BRB No. 06-0816

SAMUEL B. TUCKER, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THAMES VALLEY STEEL	)	DATE ISSUED: 06/22/2007
	)	
and	)	
	)	
HARTFORD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and the Decision and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., for claimant.

David A. Kelly (Montstream & May, L.L.P.), Glastonbury, Connecticut, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Awarding Benefits and the Decision and Order Granting in Part and Denying in Part Claimant's Motion for Reconsideration (2000-LHC-3381, 2000-LHC-3382, 2000-LHC-3383, and 2001-LHC-1667 through 2001-LHC-1676) of Administrative Law Judge Daniel F. Sutton 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).

This is the second time this case has been before the Board. Originally, claimant filed a claim for benefits against several covered employers. He claimed he suffered work-related injuries as the result of exposure to asbestos and other hazardous substances, as well as arthritis and thoracic outlet syndrome from vibrating tools, crawling, kneeling, etc. In his initial decision, the administrative law judge found that employer is responsible for claimant's permanent total disability benefits from May 21, 1985. In its decision on employer's appeal, the Board addressed numerous issues. Ultimately, as it relates to the current appeal, the Board reversed the administrative law judge's finding that claimant was an involuntary retiree, held he was a voluntary retiree, and vacated the award of permanent total disability benefits, as a voluntary retiree is limited to a permanent partial disability award under Section 8(c)(23), 33 U.S.C. §908(c)(23). The Board remanded the case to the administrative law judge for reconsideration of the onset date of claimant's partial disability and the amount of benefits to which he is entitled. The Board affirmed the administrative law judge's findings on the remaining issues. *Tucker v. Thames Valley Steel*, BRB No. 04-0136 (Dec. 28, 2004).

On remand, the administrative law judge found that claimant is entitled to permanent partial disability benefits based on a 25 percent impairment to his lungs commencing on April 1, 1993, at the rate of $60.10 per week, and that employer is entitled to a credit for benefits paid. Decision and Order on Remand at 4-5. Claimant moved for reconsideration. The administrative law judge granted the motion in part and adjusted the compensation rate to reflect the national average weekly wage in effect in July 1999 rather than April 1993. Thus, he modified his decision to reflect that claimant is entitled to $72.65 per week in compensation. The administrative law judge, however, denied claimant's motion regarding the onset date, reaffirming his finding that disability began on April 1, 1993. Decision and Order M/Recon. at 3-4. Claimant appeals these decisions, and employer responds, urging affirmance.

Claimant first contends the Board did not have jurisdiction to render its 2004 decision. Specifically, claimant argues that the Board dismissed employer's November 13, 2003, notice of appeal as premature pursuant to 20 C.F.R. §802.206(f),[1] and that

[1]Section 802.206(f) states in pertinent part:

> If a timely motion for reconsideration of a decision or order of an administrative law judge . . . is filed, any appeal to the Board, whether filed prior to or subsequent to the filing of the timely motion for reconsideration, shall be dismissed without prejudice as premature.

employer's December 23, 2003, notice of appeal sought review of only the administrative law judge's decision on the second motion for reconsideration That is, claimant argues that employer did not file a notice of appeal following the administrative law judge's final decision that included a request for review of all the administrative law judge's decisions, and the Board erred in interpreting the December 2003 notice of appeal as such. Claimant also contends that the December 2003 appeal was not timely as successive motions for reconsideration do not toll the period for appeal. Employer responds, arguing that there were no motions for reconsideration related to the November 2003 notice of appeal and that the Board acknowledged the sequence of events and accepted the November notice of appeal as timely with regard to all decisions of the administrative law judge. Additionally, employer argues that claimant is time-barred from raising the issue of the adequacy of the notice of appeal since he did not appeal the Board's orders of December 12, 2003, and February 23, 2004, and those decisions became final after 60 days.

The administrative law judge issued his Decision and Order Awarding Benefits on September 30, 2003, and it was filed with the district director on October 2, 2003. Following an Errata Order which corrected a typographical error, claimant and employer filed motions for reconsideration with the administrative law judge. On November 5, 2003, the administrative law judge issued his Order Granting in Part and Denying in Part the Motions for Reconsideration. On November 13, 2003, employer appealed the administrative law judge's decisions. The Board acknowledged this appeal on December 12, 2003, and assigned it BRB No. 04-0136. Employer also filed a motion for reconsideration with the administrative law judge, and the administrative law judge denied the motion on December 17, 2003. On December 23, 2003, employer filed another appeal with the Board. On February 23, 2004, the Board dismissed BRB No. 04-0136 pursuant to the regulation at Section 802.206(f). *See* n.1, *supra*. In that same Order, the Board acknowledged employer's second appeal, construed it as an appeal of all the underlying decisions, and assigned it BRB No. 04-0136. On December 28, 2004, the Board issued its decision vacating the administrative law judge's award of benefits and remanding the case for further consideration.

Initially, we reject employer's arguments in response to claimant's appeal. Employer's assertion that there were no motions for reconsideration that affected the November 2003 notice of appeal is incorrect. Although the November 2003 notice of appeal was timely filed, it was later properly dismissed as premature when the Board learned that a second motion for reconsideration had been filed with the administrative law judge. *See Aetna Casualty & Surety Co. v. Director, OWCP [Jourdan]*, 97 F.3d 815, 30 BRBS 81(CRT) (5th Cir. 1996); *Harmar Coal Co. v. Director, OWCP*, 926 F.2d 302, 14 BLR 2-182 (3d Cir. 1991); *Tideland Welding Service v. Sawyer*, 881 F.2d 157, 22 BRBS 122(CRT) (5th Cir. 1989), *cert. denied*, 495 U.S. 904 (1990); 20 C.F.R. §802.206(f). Employer itself filed the second motion that resulted in the dismissal of its

November 2003 appeal. Further, contrary to employer's argument, the adequacy of the November 2003 notice of appeal is not at issue. Rather, claimant argues that the December notice of appeal sought review of only the decision on the second motion for reconsideration and therefore cannot be considered a renewed or inclusive notice of appeal of all the administrative law judge's decisions and orders. To the extent employer is arguing that claimant should have challenged the Board's jurisdiction over the December 2003 appeal or moved to dismiss it at the time it was filed or prior to the issuance of the Board's December 2004 decision on the merits, we reject employer's argument, as the issue of a court's lack of subject-matter jurisdiction may be raised at any time. *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lackawanna Refuse Removal, Inc. v. Proctor & Gamble Paper Products Co.*, 86 F.R.D. 330 (D.C. Pa. 1979); Fed.R.Civ.P. Rules 12(h)(1), 60(b)(4). Therefore, we reject employer's arguments in response to claimant's current appeal.

Nevertheless, we reject claimant's arguments regarding the Board's jurisdiction to review the administrative law judge's substantive first decision. The Board obtains jurisdiction over a case where a party files a timely notice of appeal. 20 C.F.R. §§702.391, 802.204. The appeal must raise a substantial question of law or fact. 20 C.F.R. §702.392. The notice of appeal shall contain, *inter alia*, information identifying the decision or order being appealed such as the OALJ file number, OWCP number, and the date of the order or decision being appealed. 20 C.F.R. §802.208(a)(4), (5). Notwithstanding the requirements set forth above, "any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of §802.205." 20 C.F.R. §802.208(b). Moreover, "[i]n the event that identification of the case is not possible from the information submitted, the Clerk of the Board shall notify the petitioner and shall give the petitioner a reasonable time to produce sufficient information to permit identification of the case." 20 C.F.R. §802.208(c).

Claimant argues that the Board did not have jurisdiction to issue its December 28, 2004, decision vacating and remanding the administrative law judge's decision because employer validly appealed only the administrative law judge's decision on the second motion for reconsideration. The December 2003 notice of appeal specifically stated: "The petitioners . . . respectfully give notice of its appeal of Administrative Law Judge Daniel A. Sutton's Order Denying Second Motion for Reconsideration dated December 17, 2003." Paragraph seven of the notice stated: "A Motion for Reconsideration was filed on October 10, 2003 and the Supplemental Decision and Order on Reconsideration was issued on November 5, 2003. The Erratum Order was issued October 16, 2003." Moreover, employer's cover letter with the December 2003 notice stated: "As we discussed, the BRB will not assign a new docket number to this appeal, but rather, the BRB will consolidate this Notice with the previously filed Notice of Appeal." December 23, 2003 letter (emphasis in original).

Although the regulations specify the contents of a notice of appeal, they do not give form priority over substance. Rather, the regulations specifically state that identification of the decision to be appealed can be established through "any written communication[,]" 20 C.F.R. §802.208(b), and that the petitioner may be granted additional time to establish identification if necessary, 20 C.F.R. §802.208(c). The cover letter to the December 2003 notice of appeal requested that the December 2003 notice of appeal be consolidated with the November notice of appeal, which had not yet been dismissed as premature. The November notice of appeal sought review of the administrative law judge's "Decision and Order Awarding Benefits and Denying Special Fund Relief and the Order Granting in Part and Denying in Part Motions for Reconsideration and Supplemental Decision and Order on Reconsideration." Considering both notices of appeal in conjunction with the cover letter, all of which are "written communications," it is clear that employer was seeking review of all of the administrative law judge's decisions in this case. As the regulations give the Board the discretion to ascertain the decisions being appealed, and the parties are not bound by a single written document, it was reasonable for the Board to have considered the December 2003 notice of appeal as being an inclusive notice of appeal of all of the administrative law judge's decisions. Indeed, this construction is consistent with Section 802.206(f) of the regulations, which requires the Board to dismiss an appeal where a motion for reconsideration has been filed and thereafter permits appeal of the entire case once the order addressing the motion for reconsideration has been issued. As the purpose of Section 802.206(f) is to have only one appeal before the Board of all administrative decisions and decisions on reconsideration, we reject claimant's argument that the Board erred in addressing employer's arguments relating to all of the administrative law judge's decisions in this case.[2]

Next, claimant argues that, even if the Board holds that employer's December 2003 notice of appeal requested review of all of the administrative law judge's decisions, that notice could not have invoked Board review because it was untimely filed with respect to the administrative law judge's original decision and his decision on the first motion for reconsideration. We disagree. An administrative law judge's compensation

[2]Contrary to claimant's argument, *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940 (8th Cir. 1999), is not applicable. Although the court stated therein: "[o]mission of any reference to the order appealed from is more than a technical deficiency; it creates a jurisdictional bar to the appeal[,]" *id.* at 946, that case involved Rules 3 and 4 of the Federal Rules of Appellate Procedure and did not involve the Board's rules, which specifically allow the Board to request further information identifying the order to be reviewed. 20 C.F.R. §802.208(b), (c). Moreover, Section 23(a) of the Act states that the Board is not bound by the formal rules of procedure. 33 U.S.C. §923(a).

order becomes final and effective when it is filed with the district director unless it is appealed within 30 days after being filed. *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989); 20 C.F.R. §§702.350, 702.393. A request for reconsideration of the administrative law judge's decision, within 10 days of its filing, will toll the time for filing an appeal of the decision with the Board. *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099 (7th Cir. 1988); *Kuhn v. Associated Press*, 16 BRBS 46 (1983); *General Dynamics Corp. v. Hines*, 1 BRBS 3 (1974); 20 C.F.R. §802.206(a). Moreover, as we previously stated, Section 802.206(f) contemplates one appeal of a case and provides that, if a motion for reconsideration is filed with the administrative law judge, a previously filed notice of appeal is premature and any party desiring Board review must wait until the administrative law judge resolves the motion and files his decision. At that time, the initial decision and any decisions on motions for reconsideration may be appealed. *Jourdan*, 97 F.3d 815, 30 BRBS 81(CRT); 20 C.F.R. §802.206(f).

In this case, the administrative law judge's original decision was filed with the district director on October 2, 2003, and the decision on the first motion for reconsideration was filed on November 6, 2003. The decision on the second motion for reconsideration was issued on December 17, 2003. Absent the motions for reconsideration, the appeal period would have expired on November 3, 2003. Following the first motion for reconsideration, the time to file an appeal with the Board was tolled until December 8, 2003, and employer filed a timely notice of appeal on November 13, 2003. This appeal was dismissed under Section 802.206(f) when the Board learned of the second motion for reconsideration, and the Board accepted the timely notice of appeal filed following the denial of this motion. Claimant now asserts that this second motion for reconsideration cannot also toll the time for appealing the original decision, citing *Midland Coal Co. v. Director, OWCP*, 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998), a case arising under the Black Lung Act. *See also Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999).

In *Midland Coal*, the mine operator filed successive motions for reconsideration of a Board decision. The United States Court of Appeals for the Seventh Circuit held that the 60-day deadline for appealing the Board's decisions under Section 21(c) of the Act, 33 U.S.C. §921(c), commences on the date of the initial decision or the first denial of reconsideration, and once this time period has passed, the court is without jurisdiction to review the initial decision.[3] *Midland Coal*, 149 F.3d at 563, 21 BLR at 2-462; 20 C.F.R.

[3]The *Midland Coal* court relied on 5 U.S.C. §704, a section of the Administrative Procedure Act which provides that, unless specified by the agency, a decision is final regardless of any motions for reconsideration. The court found that this section does not apply to cases under the Black Lung Act or the Longshore Act, as the Board's regulations

§802.406. The court thus agreed with the United States Courts of Appeals for the Sixth and D.C. Circuits that successive motions for reconsideration do not toll the time to appeal from an agency to the courts. *Id.*, 149 F.3d at 564-565, 21 BLR at 2-463; *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997) (Black Lung case); *Sendra Corp. v. Magaw*, 111 F.3d 162 (D.C. Cir. 1997) (ATF case).

In *Betty B*, the Fourth Circuit found it unnecessary to address the issue of whether successive motions for reconsideration tolled the time for filing an appeal of the original Board decision, because the second appeal filed after the decision on a second motion for reconsideration was defective on other grounds. Betty B sought review only of that specific order which did nothing more than summarily deny the second request for reconsideration, and the court stated that the order was, consequently, unreviewable. *Betty B*, 194 F.3d at 496, 22 BLR at 2-8. A request to review an unreviewable order must be dismissed for lack of jurisdiction. *Id.* The court stated, however, that it had jurisdiction to review the Board's original decision and its decision granting reconsideration but denying relief, as an initial appeal was filed within 60 days of the Board's decision granting Betty B's first motion for reconsideration. The court stated that when an agency reopens the proceedings for any reason and issues a new final order, that order is reviewable on the merits. *Id.*, 194 F.3d at 496-497, 22 BLR at 2-9–2-10.

Both *Midland Coal* and *Betty B* apply to appeals of the Board's decisions to the courts and not to appeals of the administrative law judges' decisions to the Board. The decisions thus address the issue in terms of the requirements for invoking the jurisdiction of the United States Courts of Appeals rather than in the context of internal administrative appeals within an agency. As *Midland Coal* does not address motions for reconsideration and appeals from the administrative law judge to the Board and does not address situations where a motion for reconsideration has been *granted*, it is not dispositive of the issue herein.

Rather, guidance regarding the administrative issue raised here is found in *Jones*, 846 F.2d 1099, wherein the Seventh Circuit determined that Section 802.205A (now Section 802.206) is a valid and enforceable regulation and does not conflict with Section

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provide that the time for filing an appeal to the court of appeals will be tolled upon the filing of a timely motion for reconsideration. 20 C.F.R. §802.407(a). The Seventh Circuit, however, declined to read Section 802.407(a) of the regulations in conjunction with Section 802.406 to allow the time to be tolled by more than one motion for reconsideration following a denial of the initial motion for reconsideration. *Midland Coal*, 149 F.3d at 562-564, 21 BLR at 2-461-2-462.

21 of the Act, 33 U.S.C. §921.[4] The court held that the 30-day period for appeal under Section 21 is preserved and is "recycled and is deemed to have commenced running only upon a decision by the ALJ that addresses the motion for reconsideration." *Jones*, 846 F.2d at 1102-1103; *see also Sawyer*, 881 F.2d 157, 22 BRBS 122(CRT) (time began to run after administrative law judge filed decision granting motion to withdraw the motion for reconsideration). The Seventh Circuit specifically stated that this section provides a procedural rule addressing the manner in which the Board processes appeals and that the Board is expressly granted the authority to issue its own rules.[5] *Id.* at 1100. Although *Jones* does not address a second motion for reconsideration, the court did state that the regulation does no more than "delay the running of a statutorily-specified period for appealing a compensation order until there is no longer any possibility that the order will be modified." *Jones*, 846 F.2d at 1102. As only final decisions of the administrative law judge may be appealed to the Board, the court stated that it is "reasonable to refrain from characterizing the original order of the ALJ as his/her final action, and therefore a proper subject for BRB review, until the motion for reconsideration has been disposed of by the ALJ." *Id.* at 1102. Thus, provided the parties' motions are timely, there could be no limit on the number of times they may request reconsideration from the administrative law judge. If the administrative law judge grants the motions and reconsiders the issues, then his decisions may be amended and are not final. *Jones*, 846 F.2d 1099.

The applicable regulations place no limit on the number of times a party may seek reconsideration from the administrative law judge, and under Section 802.206(f), the mere filing of a motion renders an appeal premature until the administrative law judge acts on the motion. *See Sawyer*, 881 F.2d 157, 22 BRBS 122(CRT). Moreover, in the instant case, the administrative law judge *granted* the first motion for reconsideration in part and reconsidered an issue raised. *See Betty B*, 194 F.3d at 496-497, 22 BRBS at 2-9, 2-10. Thereafter, he denied the second motion in its entirety. Thus, the time for filing an appeal to the Board was tolled until after the administrative law judge filed his decision denying employer's second motion for reconsideration. As employer filed its notice of appeal within six days of the issuance of the administrative law judge's final decision

[4]The court held in *Jones* that the Board properly dismissed the claimant's initial appeal as being premature. Because the claimant did not file a new appeal within 30 days after the administrative law judge's final action in her case, denying her motion for reconsideration, his decision became final, and the Board properly dismissed the untimely appeal. *Jones*, 846 F.2d at 1103.

[5]The *Midland Coal* court acknowledged that motions for reconsideration are within an agency's discretion and the court has no jurisdiction over "internal appeals of such motions." *Midland Coal*, 149 F.3d at 563, 21 BLR at 2-461.

denying reconsideration, the appeal was timely.[6] As we hold that the appeal was timely and that the Board properly reviewed employer's appeal as it related to all the administrative law judge's decisions, we reject claimant's contentions regarding the Board's jurisdiction to issue its December 2004 decision.

With respect to the merits, claimant argues that the administrative law judge erred in failing to find that the onset of his disability was in 1985 rather than in 1993. The administrative law judge originally found that claimant's permanent total disability commenced on May 21, 1985. *Tucker*, BRB No. 04-0316, slip op. at 3. The Board vacated that finding and remanded the case for the administrative law judge to reconsider the onset of disability in light of the Board's holding the claimant was a voluntary retiree. *Id.* at 13. On remand, the administrative law judge found that claimant's disability commenced on April 1, 1993 based on the report of Dr. Cherniak. Cl. Ex. 2(e). The report indicated "indisputable evidence of asbestos-related pleural disease. . . ." Cl. Ex. 2(e); Decision and Order on Remand at 4. The administrative law judge also credited Dr. Cherniak's report dated July 1, 1999, which assigned an impairment rating of 25 percent and stated that claimant's condition had changed little since 1993. Decision and Order on Remand at 4; Cl. Ex. 2(b). Therefore, the administrative law judge concluded that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(23) from April 1, 1993, based on the national average weekly wage in effect on July 1, 1999, the date claimant became aware of his impairment. Decision and Order on Remand at 4; Decision and Order M/Recon. at 3.

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 impairment assessed according to the American Medical Association *Guides to the Evaluation of Permanent Impairment.* 33 U.S.C. §902(10).[7] Under Section 8(c)(23), a claimant is entitled to

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[6]Moreover, employer's first appeal was timely filed after the first decision on reconsideration. If the second motion should now be nullified, then the Board in theory should vacate its dismissal order and reinstate the original appeal. In either event, employer in this case clearly filed a timely appeal under the Board's regulations.

[7]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

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). The mere diagnosis of an occupational disease does not constitute a disability. *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); *see also 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). As the administrative law judge found, Dr. Cherniak diagnosed claimant as having asbestos-related pleural disease in 1993. Cl. Ex. 2(e). Pulmonary function studies revealed that claimant had restrictive lung disease with a measured decreased lung performance. *Id.* Dr. Cherniak did not rate claimant's impairment at that time. However, on July 1, 1999, Dr. Cherniak re-evaluated claimant, found that claimant's pulmonary function had changed little since 1993, and assigned a 25 percent impairment rating. Cl. Ex. 2(b); Decision and Order on Remand at 4 (administrative law judge noted that lung performance had improved slightly from 1993 results). Thus, the administrative law judge concluded that this evidence established that claimant had "at least the same degree of impairment in 1993 that he had in 1999. . . ." *Id.*

We affirm the administrative law judge's decision to use the July 1, 1999, report in conjunction with the April 1, 1993, report to establish that claimant's impairment became permanent in 1993. The reports show that the impairment remained essentially the same even though it had not been rated in 1993. Thus, substantial evidence supports the administrative law judge's finding that April 1, 1993, is the date that claimant's disability commenced. *See Alexander*, 32 BRBS 40 (1989 doctor's opinion established disability commenced in 1983); *Barlow*, 20 BRBS at 182-183 (date asbestosis diagnosed reasonably represented date impairment became permanent). Contrary to claimant's assertion that the Board did not restrict the administrative law judge from giving effect to his finding that claimant had a work-related lung condition in 1985, the Board held that claimant's lung condition did not impair his ability to work and that claimant was a voluntary retiree. Although the administrative law judge may have originally found that claimant had some sort of respiratory condition or shortness of breath in 1985, the medical records do not support the existence of a permanent respiratory impairment at that time. *Tucker*, BRB No. 04-0316, slip op. at 12; *see, e.g., Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989); *Frawley v. Savannah Shipyards Co.*, 22 BRBS 328 (1989). Thus, as the administrative law judge's decision is supported by substantial evidence and is in accordance with law, we affirm his finding that claimant's impairment commenced in 1993.

American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.

Accordingly, the administrative law judge's Decision and Order on Remand and the Decision and Order on the Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge