

BRB No. 07-0737

W.H.)	
(Deceased))	
P.H.)	
(Widow of W.H.))	
)	
Claimant-Petitioner)	DATE ISSUED: 05/21/2008
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Kevin C. Glavin (Cutcliffe Glavin & Archetto), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2006-LHC-00573) 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).

Decedent was employed by employer from 1965 until his retirement in 1995, during which time his employment duties exposed him to airborne asbestos dust. In March 2002, the decedent was diagnosed with lung cancer. On March 31, 2004, the

decedent filed a claim for benefits under the Act. Following the decedent's death on April 3, 2005, claimant, decedent's widow, filed a claim pursuant to Section 9 of the Act, 33 U.S.C. §909, asserting that the decedent's death was causally related to his occupational asbestos exposure.

In his Decision and Order, the administrative law judge denied the decedent's claim for disability benefits, finding that as the decedent was aware of the relationship between his lung cancer and his employment with employer no later than March 15, 2002, his March 31, 2004, claim was untimely filed pursuant to Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2). With regard to the widow's claim, the administrative law judge found that claimant established that decedent's work-related asbestos exposure was a significant contributing cause of the lung cancer that caused his death. He thus awarded claimant ongoing death benefits, payment of decedent's medical and funeral expenses, and interest.

On appeal, claimant argues that the administrative law judge erred in finding that the decedent's claim for disability benefits was untimely filed. Claimant additionally asserts that the administrative law judge erred in failing to award her an assessment pursuant to Section 14(e) of the Act. 33 U.S.C. §914(e). Employer responds, urging the Board to affirm the administrative law judge's decision in its entirety.

Claimant first argues that the administrative law judge erred in finding that the decedent's March 31, 2004, claim for disability benefits was untimely filed pursuant to Section 13 of the Act. Section 13(b)(2) provides that in the case of an occupational disease that does not immediately result in disability or death, the claim for benefits must be filed within two years after the employee becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between his employment, the disease, and the disability. 33 U.S.C. §913(b)(2); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). In a case such as this one, where the decedent retired prior to the date upon which his injury occurred, disability is defined as permanent medical impairment rated under the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. 33 U.S.C. §§902(10), 908(c)(23); *Lombardi v. General Dynamics Corp.*, 22 BRBS 323 (1989). Moreover, under Section 20(b) of the Act, 33 U.S.C. §920(b), it is presumed that the claim for benefits was timely filed. *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). In order to rebut the Section 20(b) presumption, employer must produce substantial evidence that the claim was not timely filed. For the reasons that follow, we agree with claimant that the evidence relied upon by the administrative law judge is insufficient to support a finding that the decedent was aware of the relationship between his cancer, asbestos exposure and disability more than two year prior to the filing of his claim.

In finding that the decedent was aware of the relationship between his diagnosed lung cancer and his employment with employer by no later than March 15, 2002, the administrative law judge relied upon a physician's assistant's report of that date and statements by the decedent in a deposition taken on November 18, 2004. The

administrative law judge initially found that the decedent was hospitalized on March 7 2002, for symptomatic anemia, diarrhea, and dehydration. During this hospitalization, which continued until April 2, 2002, the decedent was diagnosed with lung cancer. On March 22, 2002, the decedent underwent a left upper lobectomy on his lung to remove a non-small cell carcinoma. Upon his release from the hospital on April 2, 2002, Dr. Crawford, the decedent's attending surgeon, diagnosed the decedent with, *inter alia*, non-small cell carcinoma, obstructive lung disease, and emphysema. The administrative law judge reviewed the decedent's hospital records and found that while the reports of Dr. Crawford do not mention either asbestos exposure or an asbestos-related lung disease, a physician's assistant's consultation report dated March 15, 2002, noted that the decedent had "asbestos exposure." Decision and Order at 4; CX 6; EX 6.

The administrative law judge then quoted a passage from the decedent's deposition testimony, Decision and Order at 18-19, which established that during his hospitalization around the March 11th or 15th, hospital personnel told the decedent that he had cancer and went over a course of treatment. CX 4 at 36. Employer's counsel then questioned the decedent about his understanding of his illness during his hospitalization:

Q. Okay. Do you think at that time that, you know, asbestos was one of the causes?

A. I know something caused it.

Q. Okay. It says asbestos down here as a history and you worked at Electric Boat. Did you think at that time that asbestos was -

A. We didn't know nothing about asbestos when I first started at Electric Boat.

Q. . . .when the doctors. . .told you and your wife in March of 2002, it looks like between March 11 and March 15 of 2002, that you had lung cancer, do you think at that time that the asbestos was one of the causes?

A. Did I think?

Q. Yes, did you think?

A. Not really.

Q. You didn't?

A. I never thought about being sick or anything.

Id. Counsel then questioned the decedent regarding his asbestos exposure at Electric Boat and his knowledge that asbestos exposure can cause cancer. Decedent acknowledged he knew he had been exposed to asbestos at Electric Boat. He stated that he did not know of the dangers of asbestos exposure "until they started publicly telling the world." *Id.* at 37. Employer's counsel then asked whether in "March of 2002, did

you think that your exposure to asbestos might be a cause of the lung cancer,” and the decedent responded, “I was told that.” *Id.* at 37-38.

Based on this testimony, the administrative law judge concluded that the decedent was aware that he had been exposed to asbestos at employer’s facility, that he knew employer stopped using asbestos because it was known to cause cancer and that he admitted he was told in March 2002 that his exposure might be a cause of his cancer. Decision and Order at 19. While he acknowledged that the evidence did not identify the particular day on which the decedent had the requisite “awareness,” the administrative law judge concluded that it was clear from the decedent’s testimony, including his statement to the physician’s assistant that he had an occupational history of asbestos exposure, CX 4 at 35, that the decedent was aware of a relationship between his lung cancer and his employment with employer no later than March 15, 2002. Decision and Order at 19-20. Consequently, since the decedent did not file his claim for disability benefits until March 31, 2004, the administrative law judge concluded that the decedent’s claim was untimely filed.

We cannot affirm this conclusion, as the evidence relied upon by the administrative law judge, specifically the March 15, 2002, physician’s assistant’s report and the selected testimony of the decedent, does not constitute substantial evidence sufficient to support the administrative law judge’s finding that the decedent was aware, or in the exercise of reasonable diligence or by medical advice should have been aware, of a relationship between his asbestos exposure, his disease, and a disability more than two years prior to the filing of the claim. Initially, we note that there is a very small window here for the decedent to gain “awareness” and for this claim to be untimely. Since the claim was filed on March 31, 2004, a finding that it was untimely filed requires substantial evidence that the decedent gained “awareness” before March 31, 2002. The hospitalization during which his disease was diagnosed covered the period from March 7 to April 2, 2002. As the administrative law judge stated, the evidence does not identify a particular day on which the decedent was advised or otherwise became “aware” of the relationship between his lung cancer and his employment-related exposure to asbestos. Rather, the administrative law judge combined the decedent’s answer to the question regarding what he thought in “March 2002,” with the physician’s assistant’s report, to obtain a date no later than March 15, 2002. Decision and Order at 19-20.

The March 15, 2002, physician’s assistant’s report, however, contains no reference to, or diagnosis of, an asbestos-related lung disease. *See* EX 6. The only reference to asbestos is in the report’s “Social History” section, which states that the decedent was “a retired painter from Electric Boat [who] had asbestos exposure.” The history also states that he admitted to smoking two packs of cigarettes and drinking one-half quart of rum daily. This report further states that the decedent was being seen “for future treatment for his metastatic non-small cell lung cancer.” *Id.* at 1; *see also* CX 6. The report concludes that the decedent’s “diagnosis and plan of care was discussed in depth with both him and his wife.” *Id.* at 2. The report contains no other reference to the decedent’s exposure to

asbestos, and it does not address the etiology of the decedent's diagnosed lung cancer at any point.

Moreover, the deposition testimony of the decedent relied upon by the administrative law judge is insufficient to support a conclusion that the decedent was aware of a relationship between his cancer and asbestos exposure at the time of the March 15, 2002, report. The statements quoted by the administrative law judge considered in full and in context are insufficient to support a finding that the decedent had the requisite "awareness" prior to March 31, 2002. See *Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987)(claimant widow's deposition testimony held too inherently unreliable to provide substantial evidence to support finding of awareness). Asked by employer's counsel regarding whether on March 15, 2002, he believed that asbestos was one of the causes of his lung cancer, the decedent responded "not really;" when queried a second time as to whether he thought in March 2002 that his exposure to asbestos might be a cause of his lung cancer, the decedent responded only "I was told that." CX 4 at 36, 38. There is, however, no contemporaneous evidence corroborating that the decedent was told anything at all regarding the etiology of his condition during March 2002. To the contrary, as acknowledged by the administrative law judge, the medical evidence from the decedent's March 7 through April 2, 2002, hospitalization does not mention asbestos-related lung disease, and none of the hospital records including Dr. Crawford's five-page discharge report address the cause of the decedent's lung cancer. In fact, the first reports in the record which diagnose asbestos-related disease are dated in 2005.¹ The cause of decedent's lung cancer was contested at the hearing, with employer relying on the June 2006 report of Dr. Pulde, attributing decedent's cancer to smoking, as well as Dr. Teiger's 2005 reports which concluded that absent a diagnosis of asbestosis, a causal link to asbestos could not be established and that the decedent's smoking was the primary cause of his cancer. Claimant relied upon the 2005 reports of Drs. Cherniak and Pohl, who concluded asbestos was a contributing cause of decedent's lung cancer.²

Given the evidence in this record, there is a complete lack of substantial evidence that the decedent was actually aware of a relationship between his lung cancer and asbestos exposure by March 15, 2002. Moreover, there is also no evidence that he "should have been aware" at that time either by reason of medical advice, as there is no

¹ Claimant was hospitalized numerous times from 2002-2004 for alcoholism, seizures and other problems. His cancer is noted in some reports. For example, in a 2004 hospital report, listed under "impressions" includes "chronic smoking with a history of lung cancer status post lobectomy." CX 6. The records also document COPD and emphysema, as well as other conditions.

² The administrative law judge ultimately found that the evidence establishes that the decedent had asbestosis and gave greatest weight to the opinions of Drs. Cherniak and Pohl.

evidence of medical advice regarding etiology, or in the exercise of reasonable diligence, as it is reasonable for a person newly diagnosed with cancer and facing surgery to focus on his care and treatment. The March 15, 2002, physician's assistant's report relied upon by the administrative law judge establishes only that the decedent had a history of asbestos exposure as well as smoking and alcohol abuse. The decedent's statement to a physician's assistant regarding his history is not substantial evidence that he was aware of a relationship between his lung cancer and his employment with employer. Additionally, the deposition testimony of the decedent quoted by the administrative law judge cannot establish that decedent knew that his lung cancer was causally related to his asbestos exposure by March 15, 2002. As there is no other evidence of record relevant to this issue, the administrative law judge's finding of awareness must be reversed as it is not supported by substantial evidence.³ As the record lacks evidence that the decedent was aware prior to March 31, 2002, his claim filed two years later is timely. The case is remanded to the administrative law judge for consideration of any remaining issues related to the decedent's claim for disability benefits.

Claimant next contends that the administrative law judge erred by failing to hold employer liable for a Section 14(e) assessment.⁴ Section 14(e) of the Act, 33 U.S.C. §914(e), provides that if an employer fails to pay any installment of compensation voluntarily within 14 days after it becomes due, the employer is liable for an additional ten percent of such installment, unless it files a timely notice of controversion pursuant to Section 14(d), 33 U.S.C. §914(d), or the failure to pay is excused by the district director. Section 14(b), 33 U.S.C. §914(b), provides that an installment of compensation is "due" on the fourteenth day after the employer has been notified of an injury pursuant to Section 12 of the Act, 33 U.S.C. §912, or the employer has knowledge of the injury.

³ In addition, the administrative law judge erred in limiting his inquiry to the decedent's "awareness" of the relationship between his cancer and his employment, as Section 13(b)(2) explicitly requires awareness of the relationship between an employee's disease, his employment *and* his disability. The administrative law judge did not discuss the decedent's awareness of his disability, which cannot occur until the decedent has an actual loss in wage-earning capacity or, in the case of a voluntary retiree, a permanent impairment. *See Lewis*, 30 BRBS at 156; *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). While pulmonary function studies were performed on March 14 and claimant underwent lung surgery on March 22, there is no indication that the impairment rating necessary to a disability finding, *see* 33 U.S.C. §908(c)(23), was addressed. The pulmonary function studies are not mentioned in the March 15, 2002, physician's assistant's report.

⁴ Contrary to the statement contained in employer's response, claimant raised this issue before the administrative law judge. *See* Clt's post-hearing br. at 26 - 27. Moreover, since Section 14(e) provides for a mandatory assessment, it may be raised at any time. *See Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

Under Section 14(d), the notice of controversion must be filed with 14 days of employer's knowledge of the injury. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 23 BRBS 61(CRT) (5th Cir. 1990). As the administrative law judge did not address claimant's entitlement to a Section 14(e) assessment while the claim was initially before him, he must do so on remand.

Lastly, claimant's counsel has filed a statement requesting a fee for services performed while claimant's appeal was before the Board. Counsel requests a fee of \$1,171, representing 4.25 hours of attorney services performed at a rate of \$271 per hour, and one-quarter hour of para-legal time performed at a rate of \$77 per hour. The Act provides that claimant's counsel is entitled to an attorney's fee for success in review proceedings before the Board. 33 U.S.C. §928(b); *see Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981). As this case is being remanded, the full degree of claimant's success before the Board has yet to be determined. Thus, as the award of a fee for services performed before the Board is premature, claimant's counsel's fee request is denied at this time. *See generally Warren v. Ingalls Shipbuilding, Inc.*, 31 BRBS 1 (1997). Should claimant ultimately be successful, counsel may refile his fee petition with the Board. 20 C.F.R. §802.203(c).

Accordingly, the administrative law judge's finding that the decedent's claim for disability benefits is barred by Section 13 is reversed, and the case is remanded for further consideration in accordance with this opinion. On remand, the administrative law judge must also address claimant's contentions regarding Section 14(e). In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge