BRB No. 02-0205

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| GIUSEPPE DeVIRGILIO | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| BETHLEHEM STEEL CORPORATION | ) | DATE ISSUED: Nov. 26, 2002 |
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| Self-Insured | ) | |
| Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Supplemental Decision and Order Granting Attorney=s Fees of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Bennett A. Robbins (Baker, Garber, Duffy & Pattersen), Hoboken, New Jersey, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Supplemental Decision and Order Granting Attorney=s Fees (01-LHC-0021) of Administrative Law Judge Robert D. Kaplan 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 the 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). The amount of an attorney=s fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *See, e.g.*, *Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked for employer from 1973 through 1983, during which time he was exposed to asbestos. In 1983 Hoboken Shipyards took over the site where claimant worked, and claimant continued to work at the site until the company shut

down in 1987. Tr. at 7, 30. Claimant then worked for several non-maritime employers. In the late 1990s claimant began experiencing breathing difficulties and tightness in the chest. CT scans revealed pleural plaques and nodular dents. On January 22, 1999, claimant underwent a left thoracotomy which revealed pleural and subpleural plaques and fibroelastic scarring consistent with pleural thickening, but no malignancy. Cl. Ex. 10. Claimant thereafter filed a claim for benefits under the Act. Cl. Ex. 1

After the formal hearing, employer wrote a letter to the administrative law judge in which it acknowledged that claimant was exposed to asbestos at its facility during his employment there, that it is the last longshore employer in whose employment claimant was exposed to asbestos, and that claimant has a pleural plaques condition caused by his exposure to asbestos at its facility. *See* Employer=s October 26, 2001 letter. Thus, employer conceded that claimant was entitled to invocation of the presumption contained in Section 20(a) of the Act, 33 U.S.C. '920(a), with regard to his pleural plaques. Thereafter, in its post-hearing brief, employer additionally acknowledged that Dr. Karetzky, its medical expert, expressed the opinion that it would be prudent to set up some sort of medical monitoring schedule for claimant; accordingly, employer suggested that the administrative law judge limit an award of medical benefits to claimant to x-rays administered on not more than a yearly basis.

In his Decision and Order, the administrative law judge accepted the parties= stipulations based on employer=s statements as described in the letter referenced above, but subsequently found that claimant did not establish that he is disabled due to a pulmonary condition. Next, the administrative law judge determined that claimant is not entitled to a nominal award of disability benefits; accordingly, the administrative law judge denied the claim for disability compensation sought by claimant. Subsequent to the issuance of the administrative law judge=s decision, claimant=s counsel submitted a fee petition to the administrative law judge requesting a fee of $12,000, representing 40 hours of services rendered at $300 per hour. The administrative law judge, in his Supplemental Decision and Order Granting Attorney=s Fees, awarded claimant=s counsel a fee of $2,500.

[1]The administrative law judge did, however, award claimant medical benefits pursuant to 33 U.S.C. '907 for the monitoring agreed to by employer.

On appeal, claimant challenges the administrative law judge=s denial of his claim for disability compensation, as well as the amount of the attorney=s fee awarded to his counsel. Employer has not filed a response brief.

Under the Act as amended in 1984, when an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, he is entitled to permanent partial disability benefits based on the extent of his impairment as measured pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (AMA *Guides*). *See* 33 U.S.C. "902(10), 908(c)(23), 910(d)(1) and (2) (1988); *Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994); *Ponder v. Peter Kiewit Sons= Co.*, 24 BRBS 46 (1990). In this regard, the diagnosis of an occupational disease does not equate with a finding of disability. *See Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.,* 978 F.2d 750, 26 BRBS 85 (CRT)(1st Cir. 1992); *Morin*, 28 BRBS 205.

Claimant initially avers that the administrative law judge erred in crediting the opinion of Dr. Karetzky over that of Dr. Nahmias when addressing the issue of claimant=s present medical condition. We disagree. In the instant case, in declining to award claimant permanent partial disability compensation, the administrative law judge relied upon the opinion of Dr. Karetzky, which he found to be rational and entitled to more weight than the opinion of Dr. Nahmias. In rendering this determination, the administrative law judge found that Dr. Karetzky=s opinion that claimant has no pulmonary impairment or disability under the AMA *Guides* was based upon that physician=s determination that claimant has normal lung diffusing capacity, that four pulmonary function studies, as well as arterial blood gas studies, resulted in normal findings, and that there is thus no objective evidence that claimant suffers from a pulmonary disability. In contrast, the administrative law judge

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[2]Claimant=s reliance on the Section 20(a) presumption in support of his contention that the administrative law judge erred in failing to find that he has sustained a ratable disability is misplaced. The presumption found at 33 U.S.C. '920(a) applies to the issue of whether an injury arises in the course of employment and, thus, is work-related, and does not apply to the issues of nature and extent of disability. *See Carlisle v. Bunge Corp.,* 33 BRBS 133 (1999), *aff=d,* 227 F.3d 934, 34 BRBS 79 (CRT) (7th Cir. 2000).

[3]The administrative law judge stated that as the parties stipulated that the applicable average weekly wage for compensation purposes in the instant case is the National Average Weekly Wage in effect in May 1999; this stipulation establishes that claimant is a Avoluntary retiree@ under Sections 10(d)(2)(B) and 8(c)(23) of the Act, 33 U.S.C. "910(d)(2)(B), 908(c)(23). As claimant on appeal has not challenged this determination, it is affirmed.

[4]Dr. Karetzky opined that claimant=s January 2001 pulmonary function study which showed a poor forced vital capacity and was relied upon by Dr. Nahmias is

declined to rely upon the opinion of Dr. Nahmias, who opined that claimant has a permanent disability of 30 percent of total, since that physician evaluated claimant under the workers= compensation law of New Jersey rather than the AMA *Guides* and he did not provide any other explanation for his conclusion that claimant has a respiratory disability.

It is well-established that it is for the administrative law judge, in adjudicating a claim, to determine the weight to be accorded the medical evidence. *See generally Calbeck v. Strachan Shipping Co.,* 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Wheeler v. Interocean Stevedoring, Inc.,* 21 BRBS 33 (1988). In the instant case, the administrative law judge fully evaluated the medical opinions of record and ultimately gave determinative weight to Dr. Karetzky=s opinion based upon that physician=s use of the AMA *Guides* as required by Section 8(c)(23), as well as the fact that four pulmonary function studies resulted in normal findings. This determination is rational and within the administrative law judge=s authority as factfinder; moreover, the credited evidence supports the administrative law judge=s determination that claimant suffers from no compensable impairment. *See O=Keeffe*, 380 U.S. 359; *Larrabee v. Bath Iron Works Corp.,* 25 BRBS 185 (1991). Accordingly, we affirm the administrative law judge=s determination that claimant has not established entitlement to disability compensation under the Act for his present pulmonary condition.

In the alternative, claimant asserts that the administrative law judge erred in failing to grant a *de minimis* award. We reject this argument. In his decision, the administrative law judge denied claimant=s request for a *de minimis* award on the ground that claimant presented no evidence that there is a significant possibility that he will sustain a diminution of pulmonary function in the future. Decision and Order at 6. The administrative law judge=s conclusion on this issue is also supported by substantial evidence. The courts have approved nominal awards as a means of holding a claim open for purposes of Section 22 of the Act, 33 U.S.C. '922, where a claimant with a medical injury but no current disability demonstrates a significant possibility of future harm. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *LaFaille v. Benefits Review Board,* 884 F.2d 54, 22 BRBS 108(CRT)(2d Cir. 1989). In this case, as claimant is a voluntary retiree, the administrative law judge recognized that in order to obtain a nominal award, claimant must establish that there is a significant potential that his present

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unacceptable under testing standards, as the volume curve indicates a lack of effort by claimant. *See* EX 2 at 22-23.

injury will cause diminished capacity under future conditions. In finding that claimant has not met this requirement, the administrative law judge relied on the credited opinion of Dr. Karetzky. Dr. Karetzky stated that claimant=s current lung condition, *e.g.,* pleural plaques, does not place him at a greater risk of developing pulmonary fibrosis, asbestosis or lung cancer in the future. *See* Emp. Ex. 2 at 31-32. Claimant relies upon Dr. Karetzky=s agreement that medical monitoring in the future would be Aprudent@ for claimant, *id.;* this recommendation alone, however, is insufficient to meet claimant=s burden, particularly in context of the remainder of Dr. Karetzky=s opinion. Accordingly, as the administrative law judge=s finding is supported by substantial evidence, we affirm his determination that claimant is not entitled to a *de minimis* award in this case.

Lastly, claimant challenges the administrative law judge=s fee award. Subsequent to the issuance of the administrative law judge=s decision, claimant=s counsel submitted a fee petition to the administrative law judge requesting $12,000, representing 40 hours of services at a rate of $300 per hour. Employer filed objections to this fee request. In a Supplemental Decision and Order Granting Attorney=s Fees, the administrative law judge disallowed the time sought for services rendered before this case was referred to the Office of Administrative Law Judges, reduced the hourly rate from $300 to $250, and determined that the fee requested by counsel was excessive in light of the limited success achieved in this case. Thereafter, in accordance with *Hensley v. Eckerhart*, 461 U.S. 421 (1983), the administrative law judge awarded an attorney=s fee of $2,500 to claimant=s counsel.

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[5]As we have affirmed the administrative law judge=s denial of a nominal award based on his finding that claimant failed to establish that there is a significant potential that he will sustain a diminished pulmonary capacity in the future, we need not address the administrative law judge=s alternative conclusion that, as he found claimant was not disabled, a *de minimis* award could be unnecessary as claimant could file a new claim once he is disabled. Decision and Order at 7 n. 5.

[6]Clamant filed his claim on June 17, 1999. The case was referred to the OALJ between September 21-25, 2000. The hearing took place on February 21, 2001. Employer agreed to pay for periodic monitoring of claimant on October 16, 2001, allegedly as a response to Dr. Karetzky=s recommendation in this regard. Employer=s offer to pay for the medical monitoring was therefore made after the case was transferred to the OALJ and can thus form the basis of an attorney=s fee award.

In *Hensley*, a plurality of the Supreme Court defined the conditions under which a plaintiff who prevails on only some of his claims may recover attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. '1988. Specifically, the Court created a two-prong test focusing on the following questions:

> First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

*Hensley*, 461 U.S. at 434; *see also George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT)(D.C. Cir. 1992); *General Dynamics Corp. v. Horrigan*, 848 F.2d 321, 21 BRBS 73(CRT)(1st Cir. 1988), *cert. denied*, 488 U.S. 997 (1988). If a plaintiff has obtained Aexcellent@ results, the fee award should not be reduced simply because he failed to prevail on every contention raised. If the plaintiff achieves only partial or limited success, however, the product of hours expended on litigation as a whole, times a reasonable hourly rate, may result in an excessive award. Therefore, the fee award should be for an amount that is reasonable in relation to the results obtained. The Court, however, provided no rule or formula for calculating a fee. *Hensley*, 461 U.S. at 435-436; *see also Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993). Moreover, in cases arising under the Act, the regulations require that an administrative law judge take into account the quality of the representation and the complexity of the legal issues involved, in determining the amount of an attorney=s fee. *See* 20 C.F.R. '702.132(a).

In the present case, the administrative law judge, citing *Hensley,* 461 U.S. 421, found that claimant achieved only partial success in the pursuit of his claim. Specifically, the administrative law judge determined that while claimant was successful on the issue of entitlement to medical benefits pursuant to Section 7 of the Act, 33 U.S.C. '907, he was unsuccessful in obtaining disability compensation. Accordingly, the administrative law judge concluded, after consideration of the factors contained at 20 C.F.R. '702.132(a), the particular facts and issues of this case, and claimant=s relative degree of success, that claimant=s counsel is entitled to a fee of $2,500.

We affirm the administrative law judge=s fee award. The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, specifically discussed the Supreme Court=s decision in *Hensley* in *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT)(3d Cir. 2001), wherein it emphasized that the presiding administrative law judge is given the responsibility of determining an

appropriate attorney=s fee award, and that the administrative law judge is therefore in the best position to Aobserve firsthand the factors affecting [the] analysis of counsel's fee award.@ *Id.*, 245 F.3d at 289, 35 BRBS at 32(CRT). In the case at bar, claimant argues that only one of the hours for which he sought a fee was prior to referral of the case to the OALJ and that, in reducing the overall amount requested, the administrative law judge did not quantify the number of allowable hours. As the administrative law judge has the discretion to make a reduction as he did here where he finds that claimant achieved limited success, the administrative law judge=s decision to reduce claimant=s counsel=s fee request is affirmed. *See Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999)(50 percent reduction in an attorney=s fee is reasonable given claimant=s limited success in establishing causation and entitlement to medical benefits, but not disability benefits); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19, 30-31 (1999) (90 percent reduction in an attorney=s fee is reasonable given claimant=s limited success in establishing entitlement to medical benefits, but not temporary total disability benefits); *Hill v. Avondale Industries, 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*, 120 S.Ct. 2215 (2000)(75 percent reduction in attorney=s fees is reasonable given claimant=s failure to succeed in the prosecution of his primary claim for permanent total and partial disability compensation).

Accordingly, the administrative law judge=s Decision and Order and Supplemental Decision and Order Granting Attorney=s Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge