BRB No. 92-0947

RALPH MORIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of George C. Pierce, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

Stephen Hessert and Patricia A. Lerwick (Norman, Hanson & Detroy), Portland, Maine, for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (90-LHC-2973) of Administrative Law Judge George C. Pierce 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer predominantly as a painter from 1943 until 1944, and from 1952 until 1989, during which time he was exposed to asbestos. In 1987, claimant was transferred to fire watch in Portland due to arthritis in his elbows. In April 1989, he was informed by employer that an x-ray taken in December 1988, revealed a "spot" on his lungs, and he was offered a light-duty position. In his new position, claimant was in charge of operating the issue trailer for employer's asbestos workers. Specifically, claimant issued equipment to employees who stripped asbestos; during this time, claimant himself was at least minimally exposed to asbestos. In September 1989, when the asbestos stripping work was completed, claimant was transferred to employer's warehouse, where he issued tools and equipment to employees. Claimant spent approximately half his day in the unheated section of the warehouse, where he also bottled household cleaning solvents.

Claimant filed his claim for benefits on November 8, 1989, listing his injury as "asbestosis and related diseases." Cl. Ex. 2. He retired on December 23, 1989, at the age of 62, allegedly because the cold weather at the warehouse worsened his breathing problems. Claimant was examined by Dr. Williams on April 11, 1991. Dr. Williams obtained a work history from claimant, but testified that claimant did not report to him that he had difficulty working in cold weather. Dr. Williams diagnosed pleural plaques with calcification consistent with asbestos exposure, mild arterial hypoxemia, and dyspnea on exertion, but no restrictive lung disease, obstructive airway disease or chronic bronchitis.

In his Decision and Order, the administrative law judge invoked the Section 20(a) presumption of causation, 33 U.S.C. §920(a), and found that employer failed to establish rebuttal of that presumption. The administrative law judge thus found that claimant's asbestos-related lung disease resulted, in part, from claimant's exposure to asbestos while working for employer. Relying on the opinion of Dr. Williams that claimant's pulmonary problems have not resulted in any disability, and the opinion of Dr. Harder that claimant's shortness of breath was due to anxiety and is controlled by proper medication,[1] the administrative law judge then found that claimant voluntarily retired from his employment with employer. In making this determination, the administrative law judge declined to credit claimant's testimony that he retired due to his breathing difficulties brought on by cold weather. Next, after noting that the percentage of claimant's whole man impairment was not ascertainable from the record, the administrative law judge denied the claim for compensation.

[1]In a December 4, 1989 note, Dr. Harder stated his belief that claimant's dyspnea is due to anxiety and suggested medication for this condition. Cl. Ex. 16.

Since he did find causation, however, the administrative law judge awarded medical benefits. 33 U.S.C. §907.

On appeal, claimant contends that the administrative law judge erred in finding that he was a voluntary retiree, arguing that his retirement was brought on by his work-related shortness of breath. Specifically, claimant asserts that all the medical opinions agree that he has shortness of breath with underlying asbestos-related disease; that he was working with physical restrictions at the time of his retirement; that not telling Dr. Williams of his breathing difficulties in cold weather was not significant since the examination with that physician was in the spring; and that the administrative law judge ignored the fact that claimant was close to the regular retirement age of 65 at the time he left employer, and as of the hearing was not receiving a pension as a result of his early retirement.

The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in the instant case, requesting that the case be remanded for an entry of a permanent total disability award or in the alternative, a determination as to whether employer demonstrated the availability of suitable alternate employment. Specifically, the Director asserts that, in accordance with the holding in *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978),[2] a disability is established at the time of a diagnosis of an occupational disease where continuance in the same employment is potentially harmful because of continued exposure to the injurious stimuli. In this case, the Director argues that claimant established a *prima facie* case of permanent total disability because he was further exposed to asbestos in his light duty work at the issue trailer after his diagnosis. The Director further contends that the administrative law judge failed to consider whether claimant's work at the warehouse constituted suitable alternate employment. Lastly, the Director asserts that if the administrative law judge finds no loss in wage-earning capacity, a *de minimis* award should be entered which would preserve claimant's right to modification under Section 22 of the Act, 33 U.S.C. §922. *See Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 398.1 (5th Cir. 1981). Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Claimant challenges the administrative law judge's determination that he was a voluntary retiree, contending that the administrative law judge's finding regarding this issue is not supported by substantial evidence and should be reversed. We disagree. Under the Act as amended in 1984, when an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability based on the extent of his impairment as measured pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* and is not based on economic factors. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(1) and (2) (1988); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986); *Kellis v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 109 (1985). If, however, an employee involuntarily withdraws from the work force due to an occupational disease, he is not a voluntary retiree, the post-retirement injury provisions of Sections 2(10), 8(c)(23) and 10(d)(1) and (2) do not apply, and the claimant is entitled to an award based on his loss of wage-earning capacity.

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[2]This claim arises within the jurisdiction of the United States Court of Appeals for the First Circuit.

See Smith v. Ingalls Shipbuilding Division, Litton Systems Inc., 22 BRBS 46, 49 (1989); *Truitt v. Newport News Shipbuilding and Dry Dock Co.,* 20 BRBS 79, 82 (1987). Under the Act's regulations, "retirement" is defined as the voluntary withdrawal by an individual from the work force with no realistic expectation of return. 20 C.F.R. §702.601(c). The determination of whether a claimant's retirement is "voluntary" or "involuntary" should be based on whether a work-related condition caused him to leave the work force, or whether his departure was due to other considerations. *See Johnson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 22 BRBS 160, 162 (1989).

In the instant case, claimant was diagnosed with asbestos-related pleural disease prior to his retirement. *See* Cl. Exs. 15, 16. A review of the record, however, reveals no evidence that claimant was or is medically impaired because of this condition. Dr. Harder, in April 1989, opined that claimant's shortness of breath was due to anxiety. Cl. Ex. 16. In addition, Dr. Williams testified that he would not suggest that claimant stop working and that claimant was not under any work restriction other than to avoid occupational irritants.[3] Cl. Ex. 22 at 14. In addition, the administrative law judge found persuasive the fact that claimant failed to mention to Dr. Williams that he was having breathing difficulties due to cold weather. *See* Decision and Order at 8; Cl. Ex. 22 at 13. The foregoing constitutes substantial evidence in support of the administrative law judge's finding that claimant retired voluntarily, rather than due to his lung condition. Thus, as it was within the administrative law judge's discretion to discredit claimant's testimony and rely on the opinions of Drs. Harder and Williams, we affirm the administrative law judge's finding that claimant is a voluntary retiree, as that finding is supported by substantial evidence. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *see, e.g.*, *Johnson*, 22 BRBS at 160; *Smith*, 22 BRBS at 46. Additionally, inasmuch as the medical evidence contains no percentage of whole man impairment, we affirm the administrative law judge's denial of disability benefits subsequent to claimant's retirement in December 1989. 33 U.S.C. §§902(10); 908(c)(23); 910(d)(1), (2) (1988).

Next, we consider the Director's request that the case be remanded for further findings in accordance with the decision of the United States Court of Appeals for the First Circuit in *Bath Iron*

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[3]Claimant contends that the administrative law judge mischaracterized Dr. Williams' testimony, as the physician stated that he never places limitations on patients; rather, he tells them to do what they can do. Cl. Ex. 22 at 8. Subsequent to that testimony, the following examination took place:

Q. I take it from your earlier statements that you wouldn't place any restrictions on him other than to avoid occupational irritants that -- or occupational hazards, as you said; that it would not have been your recommendation that he stop working altogether because of any pulmonary problems he may have had?

A. I think that's correct.

Cl. Ex. 22 at 14.

Works Corp. v. White, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978). In *White*, the claimant was exposed to asbestos while working for the employer from 1939 to 1967. In July 1966, he was diagnosed as having an asbestos-related lung disorder; he was transferred to the machine shop in February 1967 and his classification was changed from skilled laborer to a semi-skilled laborer, although he still received the same rate of pay. The claimant, however, continued to be exposed to asbestos until September 1974, when he left employer's employment. He filed his claim for permanent partial disability benefits from the date of his transfer in February 1967 to September 1974, and permanent total disability thereafter. In affirming the Board's award of benefits, the court held that the claimant was entitled to permanent partial disability compensation prior to September 1974, even though he was being paid the same wages for his lower-rated position, because the claimant had suffered a loss in wage-earning capacity in the open labor market.

In the instant case, the Director seeks remand, asserting that under *White* disability is established at the time of the diagnosis of an occupational disease in cases where continuance in the same or any other employment is potentially harmful because of continual exposure to the injurious stimuli responsible for the disease. *See* Director's Brief at 2. In support of her position, the Director cites to the following language in *White*:

> The diagnosis . . . of probable asbestosis determined medically that White had an occupational disease. There was a time bomb implanted in his lungs, the power of which to disable and destroy became stronger with increased exposure to asbestos dust. To argue that there must be outward physical symptoms before a finding of permanent partial disability flies in the face of common sense as well as medical evidence.

White, 584 F.2d at 576, 8 BRBS at 824. Thus, in the instant case, the Director contends that since claimant was diagnosed with an asbestos-related lung disorder prior to his transfer to a light duty position in April 1989, and then continued to be exposed to asbestos while working in the issue trailer, he has established a *prima facie* case of permanent total disability.

Subsequent to the Director's filing of her brief in the instant case, the United States Court of Appeals for the First Circuit issued a decision in which it expounded upon its prior ruling in *White*. In *Liberty Mutual Insurance Co. v. Commercial Union Insurance Co.*, 978 F.2d 750, 26 BRBS 85 (CRT)(1st Cir. 1992), the claimant was exposed to asbestos while working for employer from 1941 to 1985. In December 1980, claimant learned that he had contracted asbestosis; however, he remained at his regular job. In rejecting the Director's contention that pursuant to *White*, the mere diagnosis of an occupational disease which will inevitably become disabling constitutes disability as a matter of law, the First Circuit stated that:

> To be sure, in the *White* case, the employee's disease was sufficiently advanced that, arguably, diagnosis and diminished earning capacity coincided. But, it is too much of a stretch to conclude that, because diagnosis and diminished earning capacity may sometimes occur in tandem, the former is indistinguishable from the latter. We do not believe that the *White* court either held or intimated that disability and diagnosis are one and the same concept.

Liberty Mutual, 978 F.2d at 758, 26 BRBS at 103 (CRT).[4] The court noted that *White* stands for the proposition that reduction in earning capacity -- not out-of-pocket loss -- is the proper test for the availability of permanent partial disability benefits. "*White* teaches," the court continued, "that on particular occasions the Board may find that diagnosis and reduced earning capacity coincide and that it may do so despite the absence of outward physical symptoms, provided that its decision is supported by other substantial evidence of diminished earning capacity." *Liberty Mutual*, 978 F.2d at 758-759, 26 BRBS at 104-105 (CRT).

Accordingly, based on *Liberty Mutual,* we reject the Director's argument that claimant established a *prima facie* case of permanent total disability when he was first diagnosed as suffering from an asbestos-related lung disorder. Moreover, inasmuch as claimant has submitted no evidence to support a finding of permanent partial disability benefits for the

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[4]In *Liberty Mutual*, the Director relied upon the same excerpt from the court's opinion in *White* that is set forth in the instant case. The First Circuit responded as follows: "The Director says that this passage equates diagnosis with disability. He is wrong." *Liberty Mutual*, 978 F.2d at 758, 26 BRBS at 104 (CRT).

period of December 1988 through December 1989, we hold that claimant is not entitled to permanent partial disability for that period.[5]

In the alternative, the Director argues that claimant should be granted a *de minimis* award, so that if his condition develops into a quantifiable disability, his right to request modification under Section 22 of the Act, 33 U.S.C. §922, would be preserved. We disagree. *De minimis* awards are only available where a claimant has not established a loss in wage-earning capacity under Section 8(c)(21), but has established that there is a significant possibility of future economic harm as a result of the injury. *See generally Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole*, 640 F.2d at 769, 13 BRBS at 398.1; *see also Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489 (9th Cir. 1986), *aff'g Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985); *Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988). In the instant case, a *de minimis* award is not necessary to protect claimant's rights, since claimant's right to re-file a claim for disability benefits is already protected by the 1984 Amendments to the Act. Specifically, under Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2)(1988), the time for filing a claim based on an occupational disease does not begin to run until the employee is aware of the relationship between his employment, the disease, and the disability. The implementing regulations further provide that the time limitations do not begin to run until the employee is disabled. 20 C.F.R. §§702.212(b), 702.222(c); *see Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993); *see also Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98 (CRT)(4th Cir. 1991); *Abel v. Director, OWCP*, 932 F.2d 819, 821, 24 BRBS 130, 134 (CRT)(9th Cir. 1991), *citing Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988); *Bechtel Associates, P.C. v. Sweeney*, 834 F.2d 1029, 20 BRBS 49 (CRT)(D.C. Cir. 1987). Inasmuch as claimant has no work-related disability at present, he does not yet have the requisite awareness needed to commence the time period for filing a claim and, thus, his right to re-file a claim for disability benefits is protected. The Director's request that claimant be granted a *de minimis* award is therefore rejected.

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[5]It is well established that the claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards, Inc.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). Other than his own testimony, claimant has failed to submit any evidence on the issue of permanent partial disability prior to his retirement in December 1989.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge