BRB No. 92-706

OTHA PERRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING AND DRY DOCK CORPORATION	)	DATE ISSUED:_____)
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins), Newport News, Virginia, for claimant.

Thomas J. Duff (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-2650) of Administrative Law Judge Daniel A. Sarno, Jr., 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).

While working for employer as a pipefitter in 1960, in 1964, and from January 15, 1976 to March 10, 1987, claimant was exposed to asbestos. Claimant has had diabetes since 1979 and

suffers from peripheral neuropathy, a condition related to the diabetes, which causes him to lose sensation in his feet. He stopped working for employer in March 1987 because, due to his peripheral neuropathy, he burned his feet. While being treated for the burns in the hospital, claimant was diagnosed as having mesothelioma and asbestosis. A successful partial lobectomy was performed to remove the tumor, and subsequently claimant experienced massive heart failure. Claimant filed a claim for benefits under the Act for an occupational lung disease on October 7, 1987. Claimant resumed working for employer in the tool room on February 29, 1988, and worked through July 14, 1988, when he stopped working due to breathing difficulties.

Without obtaining employer's prior approval, claimant entered into four settlements with asbestos manufacturers: on September 27, 1989 with Garlock, Inc. for $1500 gross, on February 2, 1989 with Eagle-Picher Industries, Inc. for $12,500 gross, on March 29, 1990 with Owens-Corning Fiberglas Corp. for $10,000 gross, and on August 11, 1989 with Babcock & Wilcox for $2,250 gross. Employer stated that it received notice of these settlements during claimant's deposition on September 19, 1990.

The administrative law judge found that the claim was not barred by Section 33(g)(1), 33 U.S.C. §933(g)(1)(1988), because at the time claimant entered into the settlements, he was not receiving any benefits. The administrative law judge found that, therefore, claimant was not a "person entitled to compensation" within the meaning of Section 33(g)(1), and was not required to obtain employer's prior written approval. The administrative law judge found claimant gave employer proper notice of the settlements during his September 1990 deposition, and that therefore the requirements of Section 33(g)(2), 33 U.S.C. §933(g)(2) (1988), are satisfied.

The administrative law judge subsequently determined that the evidence establishes that claimant is permanently and totally disabled due, in part, to asbestosis, as he found the Section 20(a), 33 U.S.C. §920(a), presumption was invoked, but not rebutted. The administrative law judge therefore ordered employer to pay claimant benefits for permanent total disability commencing August 5, 1988, at a weekly compensation rate of $344.97. The administrative law judge also awarded claimant medical expenses, and found employer entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in failing to find that the claim is barred by Section 33(g), and, in the alternative, erred in finding that claimant's disability is related to his asbestosis. Claimant responds, urging affirmance.

Employer first contends that claimant's claim is barred by Section 33(g), and cites *Estate of Cowart v. Nicklos Drilling Co.*, U.S. , 112 S.Ct. 2589, 26 BRBS 49 (CRT)(1992), contending that the *Cowart* holding should be applied to this case. Specifically, employer asserts that, because claimant failed to obtain prior written approval of the third-party settlements, as required by Section 33(g)(1), claimant should be barred from receiving compensation under the Act.

The Board has recently addressed the issue of the applicability of the *Cowart* decision to

cases pending at the time of its issuance. In *Kaye v. California & Ballast*, 28 BRBS 240 (1995), the Board held that the decision in *Cowart* is to be applied in pending cases. *Kaye*, 28 BRBS at 247; *see also Linton v. Container Stevedoring Co.*, 28 BRBS 282, 286 (1994). Consequently, the Supreme Court's decision in *Cowart* applies to this case.

In this regard, employer argues that the administrative law judge erred in determining that claimant is not a "person entitled to compensation." The Supreme Court held that an employee becomes a "person entitled to compensation" at the moment his right to recovery vests and not when an employer admits liability. *Cowart*, 112 S.Ct. at 2595, 26 BRBS at 52 (CRT). The Board has interpreted the Court's holding as indicating that a claimant's right to compensation vests at the "time of injury," making the claimant a "person entitled to compensation" from that time forward. *Harris v. Todd Pacific Shipyards Corp.*, 28 BRBS at 254, 260 (1995) (motion for recon. *en banc* pending); *Glenn v. Todd Pacific Shipyards Corp.*, 27 BRBS 112 (1993)(Smith, J., concurring in the result), *aff'g on recon.* 26 BRBS 186 (1993). The Board also determined that, in cases involving an occupational disease, the "time of injury" occurs when the employee is aware of the relationship between the disease, the disability and employment. *Harris*, 28 BRBS at 262; *Glenn*, 27 BRBS at 115. Because the decision in *Cowart* was issued after the administrative law judge's decision in this case, we vacate his finding that claimant is not a "person entitled to compensation" and we remand the case for further consideration of the issue in accordance with *Cowart*, 112 S.Ct. at 2593, 2597, 26 BRBS at 51, 53 (CRT). In making his determination on remand, the administrative law judge should address whether the amount of claimant's third-party settlements is less than the amount to which claimant would otherwise be entitled under the Act. *See Linton*, 28 BRBS at 287-288; *Harris*, 28 BRBS at 265-266; *Krause v. Bethlehem Steel Corp.*, BRBS , BRB No. 89-3165 (Dec. 30, 1992); *see also Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 42 (CRT) (3d Cir. 1995).

Although this case must be remanded for further consideration of the applicability of Section 33(g), we nonetheless shall address employer's contention regarding the cause of claimant's disability. Employer concedes that claimant has asbestosis and that he is totally disabled. On appeal, however, employer contends that the relevant doctors' opinions of record--those of Drs. Schepers, McBrayer and Kagan--establish that, while claimant's asbestosis and lung surgery may contribute to his shortness of breath, his inability to work is due to his non work-related medical conditions.

Under the aggravation rule, an employment injury need not be the sole cause of a disability; rather, if the injury aggravates, accelerates, or combines with an underlying condition, the entire resultant disability is compensable. Further, the relative contributions of the work-related injury and the prior condition are not weighed. *LaPlante v. General Dynamics Corp./Electric Boat Div.*, 15 BRBS 83 (1982). It is employer's burden to rebut the Section 20(a) presumption that claimant's disability is work-related with substantial countervailing evidence that the work injury did not cause, contribute to or accelerate the underlying condition. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, BRBS , BRB No. 92-2358 (June 27, 1995); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969

F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1991), *cert. denied*, 113 S.Ct. 1253 (1992); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 95 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, No. 91-70743 (9th Cir. Sept. 17, 1993).

The administrative law judge found that Drs. Schepers, McBrayer and Kagan do not specifically state that claimant's exposure to asbestos does not contribute to his disability or shortness or breath. Dr. Schepers stated that claimant's disability is due to a combination of diabetes, coronary artery disease and asbestosis. Schepers Dep. at 35. Dr. McBrayer, a pulmonary specialist, stated that claimant has a significant permanent impairment as a result of his exposure to asbestos, his right upper lobe lobectomy, and his obstructive airways disease, which is related to smoking. Cl. Ex. 3. Dr. Kagan opined in April 1987 that claimant was totally disabled due to his peripheral neuropathy, diabetes and heart condition. Emp. Ex. K3. At his deposition in 1991, however, he stated that claimant has several disabling conditions, including progressive shortness of breath due to pulmonary problems. Kagan Dep. at 53-54. He also stated that, as a family practitioner, he would defer to the opinions of the pulmonary specialists regarding claimant's asbestos exposure.

We affirm the administrative law judge's finding that employer did not establish that claimant's disability is not work-related. As the administrative law judge properly found, none of the opinions rules out claimant's work-related asbestos condition as a contributory cause of his disability, irrespective of the amount of the condition's contribution to claimant's overall impairment. *See Peterson*, 25 BRBS at 78. The opinions therefore are insufficient to rebut the Section 20(a) presumption, and a causal relationship is therefore established between claimant's disability and his work injury. *See Caudill*, 25 BRBS at 96.

Accordingly, the administrative law judge's finding that Section 33(g) is inapplicable is vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge