

BRB No. 93-0423

WENDY KIRK WENDLER)
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 Claimant-Petitioner)
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 v.)
)
 AMERICAN NATIONAL RED CROSS) DATE ISSUED:
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 and)
)
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision on Remand - Denying Benefits and the Decision and Order on Remand - Denying Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Wendy Kirk Wendler, Dallas, Texas, *pro se*.

Thomas M. Nosewicz (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, representing herself, appeals the Decision on Remand - Denying Benefits and the Decision and Order on Remand - Denying Motion for Reconsideration (86-LHC-1366) of Administrative Law Judge James W. Kerr, Jr., 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). In reviewing this appeal without counsel, the Board 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This is the second time this claim is before the Board.

Claimant was employed by this employer from October 24, 1966, through May 29, 1969,

and from 1974 through 1976. EXS 3, 28. From July 1967 through July 14, 1968, claimant was stationed in the Republic of Korea pursuant to employer's Supplemental Recreational Activities Overseas program, during which time claimant alleges she was exposed to toxic chemical herbicides including, *inter alia*, Agent Orange, and that this exposure has resulted in damage to her immunological, dermatological, gynecological, and psychological systems. Claimant filed a claim for permanent total disability compensation and medical benefits, alleging that she has been unable to work since October 1982.

In his first Decision and Order, the administrative law judge found that the claim had been untimely filed pursuant to Section 13, 33 U.S.C. §913, of the Act, based upon his conclusion that claimant had been aware of the relationship between her alleged injury, employment, and disability prior to May 1983, but had not filed her claim until June 4, 1985, which was beyond the two-year limitation period set forth in Section 13(b)(2) of the Act. 33 U.S.C. §913(b)(2)(1988). Accordingly, the administrative law judge denied the claim. The administrative law judge subsequently denied claimant's petition for reconsideration. Claimant appealed this decision to the Board.

The Board affirmed the administrative law judge's conclusion that the claim filed by claimant in June 1985 was untimely. *Wendler v. American National Red Cross*, 23 BRBS 408 (1990) (McGranery, J., concurring and dissenting). However, the Board noted that a claim for medical benefits is never time-barred; the Board therefore remanded the case to the administrative law judge to determine if an award of medical benefits under Section 7 of the Act, 33 U.S.C. §907, was appropriate. 23 BRBS at 414.

On remand, the administrative law judge reviewed and discussed the evidence contained in this voluminous record and determined that claimant was not entitled to medical benefits under the Act; specifically, the administrative law judge found that claimant had failed to establish her *prima facie* case since she had failed to establish that she was exposed to Agent Orange or any other defoliants during the course of her employment in Korea. Decision on Remand at 8. The administrative law judge further found that even if claimant established a *prima facie* case, the Section 20(a), 33 U.S.C. §920(a), presumption was rebutted by substantial medical evidence and, weighing the evidence as a whole, found no causation. Consequently, the administrative law judge denied medical benefits. Decision on Remand at 49. The administrative law judge subsequently denied claimant's motion for reconsideration.

On appeal, claimant, appearing *pro se*, challenges the administrative law judge's denial of her claim. Employer responds, urging affirmance. In order to be entitled to medical treatment at employer's expense, claimant must have a work-related harm. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In the instant case, claimant contends that she is disabled due to numerous health problems caused by her exposure to Agent Orange and other defoliants while in the Republic of Korea. In determining whether an injury is work-related, claimant is aided by the Section 20(a) presumption which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, claimant must show that she sustained a harm or pain and that conditions existed or an accident occurred at her place of employment which could have caused the harm or pain.

Hartman v. Avondale Shipyard, Inc., 23 BRBS 201 (1990), *vacated in part on reconsideration*, 24 BRBS 63 (1990); *Bartelle v. McLean Trucking Co.*, 14 BRBS 166 (1981), *aff'd* 687 F.2d 34, 15 BRBS 1 (CRT)(4th Cir. 1982); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994).

In the instant case, claimant did not initially assert that there had been a definitive time period or incident during which her alleged exposure to defoliants may have occurred; rather, claimant averred that she had been in Korea during a short period of time when such defoliants were also in that nation. Claimant subsequently contended that her exposure may have occurred during an alleged trip to and/or near the demilitarized zone (DMZ). *See* Tr. at 448-49, 1823-24, 1859-63, 1970-71. In discussing the voluminous testimony of record in this case, the administrative law judge initially noted that claimant left Camp Pedham in January 1968, and that the record contained no evidence that there were any herbicides stored or sprayed during the period of time claimant was at that location. Decision and Order on Remand at 7. Next, the administrative law judge, after noting that chemical spraying did not commence in Korea until mid-May 1968, determined that the only possible period of claimant's exposure to chemicals would have been from mid-May 1968 until her departure from Korea in July 1968. The administrative law judge found, however, that such application of chemical defoliants occurred only along the security fence on the southern border of the DMZ, and north of a civilian control line maintained by American and Korean military personnel, and that claimant, during two pre-trial depositions and during several days of direct examination, had failed to assert that she had crossed the civilian control line during that time period. Rather, claimant testified that, except for two trips to the DMZ in 1967, she was never in that zone since it was off-limits to Red Cross employees. The administrative law judge found unpersuasive claimant's subsequent testimony on cross-examination that she had in fact crossed the civilian control line in May or June 1968. Lastly, the administrative law judge noted claimant's testimony that she never saw any herbicide stored or sprayed during her tenure in Korea. The administrative law judge then concluded, taking into consideration the limited window of opportunity for exposure, *i.e.*, mid-May to mid-July 1968, claimant's inconsistent testimony of her presence in any possible area of exposure, and the testimony of record regarding the storage and application of herbicides in Korea, *see* EX 132, CX 41, as well as claimant's medical records at the time of the alleged exposure, that claimant had failed to establish the existence of working conditions which could have caused any of the alleged conditions which she relates to her employment in Korea.

It is well-established that in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, the administrative law judge's credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *See generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988); *see also Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990). In the instant

case, the administrative law judge's determinations are supported by substantial evidence and are neither inherently incredible nor patently unreasonable. *See Bolden v. G.A.T.X. Terminals Corp.*, BRBS (BRB No. 93-0204)(Apr. 25, 1996); accordingly, we affirm the administrative law judge's determination that claimant failed to establish the existence of working conditions, specifically that she was exposed to Agent Orange or other defoliants, which could have caused her present alleged conditions. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant has not established her *prima facie* case, the Section 20(a) presumption is not applicable, and the administrative law judge properly denied her claim for medical benefits. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988).

Moreover, the administrative law judge's alternate conclusion that, even if Section 20(a) were invoked, the record establishes the lack of a causal relationship is also supported by substantial evidence. Employer has presented overwhelming evidence severing any connection between claimant's conditions and her employment in Korea. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). In addition to the opinions of Drs. Feld, Harrison, Jansen, Mailbach, Steele, and O'Rourke, who opined that there was no component of claimant's alleged symptoms that indicates exposure to toxic herbicides, the administrative law judge's conclusion is further supported by medical test results and lay opinions of record. *See, e.g.*, CXS 26, 48, RXS 126, 213, 132.¹ *See also* Tr. at 3493-94, 3677, 3813, 3977, 4273-74. As claimant has not established the existence of a work-related harm and as there is no causal relationship between her current physical conditions and her employment, claimant is not entitled to medical benefits.

¹These exhibits include the opinions of numerous doctors, all of whom state that claimant's various alleged medical problems are not related to her alleged exposure to Agent Orange and/or other toxic herbicides.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge