BRB Nos. 99-0763
and 99-0763A

DOMINGO ALEXANDER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TRIPLE A MACHINE SHOP	)	DATE ISSUED: April 20, 2000
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Second Remand and the Decision on Employer's Petition for Reconsideration and Claimant's Cross-Petition for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises, Simon & Abrams), Oakland, California, for claimant.

Herman Ng, San Francisco, California, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Second Remand and the Decision on Employer's Petition for Reconsideration and Claimant's Cross-Petition for Reconsideration (91-LHC-1163) of Administrative Law Judge Alfred Lindeman 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).

This case is before the Board for the third time. To briefly recapitulate the facts relevant to this appeal, claimant was employed by Triple A and other employers as a sheetmetal worker, shipfitter and boilermaker from the 1940's through 1982, last working for Triple A in 1980. After leaving Triple A, claimant worked for Southwest Marine until September 1982, when he was laid off. Starting in December 1982, claimant obtained employment outside the coverage of the Act, and remained in this employment until February 1983, when he retired after suffering a neck injury.

Claimant was diagnosed with asbestosis in 1978. On October 31, 1979, he filed the first of four claims for benefits under the Act, alleging injury due to exposure to asbestos and other industrial toxins and naming Triple A as one of the potentially responsible employers. These claims were eventually referred to the Office of Administrative Law Judges, and a formal hearing was conducted on July 8, 1991, before Administrative Law Judge Alfred Lindeman. During these proceedings, claimant settled his claims pursuant to Section 8(i), 33 U.S.C. §908(i), with three employers: General Engineering, Service Engineering, and Southwest Marine.

In his initial Decision and Order dated December 12, 1991, the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23)(1994), for a 37.5 permanent impairment based on Dr. Raybin's opinion that claimant demonstrated a Class 3 impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (3d ed. 1989)(AMA *Guides*), as of June 13, 1989. The administrative law judge also granted employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), but denied it a credit for the payments claimant received pursuant to the settlements with the other employers named in this claim. The administrative law judge additionally found that claimant was not entitled to a penalty pursuant to Section 14(e), 33 U.S.C. §914(e). Both parties appealed.

On appeal, the Board affirmed the administrative law judge's determination that claimant was a voluntary retiree, vacated his finding that the onset date for the award of permanent partial disability was in 1989, and remanded for reconsideration of this issue, as Dr. Raybin's 1989 report stated that claimant demonstrated a Class 2 impairment in 1983. The Board further held that the administrative law judge erred in determining that employer was not liable for a Section 14(e) penalty. Moreover, the Board accepted employer's argument on cross-appeal that the administrative law judge erred in not granting it an offset

for amounts paid to claimant pursuant to his settlements with the other Longshore Act employers in the claim, holding that application of the general credit doctrine which functions to preclude a double recovery for benefits for the same injury or disability applies to support a credit in this instance. In so concluding, the Board noted that the avoidance of double recovery would militate in favor of an offset, regardless of the source of the payment. Accordingly, the Board held that under the circumstances presented, where claimant had received monies under Section 8(i) settlements from prior employers based on the same pulmonary impairment for which he is receiving compensation from employer, it was necessary to vacate the denial of the offset. The Board therefore directed the administrative law judge to reconsider this issue in light of the purposes of the credit doctrine and Section 14(j), 33 U.S.C. §914(j)(1994), on remand. *Alexander v. Triple A Machine Shop*, BRB No. 92-0878A/B (Aug. 19, 1996)(unpublished).

On remand, relevant to the present appeal, the administrative law judge found that Dr. Raybin's determination that claimant suffered a Class 2 impairment in 1983 was based on an incorrect application of the AMA criterion, and reinstated his prior determination that the onset date for the award of permanent partial disability compensation was in 1989. The administrative law judge additionally concluded on remand that Section 14(j) does not provide a basis for awarding employer a credit for the Section 8(i) settlement payments made to claimant by other longshore employers because the statutory language of that provision contemplates the situation where the same employer has made advance compensation payments. The administrative law judge further determined that a credit was also not warranted under the judicially created credit doctrine because claimant's Section 8(i) settlements did not represent a double recovery for the same injury. Claimant's motion for reconsideration was denied in an Order dated April 8, 1997.[1] Again, both parties appealed to the Board.

In its second decision, the Board held that the administrative law judge erred in finding that Dr. Raybin misapplied the AMA *Guides* as the administrative law judge's finding was based on incorrect numerical data, rather than on claimant's actual 1983 forced vital capacity (FVC) reading of 3.04. Specifically, the Board held that when claimant's 1983 FVC reading is compared with the reference values contained in the AMA *Guides*, the results demonstrate a Class 2 impairment, consistent with Dr. Raybin's opinion. Accordingly, the

[1]In applying the Third Edition of the AMA *Guides*, published in 1988, the administrative law judge noted that edition was in effect at the time Dr. Raybin's opinion was rendered in 1989.

Board held that Dr. Raybin's opinion establishes an onset date of May 6, 1983 as a matter of law, and remanded the case for the administrative law judge to award benefits under Section 8(c)(23) as of that date. In considering employer's cross-appeal of the administrative law judge's denial of a credit, the Board held that as its prior determination that the general credit doctrine is applicable constitutes the law of the case, the administrative law judge erred in reconsidering this issue on remand. Moreover, the Board rejected the administrative law judge's rationale for concluding that employer is not entitled to a credit under either Section 14(j) or the general credit doctrine, holding that consistent with the last responsible employer rule, the liable employer is entitled to a credit for payments by prior employers toward the same disability. The Board thus reversed the administrative law judge's denial of a credit to employer for monies received by claimant from his prior employers, and instructed the administrative law judge on remand to determine the amount of the credit due. *Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1999).

In his Decision and Order on Second Remand dated January 6, 1999, the administrative law judge determined, based upon Dr. Raybin's assessment of a Class 2 respiratory impairment in 1983 and claimant's 1983 FVC test results, that claimant had a 10 percent permanent partial impairment commencing May 6, 1983, and further found that claimant's level of impairment increased to 37.5 percent as of June 12, 1989. The administrative law judge next determined that employer is entitled to a credit in the amount of $28,000 for the Section 8(i) settlement payments made to claimant by other employers for the same disability. In his decision on reconsideration dated March 18, 1999, the administrative law judge denied claimant's motion for reconsideration with respect to employer's entitlement to a credit, but granted claimant's motion with respect to the reduction in the amount of the credit for the attorneys' fees portion of the settlement monies. The administrative law judge denied employer's motion for reconsideration regarding the extent of claimant's impairment in 1983, explicitly finding that the Third Edition of the AMA *Guides* is applicable to the determination of the extent of claimant's respiratory impairment as of 1983.

In his present appeal, claimant challenges the administrative law judge's award of a credit to employer for the settlement monies paid to him by other longshore employers, reiterating the arguments he made in the previous two appeals in this case. Employer responds that the Board's prior decisions on the credit issue constitute the law of the case. In its cross-appeal, employer avers that the administrative law judge erred in awarding claimant benefits for a 10 percent permanent partial impairment under Section 8(c)(23) commencing May 6, 1983. Claimant responds, urging affirmance.

With respect to claimant's appeal of the administrative law judge's award of a credit to employer, we agree with employer that the Board's prior determination that employer is entitled to a credit for settlement monies paid to claimant by other longshore employers for the same disability as a matter of law constitutes the law of the case. *See Alexander*, 32 BRBS at 44; *Bruce v. Bath Iron Works Corp.*, 25 BRBS 157 (1991). As claimant presents no

new arguments on appeal and as there are no circumstances presented by this case which would militate against application of the law of the case doctrine, *see Gladney v. Ingalls Shipbuilding, Inc.*, 33 BRBS 103, 106-107 (1999), we adhere to our previous decisions with respect to employer's entitlement to a credit. Thus, for the reasons set forth in our prior decisions, we affirm the administrative law judge's award to employer of a credit for the settlement monies paid by other longshore employers to claimant, less the amount of the attorneys' fees portion of those monies.

We next address employer's argument on cross-appeal that the administrative law judge erred in awarding benefits under Section 8(c)(23) of the Act for a 10 percent permanent partial impairment commencing May 6, 1983. Specifically, employer contends that the administrative law judge improperly utilized the Third Edition of the AMA *Guides* in determining the extent of claimant's respiratory impairment as of 1983 inasmuch as the standards contained in that edition were not in effect at the time the pulmonary function studies were administered in 1983.[2] We reject employer's contentions of error and, for the reasons that follow, we affirm the administrative law judge's findings on this issue. In cases involving voluntary retirees, the Act requires impairment ratings to be based on medical opinions using the criteria contained within the AMA *Guides*. *See* 33 U.S.C. §902(10); 908(c)(23); 910(d)(2); *Pimpinella v. Universal Maritime Service Inc.*, 27 BRBS 154, 159 n.4 (1993). Section 2(10) of the Act, 33 U.S.C. §902(10), defines the term "disability," with respect to claims for permanent partial disability under Section 8(c)(23) by voluntary retirees as "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 American Medical Association, ..." (emphasis applied).

In its prior decision issued on March 30, 1998, the Board held that claimant's May 6, 1983 FVC reading of 3.04, when compared with the reference values contained in Table 2 of the applicable AMA *Guides*, the Third Edition, demonstrates a Class 2 impairment, consistent with Dr. Raybin's opinion. *See Alexander*, 32 BRBS at 43. Accordingly, the

[2]Employer concedes that the administrative law judge correctly used the Third Edition of the AMA *Guides* in determining the extent of claimant's respiratory impairment as of June 13, 1989, but avers that the fact that the Third Edition is the appropriate edition to use in determining impairment in 1989 does not mean that its use is appropriate in determining the extent of claimant's impairment in 1983.

Board remanded the case to the administrative law judge to award benefits under Section 8(c)(23), commencing on May 6, 1983. On remand, the question of which edition of the AMA *Guides* is applicable to the determination of claimant's respiratory impairment as of 1983 was clarified by the administrative law judge in his decision on reconsideration dated March 18, 1999. Specifically, the administrative law judge, relying on the Board's previous holding that Dr. Raybin's opinion establishes that claimant suffered from a Class 2 respiratory impairment as of 1983, found the Third Edition of the AMA *Guides* to be applicable because Dr. Raybin's opinion regarding claimant's 1983 impairment, which was based on the results of testing performed in 1983, was rendered in 1989, one year after publication of the Third Edition.

The Board has held that, in a Section 8(c)(23) permanent partial disability claim filed by a voluntary retiree, the determination of the level of claimant's disability, which entails ascertaining a numerical rating of physical impairment, is a factual determination to be made by the administrative law judge based upon the medical evidence of record. *See Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). In the case at bar, the administrative law judge's finding that claimant had a 10 percent permanent partial impairment under Section 8(c)(23) as of 1983 was based on Dr. Raybin's assessment of a Class 2 respiratory impairment in 1983 in accordance with the standards set forth in the Third Edition of the AMA *Guides*. Dr. Raybin's opinion used the test results recorded in 1983 and compared them to the standards in effect at the time he rendered his opinion. In light of the statutory provision that impairment be determined in accordance with the AMA *Guides* "as modified from time to time...," 33 U.S.C. §902(10), we hold that the administrative law judge properly relied on Dr. Raybin's opinion and the reference values contained in the Third Edition, which was the current version of the AMA *Guides* at the time Dr. Raybin's opinion was rendered in 1989. As noted by claimant in his response brief, at the time of Dr. Raybin's 1989 opinion, the criteria contained in the Third Edition represented the state of the art standards for the evaluation and rating of claimant's respiratory impairment, and, as such, they were appropriately utilized by the administrative law judge in assessing the extent of claimant's impairment as it existed in both 1983 and 1989.[3] Thus, as the administrative law

[3]In light of our rejection of employer's argument that claimant's respiratory impairment in 1983 must be determined in accordance with the First Edition of the AMA *Guides*, we need not address at length claimant's alternate contention that claimant's 1983

judge's determination that claimant had a 10 percent permanent partial disability as of May 6, 1983, is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *See generally Donnell*, 22 BRBS at 136.

FEV_1 value qualifies as a Class 2 impairment under the First Edition. *See Alexander*, 32 BRBS at 43 n.3. Claimant appears to be correct in asserting that his 1983 FEV_1 test results, when compared with the reference values in the First Edition, demonstrate a Class 2 respiratory impairment.

Accordingly, the administrative law judge's Decision and Order on Second Remand and his Decision on Employer's Petition for Reconsideration and Claimant's Cross-Petition for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge