

WILLIE M. RICHARDSON)
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 Claimant-Petitioner)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: Feb. 17, 2004
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Hugh B. McCormick, III (Patten, Wornom, Hatten & Diamonstein), Newport News, Virginia, and Gary R. West (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1999-LHC-1508, 2000-LHC-1188) of Administrative Law Judge Richard E. Huddleston denying benefits on claims 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that he contracted an asbestos-related lung disease as a result of exposure to asbestos dust and fibers, and chronic obstructive pulmonary disease (COPD) from exposure to welding smoke and paint fumes, during the course of his approximately 30 years of work for employer. Claimant filed a claim for asbestosis in 1995 and for COPD in

1999; the claims were eventually consolidated before the administrative law judge. At the formal hearing, claimant averred that he did not presently have asbestosis and thus he sought to amend his asbestos claim to seek only an award for medical monitoring under Section 7 of the Act, 33 U.S.C. §907. Tr. at 5-7. The administrative law judge granted claimant's request. While his claims were pending, claimant became involved in litigation against asbestos manufacturers and he entered into third-party settlements in two cases. Specifically, claimant received \$6,500 in February 1999 from The Babcock and Wilcox Company, and \$112 in June 1999 from Forty-Eight Insulations, as part of separately executed settlements. Employer thereafter argued that Section 33(g) of the Act, 33 U.S.C. §933(g), barred claimant's claims since he had entered into third-party settlements without employer's prior written approval.

In his decision, the administrative law judge determined that claimant was a "person entitled to compensation" at the time he entered into two third-party settlements and that he did not obtain employer's prior written approval in either instance. Thus, the administrative law judge found that Section 33(g) bars claimant's claim for medical benefits for his asbestos-related condition. The administrative law judge next concluded that as claimant suffers from a single disability caused by his simultaneous exposure to asbestos fibers, smoke, dust, and fumes, Section 33(g) likewise bars his COPD claim for disability benefits. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that Section 33(g) bars his claims.¹ Employer responds, urging affirmance.

Claimant first asserts that he is not a "person entitled to compensation" with regard to his claim for medical monitoring because he is not entitled to disability benefits for his asbestos-related condition. Claimant contends that he does not have asbestosis, and that his pulmonary impairment and resultant disability are not due to an asbestos-related condition. Therefore, claimant contends that the administrative law judge erred in barring his claim for medical monitoring. Claimant also asserts that the administrative law judge erred in finding that his COPD claim is barred by Section 33(g). In this regard, claimant alleges that the administrative law judge erred in finding that claimant's third-party settlements were for the same disability as that which is compensable under the Act. Claimant argues that as he suffers from two distinct respiratory conditions, an asbestos-related condition and COPD related to non-asbestos irritants, Section 33(g) cannot bar his COPD claim for disability benefits under the Act as the third-party settlements related only to claimant's asbestos-

¹ Claimant is represented by two different attorneys in his longshore claims – Mr. McCormick in his claim for medical monitoring and Mr. West in his claim for disability benefits due to COPD. Claimant was represented by a third attorney in his third-party claims.

related lung disease.

Section 33(g)(1) requires that a “person entitled to compensation” obtain employer’s prior written consent where he enters into third-party settlements for an amount less than the compensation to which he would be entitled under the Act.² See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 26 BRBS 49(CRT) (1992); *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998). Absent the employer’s approval, employer is not liable for disability or medical benefits. *Cowart*, 505 U.S. 469, 26 BRBS 49(CRT); *Esposito v. Sea-Land Service, Inc.*, 36 BRBS 10 (2002). The United States Supreme Court has held that an individual becomes a “person entitled to compensation” at the moment his right to recovery vests, and that he need not be receiving compensation or have had an adjudication in his favor in order to be such a person. *Cowart*, 505 U.S. at 477, 26 BRBS at 51(CRT); see also *Ingalls Shipbuilding, Inc. v. Director, OWCP [Yates]*, 519 U.S. 248, 31 BRBS 5(CRT) (1997). The right to recovery vests when the claimant satisfies the prerequisites attached to that right. *Cowart*, 505 U.S. at 477, 26 BRBS at 51-52(CRT). In occupational disease cases, case law establishes that the employee does not sustain an injury under the Act until he is aware of the relationship between the disease, the disability, and the employment, and that in order to be “aware” of his disability, the employee must be aware that his work-related disease has caused a loss in wage-earning capacity. See discussion in *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 6 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *aff’d* 28 BRBS 254 (1994). Since sustaining a disability is a necessary prerequisite to an award of compensation, under *Cowart*, a person who is not a voluntary retiree cannot be considered to be a “person entitled to compensation” until he has a loss in

² Section 33(g)(1) of the Act states:

If the person entitled to compensation (or the person’s representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person’s representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer’s carrier, before the settlement is executed, and by the person entitled to compensation (or the person’s representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

33 U.S.C. §933(g)(1). The administrative law judge found that employer met its burden of proving that claimant entered into fully executed settlements of claims against asbestos manufacturers on February 16, 1999, and June 17, 1999, without its prior written approval. Claimant does not allege any errors in this finding, and thus it is affirmed.

earning capacity. *See Sain*, 162 F.3d 813, 32 BRBS 205(CRT); *Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103 (1999).

We first address claimant's contention that he was not a "person entitled to compensation" with regard to his claim for medical monitoring for asbestos-related conditions. Claimant contends that as he is neither impaired nor disabled by an asbestos-related condition, the administrative law judge erred in finding he was a "person entitled to compensation." The administrative law judge found, based on the evidence in existence at the time of the settlements, that claimant's exposure to asbestos caused asbestosis and pleural thickening, and that claimant, by his own admission, was totally disabled beginning November 18, 1998, as a result of his respiratory condition. Decision and Order at 41-43. The administrative law judge acknowledged that his finding was made without regard to any subsequent evidence that may have been developed to demonstrate that claimant's lung impairment, and thus any loss in wage-earning capacity, was due solely to COPD and not asbestosis. *Id.* at 41 n.10 and 43 n.11. The administrative law judge therefore concluded, pursuant to *Cowart*, that claimant was "a person entitled to compensation" within the meaning of Section 33(g) at the time he entered into the third-party settlements, and thus, that his claim for asbestos medical monitoring is barred by Section 33(g).

We affirm the administrative law judge's finding that claimant was a "person entitled to compensation" at the time he entered into the third-party settlements in 1999. Based on the facts of this case, the administrative law judge rationally looked to the evidence in existence as of the date of the settlements in order to determine if claimant satisfied the prerequisites to the right to recover, and substantial evidence supports his finding that as of the date claimant stopped working, November 18, 1998, claimant was aware of the relationship between his work-related asbestosis and his inability to work. *See generally Bechtel Associates v. Sweeney*, 834 F.2d 1029, 20 BRBS 49(CRT) (D.C. Cir. 1987). In a 1981 report, Dr. Saltzman stated that claimant's exertional dyspnea might be related to asbestos exposure or to pre-existing asthma. CX 12. In 1994 and 1998, claimant had abnormal pulmonary function results, with both a restrictive and obstructive component. CXs 1, 3C; EX 22. Dr. Harron reviewed a November 13, 1997, x-ray as "consistent with asbestosis." EX 23. Dr. Zimmet opined on October 8, 1998, that claimant has asbestosis, based on his history of asbestos exposure, and his abnormal pulmonary function studies and x-ray. The administrative law judge also found that claimant credibly testified that he stopped working due to shortness of breath.³ Tr. at 120; Decision and Order at 43. Based on the evidence in existence at the time of the 1999 third-party settlements, claimant satisfied the prerequisites to the right to compensation, and therefore was a "person entitled to

³Thus, unlike the situation in *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998), which claimant contends is analogous to this case, claimant herein was disabled at the time of the third-party settlements.

compensation.” This finding, however, does not mandate the conclusion that claimant’s claim for medical monitoring is barred. Rather, this determination can be made only after we address the contentions regarding claimant’s COPD claim.

As claimant contends, the seminal issue regarding the COPD claim concerns the administrative law judge’s finding that the third-party settlements with the asbestos manufacturers were for the same disability as that for which claimant sought compensation under the Act. Section 33(a) of the Act states:

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(a). Thus, in order for Section 33(g) to apply, the disability for which claimant seeks compensation under the Act must be the same disability for which he recovered from third parties. *See United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979) (Section 33(g) limited to situation where third party is potentially liable to both the employee and the covered employer); *Goody v. Thames Valley Steel Co.*, 31 BRBS 29 (1997), *aff’d mem. sub nom. Thames Valley Steel Co. v. Director, OWCP*, 131 F.3d 132 (2^d Cir. 1997) (table); *Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). As noted above, claimant withdrew his claim for disability benefits for asbestosis, ostensibly on the ground that the later medical evidence cannot support a finding of either asbestosis or disability due to asbestosis. Nonetheless, the administrative law judge addressed the medical evidence as a whole and concluded that claimant has asbestosis, asbestos-related pleural plaques, and both a restrictive and an obstructive lung impairment due to simultaneous work exposure to asbestos, smoke, dust and welding fumes, and which combines with claimant’s pre-existing asthma to render him totally disabled. The administrative law judge thus concluded that claimant’s disability due to his lung condition is the same disability for which he settled his third-party claims. The administrative law judge therefore found the disability claim under the Act barred, because the settlements were for an amount less than claimant’s compensation entitlement. Decision and Order at 44-48.

We cannot affirm this finding; rather, we must remand the case to the administrative law judge for further findings. Our analysis of this issue begins with *O’Berry v. Jacksonville Shipyards, Inc.*, 21 BRBS 355 (1988), in which the claimant filed separate claims under the Act for siderosis and asbestosis. The claimant also filed and settled claims with asbestos manufacturers. The Board held that Section 33(g) was potentially applicable to both of the claims, as the asbestosis and siderosis claims resulted in the same disability, *i.e.*, a respiratory

impairment.⁴ The Director, Office of Workers' Compensation Programs filed a motion for reconsideration, contending that the Board's interpretation of what constitutes the "same disability" was improper because it would permit the employer to take a credit, pursuant to Section 33(f), 33 U.S.C. §933(f),⁵ for the third-party asbestos settlement proceeds against its liability under the Act for the siderosis claim. The Board stated that the Director's interpretation may have merit and instructed the administrative law judge to consider the argument on remand. *O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989); *see also Goody v. Thames Valley Steel Corp.*, 28 BRBS 167 (1994) (McGranery, J., dissenting).

The Board next addressed the issue of whether two conditions comprise the "same disability" in the context of Section 33(f) in *Chavez v. Todd Shipyards Corp.*, 27 BRBS 80 (1993) (McGranery, J., dissenting), *aff'd on recon. en banc*, 28 BRBS 185 (1994) (Brown and McGranery, JJ., dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 32 BRBS 67(CRT) (9th Cir. 1998). In *Chavez*, the claimant developed asbestosis and hypertension and retired from employer's employ in 1980 because of an inability to perform his job. Claimant filed a claim seeking permanent total disability benefits. The administrative law judge determined that the claimant was permanently totally disabled as a result of his combined pulmonary and hypertension problems. Subsequent to the initial hearing, claimant filed approximately 15 third-party suits against asbestos manufacturers, suppliers, and distributors, and employer asserted that claimant settled two of those cases without its consent. Employer's contention that Section 33(g) applied was rejected, as the administrative law judge determined that no settlements had been executed, but the administrative law judge nevertheless determined that employer was entitled to a full lien pursuant to Section 33(f) with regard to any future asbestos-related third-party settlements.

⁴The Board held, however, that Section 33(g) was not applicable because the claimant was not a "person entitled to compensation" under the pre-*Cowart* interpretation of that phrase.

⁵ Section 33(f) states:

If the person entitled to compensation institutes proceedings within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

After proceedings before the court of appeals,⁶ claimant contended that employer's Section 33(f) offset should be apportioned so that it applied only to that part of claimant's disability due to asbestosis. Employer argued that since it was liable for claimant's entire disability under the aggravation rule, it should receive a credit against its entire liability. The Board rejected the apportionment contention, based on *Force v. Director, OWCP*, 938 F.2d 981, 25 BRBS 13(CRT) (9th Cir. 1991) (no apportionment among claims of the person entitled to compensation) and adopted the position of the Director that the determination of whether the employer got a full credit or no credit turned on the cause of the claimant's disabilities. *Chavez*, 27 BRBS at 85-87. Thus, the Board held that if only claimant's asbestosis was work-related, then the employer was entitled to a full offset against the claimant's net recovery from his third-party asbestos settlements. The Board stated that such a finding is consistent with Section 33(a), as asbestosis is the disability "for which compensation is payable under the Act." *Id.* at 85. If, however, claimant's hypertension was his only work-related disability, then the asbestosis was not the disability compensable under the Act and employer would not be entitled to any Section 33(f) credit because the third-party suits were not for the same disability. *Chavez*, 27 BRBS at 85-87. The Board held that if both conditions were work-related, then claimant could have sought benefits for hypertension alone and received total disability benefits under the aggravation rule. Under this scenario, no offset is available because the tortfeasors' actions did not cause the compensable injury. *Id.*; *O'Berry*, 22 BRBS at 433. The Ninth Circuit affirmed this interpretation of Section 33(f). The court stated:

The rationale behind this interpretation is that an employee who is totally disabled based on either injury alone could recover from the employer under either injury. Therefore, to allow an employer set-off for third party proceeds received under one injury would result in a windfall for the employer because the employee could have sought recovery under the other injury for which no third party proceeds are available. Such an interpretation in effect would reward the employer for causing two work related disabilities instead of one.

Chavez, 139 F.3d at 1312, 32 BRBS at 70(CRT).

As Section 33(g) is premised on Section 33(a) as is Section 33(f), it follows that the

⁶ The Board held that as no settlements had been executed, the parties' contentions concerning Section 33(f) were not ripe for adjudication. *Chavez v. Todd Shipyards Corp.*, 24 BRBS 71 (1990). The Ninth Circuit reversed, holding that the issue was ripe and remanding the case for the Board to address the parties' contentions concerning Section 33(f). *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134(CRT) (9th Cir. 1992).

holding in *Chavez* should be applied before Section 33(g) can be found to bar claimant's COPD claim in this case. *See generally Taylor v. Director, OWCP*, 201 F.3d 1234, 33 BRBS 197(CRT) (9th Cir. 2000) ("person entitled to compensation" must be interpreted the same in Section 33(f) and (g)). Therefore, we remand the case to the administrative law judge to make findings consistent with *Chavez* and to then determine the applicability of Section 33(g) based on these findings. Only if asbestosis is claimant's only work-related disability can Section 33(g) be invoked to bar claimant's claim.⁷ *Chavez*, 27 BRBS at 85. If, after reviewing the medical evidence in light of *Chavez*, the administrative law judge again finds that claimant is disabled by both asbestosis and COPD, Section 33(g) cannot bar the claim because, under the aggravation rule, COPD is considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third-party claims.⁸ *See Goody*, 31 BRBS at 33; *see generally Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52(CRT) (4th Cir. 1982); *LaPlante v. General Dynamics Corp.*, 15 BRBS 83 (1982). Consequently, we vacate the administrative law judge's finding that Section 33(g) bars claimant's COPD claim and remand this case for consideration of the entire record to discern the cause of claimant's disability. *Chavez*, 27 BRBS 80.

With regard to the administrative law judge's analysis of the medical evidence in this case, claimant contends that the administrative law judge erred in finding he has asbestosis or any impairment due to asbestosis. Due to our decision to remand this case, we need not address these contentions in detail. In finding that some component of claimant's respiratory disability is due to asbestosis, the administrative law judge observed that Drs. Baker and Freeman stated that claimant's restrictive pulmonary impairment is consistent with asbestosis, CXs 2, 10 at 24-25, but is not due to asbestosis because they do not believe he has this condition due to the absence of x-ray evidence of it. The administrative law judge credited Dr. Harron's reading of a 1997 x-ray as positive for asbestosis over the later, negative x-ray readings of Drs. Baker and Freeman, due to Dr. Harron's superior radiological

⁷Although claimant withdrew his claim for disability benefits due to asbestosis, employer nevertheless may attempt to establish, in support of its claim that Section 33(g) applies, that claimant's disability is due to asbestosis alone.

⁸Moreover, under such circumstances, claimant's claim for medical monitoring for any asbestos-related condition cannot be barred by Section 33(g) because, ultimately, claimant is not entitled to disability compensation for asbestosis. A person entitled only to medical benefits is not a "person entitled to compensation" for purposes of Section 33(g). *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4th Cir. 1998); *Harris v. Todd Pacific Shipyards Corp.*, 30 BRBS 6 (1996) (*en banc*) (Brown and McGranery, JJ., concurring and dissenting), *aff'd* 28 BRBS 254 (1994).

credentials. Thus, to the extent that the opinions of Dr. Baker and Freeman that claimant does not have asbestosis is based on their negative x-ray readings, the administrative law judge gave their opinions less weight. Decision and Order at 46-47. On remand, the administrative law judge should reconsider the weight to be accorded to Dr. Harron's x-ray reading in light of the later CT scan which Dr. Baker and Dr. Freeman stated is insufficient to establish a diagnosis of asbestosis. CX 2; CX 14 at 10. Moreover, while the administrative law judge could accord their opinions less weight to the extent they were based on their negative x-ray readings, both doctors based their opinions on other test results as well as personal examinations of the claimant; as the administrative law judge gave no basis for discounting their opinions in this regard, he must reconsider their opinions that claimant does not have asbestosis. Finally, we note that none of the more recent medical evidence states that claimant's restrictive lung impairment is, in fact, due to asbestosis. CXs 5, 10. Dr. Freeman stated that the most likely cause for claimant's condition was something that he inhaled while employed at employer's shipyard, although to a reasonable degree of medical certainty, it is not due to any inhalation of asbestos. CXs 10, 14. In any event, if the evidence establishes that claimant's work-related COPD is a cause of his disability, then pursuant to the aggravation rule, he is entitled to compensation for the entire disability based solely on that condition, and the asbestos-related settlements cannot bar the claim under Section 33(g).

Accordingly, the administrative law judge's findings that Section 33(g) bars claimant's asbestos-related claim for medical monitoring and claimant's entitlement to disability benefits on his COPD claim are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge