine Repair Service*, 21 BRBS 115 (1988), *modified on recon.*, 22 BRBS 335 (1989). Thus, the determination of when maximum medical improvement is reached is primarily a question of fact based on medical evidence. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A finding of fact establishing the date of maximum medical improvement, and thus permanency, must therefore be affirmed if it is supported by substantial evidence. *See Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984).

In his Decision and Order, the administrative law judge found May 25, 1989, to be the date on which claimant's condition reached maximum medical improvement, based on Dr. DeGraff's definitive diagnosis of asbestosis on that date. Citing to *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1989), the administrative law judge declined to utilize the date of claimant's involuntary retirement as the date claimant's condition reached maximum medical improvement, noting that claimant required extensive medical care and treatment subsequent to that date in order to determine the nature and etiology of his pulmonary condition. *See Decision and Order* at 17-18. In *Lozada*, however, the record contained medical evidence which indicated that claimant's condition continued to improve after the date of maximum medical improvement asserted by claimant.

In the instant case, the administrative law judge's finding that claimant is totally disabled as of August 31, 1985, the date after which he involuntarily retired due to his work-related pulmonary condition, is unchallenged on appeal. Furthermore, it is clear that claimant's breathing problems existed at the time of and led to claimant's retirement; the record contains no evidence that claimant's pulmonary condition improved subsequent to the date of his involuntary retirement. Given these uncontroverted facts, claimant's 1989 diagnosis simply confirmed the existence of a long-standing impairment and does not provide substantial evidence supporting a finding that claimant's condition

was not permanent until 1989. By the time of his retirement, claimant had a lasting breathing impairment sufficient to establish permanency at that date. *See Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649, *petition for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). We therefore vacate the administrative law judge's finding that claimant reached maximum medical improvement on May 25, 1989, and modify the administrative law judge's decision to reflect a permanency date of August 31, 1985. Claimant is entitled to receive permanent total disability benefits commencing August 31, 1985, and employer is entitled to Section 8(f) relief after 104 weeks of payments commencing on that date. 33 U.S.C. §908(f).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order on Motion for Reconsideration are modified to reflect August 31, 1985, as the date claimant's pulmonary condition became permanent and the commencement date of claimant's permanent total disability benefits. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge