

LOUIS LIZOTTE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS	)	
CORPORATION	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF	)	DATE ISSUED:
NORTH AMERICA	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Sheldon R. Lipson, Administrative Law Judge, United States Department of Labor.

Mark W. Oberlatz (O'Brien, Shafner, Bartinik, Stuart & Kelly, P.C.), Groton, Connecticut, for claimant.

Marianne Demetral Smith (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (88-LHC-0441) of Administrative Law Judge Sheldon R. Lipson 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 of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from 1951 until 1966 as a chipper/burner; subsequently, claimant worked for non-maritime employers until his retirement for health reasons in 1986. Claimant is seeking compensation for breathing problems arising out of his occupational exposure to lung irritants during the course of his employment with employer.

In his Decision and Order, the administrative law judge found that while claimant's industrial bronchitis was causally related to his employment with employer, claimant failed to establish that he had been exposed to asbestos while working for employer. The administrative law judge further found that this claim was untimely filed pursuant to Section 13(b)(2), 33 U.S.C. §913(b)(2), of the Act. Accordingly, the administrative law judge denied compensation to claimant, but awarded medical benefits for the treatment of claimant's industrial bronchitis.

Claimant now appeals, arguing that the administrative law judge erred in finding his claim time-barred and in concluding that claimant was not entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption linking his asbestosis to his employment with employer. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in support of claimant's position. Employer has not filed a response brief.

Claimant initially contends that the administrative law judge erred in determining that the claim was barred pursuant to Section 13(b)(2) of the Act. Section 13(b)(2) provides that an occupational disease claim shall be timely if filed within two years after claimant "becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of the relationship between the employment, the disease, and the . . . disability . . . ." 33 U.S.C. §913(b)(2)(1988). In the instant case, the administrative law judge stated that the claim should have been filed within two years of November 10, 1964, the date of a letter from Dr. Wade informing claimant of the relationship between his chronic bronchitis and his employment with employer. *See* Decision and Order at 12-13. Contrary to the administrative law judge's statement, however, the two year limitation period does not begin to run until claimant is aware or should be aware of the relationship between his employment, disease, and disability. *See* 33 U.S.C. §913(b)(2)(1988); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). Thus, the time period does not begin to run until the employee is aware of a work-related disease which has resulted in disability, *i.e.*, which has impaired his earning capacity. *Id.*; 20 C.F.R. §702.222(c). In the instant case, the administrative law judge made no finding as to when claimant became aware that his industrial bronchitis had an impact on his capacity to earn wages; accordingly, we must

remand the case for such a determination. *See Lombardi*, 22 BRBS at 323. Accordingly, the administrative law judge's finding that this claim was untimely filed is vacated, and the case is remanded for the administrative law judge to reconsider this issue in accordance with the proper legal standard.

Claimant next contends that the administrative law judge erred in failing to invoke the Section 20(a) presumption when addressing claimant's claim arising from his asbestosis. In support of this contention, claimant asserts that the administrative law judge erred in finding that claimant had not established the existence of working conditions, specifically exposure to asbestos, which could have caused claimant's condition. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury is causally related to his employment. In order for Section 20(a) to be invoked, claimant must establish a *prima facie* case by proving that he suffered a harm and that working conditions existed or an accident occurred which could have caused the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Claimant has the burden of proof to establish his *prima facie* case. *Obert v. John T. Clark and Son of Maryland*, 23 BRBS 157 (1990). Once the presumption is invoked, the burden shifts to employer to establish that claimant's condition was not caused or aggravated by his employment. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). If employer establishes rebuttal of the presumption, the issue of causation must be resolved on the whole body of proof. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

In the instant case, the record contains medical reports contemporaneous with claimant's covered employment with employer in which claimant reported working with asbestos blankets and being covered with a white dust, *see CX 5*; moreover, claimant testified that he worked in a smoky and dusty environment. *See Tr.* at 26-28. The administrative law judge concluded that claimant failed to establish the working conditions prong of his *prima facie* case because he did not present any documentary evidence to support his contention that he was exposed to asbestos during his covered employment. In order to invoke the Section 20(a) presumption, however, claimant must demonstrate that he sustained a harm and that employment conditions existed that could have caused the harm. *See Devine v. Atlantic Container Lines*, 23 BRBS 279 (1990). In the instant case, claimant's testimony, as supported by contemporaneous medical reports, may be sufficient, if credited, to establish the existence of working conditions *i.e.*, exposure to asbestos, which could have caused his asbestosis; claimant is not required to submit documentary evidence. *See Martin v. Kaiser Corp.*, 24 BRBS 112 (1990). The administrative law judge made no credibility finding regarding claimant's testimony or the history reported in the medical

records. We therefore vacate the administrative law judge's finding on this issue; on remand, the administrative law judge must address all of the evidence regarding the existence of working conditions which may have caused claimant's asbestosis.

Accordingly, the administrative law judge's findings regarding the timeliness of the claim and the existence of working conditions which could have caused claimant's asbestosis are vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge