U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0563

ALBERT R. SCHINDLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KELLOGG BROWN & ROOT SERVICES	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	DATE ISSUED: 08/20/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order of Admission/Exclusion of Claimant's Exhibits and the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joel S. Mills, Gary B. Pitts, and Hunter P. Ratcliff (Pitts, Mills & Ratcliff), Houston, Texas, for Claimant.

Edwin B. Barnes (Thomas Quinn, LLP), San Diego, California, for Employer/Carrier.

Ann Marie Scarpino (Elena S. Goldstein, Deputy Solicitor of Labor; Barry

H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Francine L. Applewhite's Order of Admission/Exclusion of Claimant's Exhibits and Decision and Order Denying Benefits (2018-LDA-00771) rendered on a claim filed pursuant to 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*. (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as an environmental coordinator for Employer in Iraq between December 2004 and April 2005. HT at 33-38. His duties for Employer included the proper handling and securing of chemical storage containers, as well as the daily overseeing of trash disposal through burn pits that allegedly exposed him to copious amounts of smoke and potentially hazardous fumes.[1] *Id.* Though requested, he was not provided any protective gear. *Id.* at 40. Claimant left his job in Iraq in April 2005 and returned to the United States. He then worked for the Federal Emergency Management Agency (FEMA) from 2005 through 2009 in Mississippi, Louisiana, and Texas. During this time-frame, he also operated his own business designing and installing groundwater remediation systems.

In late 2005, Claimant developed a productive cough, prompting a CT scan that showed a pulmonary lesion in his left lung and resulted in a diagnosis of sarcoidosis. He underwent a procedure in 2006 that showed "some mediastinal lymphadenopathy and a left lung nodule" measuring 2.5 cm in size. The nodule was not removed or biopsied but Claimant's pulmonologist recommended monitoring the condition. Subsequent CT scans revealed gradual enlargement of the lesion to the point Claimant sought treatment at the Mayo Clinic in November 2011.[2]

[1] The trash consisted primarily of plastic materials – plates, cups, and bottles – but also included common trash, spent ammunition, and construction and medical debris. HT at 34-36.

[2] A 2009 CT scan showed the lesion had enlarged, but Claimant was asymptomatic at that time and did not receive any treatment. A 2011 CT scan revealed a significant

A biopsy was positive for atypical carcinoid disease and on November 15, 2011, surgery was performed to remove Claimant's left lung. In March 2012, Mayo Clinic physicians Dr. Wayne D. Ormsby and Dr. Timothy J. Hobday issued final diagnoses of Stage IIIA atypical pulmonary carcinoid, status post-left pneumonectomy, and intermittent light-headedness. Claimant, thereafter, underwent semi-regular checkups with his personal physician, Dr. Russell VanHouzen, an internist, beginning in 2010 or 2011.

In March 2018, Dr. VanHouzen issued a letter stating it was "highly likely" that Claimant's "burn pit exposure could have caused his cancer." CX 3; EX 8. On April 10, 2018, Claimant filed a claim for disability and medical benefits alleging he sustained a work-related lung injury due to his exposure to the burn pits in Iraq. Employer controverted the claim and the case was forwarded to the Office of Administrative Law Judges (OALJ) for proceedings.

On January 3, 2019, the administrative law judge issued a Prehearing Order detailing discovery deadlines. The parties subsequently submitted their respective exhibit lists to the administrative law judge; Employer on June 19, 2019 and Claimant on June 20, 2019. On July 1, 2019, Claimant submitted an amended exhibit list. Employer thereafter filed a motion to strike Claimant's exhibits as untimely submitted or alternatively because they are inadmissible hearsay, irrelevant, and not produced during the period of discovery.

At the July 9, 2019 hearing, the administrative law judge, among other things, provided the parties "a full opportunity to present argument" on Employer's motion to strike Claimant's evidence. Order of Admission/Exclusion of Claimant's Exhibits (Order) at 1; *see also* Decision and Order at 2; HT at 10-23, 103. In her Order dated July 27, 2020, the administrative law judge, "[h]aving fully considered the Motions and arguments thereto," admitted the bulk of Claimant's exhibits into evidence, but excluded Claimant's exhibits 1, 2, 6, 8 and 31 as "inadmissible hearsay." Order at 2.

In her Decision and Order, the administrative law judge found Claimant did not give Employer timely notice of his occupational lung disease pursuant to Section 12(a), 33 U.S.C. §912(a), and that his failure was not excused because there was no allegation Employer knew of Claimant's occupational disease until it received actual notice in 2018 and it provided substantial evidence it was prejudiced by the late notice. 33 U.S.C. §912(d). She also found Claimant should have been aware of the connection between his occupational disease and his work with Employer in 2011. She therefore found Claimant's 2018 claim for disability benefits was barred under Section 13(b)(2), 33 U.S.C. §913(b)(2).

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enlargement in the mass (7.5 cm) and the left hilar lymph node which served as the impetus for Claimant's visit to the Mayo Clinic.

She further denied Claimant's claim for medical benefits because he did not establish working conditions existed with Employer in Iraq that could have caused his lung cancer. Accordingly, she denied the claim.

On appeal, Claimant challenges the administrative law judge's decision to exclude several of his exhibits from the record, as well as her findings that his claim for disability benefits is time-barred and that he is not entitled to the Section 20(a) presumption, 33 U.S.C. §920(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits.[3] The Director, Office of Workers' Compensation Programs (the Director), responds stating the case must be remanded for reconsideration of the administrative law judge's evidentiary rulings and findings regarding the timeliness of Claimant's claim. Employer filed a Motion to Strike the Director's arguments as they reflect new contentions outside the scope of those permitted in a response brief and do not support the administrative law judge's decision below. The Director responds, urging the Benefits Review Board to deny Employer's motion.

Employer's Motion to Strike the Director's Response Brief

Employer contends the Director's brief is not a "response" brief as 20 C.F.R. §802.212 contemplates because it raises issues beyond the scope of those Claimant raised in his appeal. Employer avers the Board cannot address them because the Director did not file a cross-appeal. The Director responds that his contentions involve legal arguments regarding the same issues that Claimant defined and briefed, i.e., both challenging the administrative law judge's exclusion of evidence and finding that his claim was untimely filed, albeit on slightly different grounds.

Pursuant to 20 C.F.R. §802.212(b),[4] arguments in response briefs must be limited to those which respond to issues raised in petitioner's brief or those in support of the decision below. *Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014); *Reed v. Bath Iron Works Corp.*, 38 BRBS 1 (2004); *King v. Tennessee Consolidated Coal Co.*, 6 BLR

[3] In its response brief, Employer also moved for oral argument. We deny the motion. 20 C.F.R. §§802.305-306.

[4] Section 802.212(b) states:

> Arguments in response briefs shall be limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. Other arguments will not be considered by the Board (*see* § 802.205(b)).

1-87 (1983). The Board otherwise will not address new issues that a respondent raises challenging the administrative law judge's ultimate decision without the benefit of a cross-appeal. *Id.*

Contrary to Employer's contention, however, the arguments raised in the Director's response brief encompass the allegations of error and issues raised in Claimant's appeal and brief. *Compare* Cl. Br. at 7, 24-30 *with* Dir. Br. at 4, 5-6. The Director, therefore, is not raising new issues, but agreeing with Claimant that the administrative law judge erred in summarily excluding certain exhibits and in not addressing the timeliness issue under the appropriate standard. 20 C.F.R. §802.212. We therefore deny Employer's motion to strike the Director's brief.

Exclusion of Evidence

Claimant contends the administrative law judge's summary exclusion of five of his exhibits as "inadmissible hearsay" is erroneous because it does not comport with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557.[5] He maintains Employer, as the proponent of the motion to exclude his evidence as hearsay, had an affirmative burden to show that such evidence is irrelevant and not probative – a burden which the administrative law judge, through her summary conclusion, failed to address:

[5] The five exhibits with brief descriptions are:

CX 1 – Veterans Administration (VA) Airborne Hazards and Open Burn Pit Registry and Information for Health Care Providers, TA-023-0614, June 22, 2015;
CX 2 – July 31, 2018 letter from former General David Petraeus to Congress requesting support for legislation requiring periodic health assessments for Department of Defense soldiers and civilians who are exposed to burn pits or airborne toxins;
CX 6 – VA Training Letter dated April 26, 2018, informing regional personnel of specific environmental hazards, providing guidance on handling claims potentially arising from exposure to those hazards, and providing fact sheets as resources;
CX 8 – November 21, 2018 *Health* article describing a study regarding a link between burn pit exposure and high cancer mortality levels among Army veterans; and
CX 31 – medical research report from Augusta University concerning elevated cancer rate among veterans and the relationship to the smoke from burn pits.

she made no finding that the evidence is unreliable, irrelevant or immaterial. The Director similarly contends the administrative law judge's summary exclusion of the five exhibits cannot stand because she did not address the determinative factors as to the admissibility of the proffered evidence: is it significant, probative, reliable, and is its use fair given the overall circumstances of the case? He further states the administrative law judge's exclusion of the evidence is not harmless error, as those documents could potentially assist Claimant in establishing the working conditions element of his prima facie case for application of the Section 20(a) presumption.[6]

In contrast, Employer asserts the administrative law judge's exclusion of Claimant's five exhibits as hearsay represents a proper exercise of the broad discretion afforded her in evidentiary matters and is therefore in accordance with the requirements of the APA.[7]

Section 23(a) of the Act, 33 U.S.C. §923(a), provides in pertinent part:

> In making an investigation or inquiry or conducting a hearing the [administrative law judge] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

See also 33 U.S.C. §919(d); 20 C.F.R. §702.339. Hearsay evidence is generally admissible in administrative proceedings if it is considered reliable. *See Richardson v. Perales*, 402

[6] The Director maintains the excluded documents are relevant and probative as they address the link between burn pits and cancer and, therefore, bolster Dr. VanHouzen's opinion that Claimant's condition could be the result of his work with Employer in Iraq.

[7] Citing 29 C.F.R. §18.802, Employer also maintains hearsay evidence is generally not admissible in matters before the OALJ and therefore it was appropriate for the administrative law judge to summarily deny the submitted exhibits as "inadmissible hearsay." Employer's contention is meritless as Section 18.802 is inapplicable to this case because it is inconsistent with the statute and implementing regulation. 29 C.F.R. §18.10(a) ("To the extent [the OALJ] rules may be inconsistent with a governing statute, regulation, or executive order, the latter controls."); *see* 33 U.S.C. §923(a); 20 C.F.R. §702.339.

U.S. 389 (1971).[8] As hearings before the administrative law judge follow relaxed standards of admissibility, the admissibility of evidence depends on whether it is such evidence as a reasonable mind might accept as probative. *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968). Indeed, where it possesses rational probative force, hearsay evidence alone may constitute substantial evidence to support an administrative holding. *Camarillo v. Nat'l Steel & Shipbuilding Co.*, 10 BRBS 54, 60 (1979). Therefore, as the Director notes, to be admissible hearsay evidence must bear satisfactory indicia of reliability, i.e., it is not the hearsay nature *per se* of the proffered evidence that is significant, but rather its probative value, reliability and the fairness of its use that are determinative. *See generally Woolsey v. Nat'l Transp. Safety Bd.*, 993 F.2d 516, 520 n.11 (5th Cir. 1993); *Bustos-Torres v. INS*, 898 F.2d 1053 (5th Cir. 1990) (hearsay evidence is admissible in administrative proceedings, as long as admission of evidence meets tests of fundamental fairness and probity).

In her Order dated July 27, 2020, the administrative law judge briefly reviewed the history surrounding Claimant's submission of exhibits and Employer's motion to strike. Order at 1. After stating "the Parties had a full opportunity to present argument on the issue" at the hearing, *id.* at 2, and acknowledging she "fully considered the Motions and arguments thereto," the administrative law judge ruled:

> I hereby **ADMIT** into the evidentiary record *CX-3 to CX-5, CX-7, CX-9 to CX-30, CX-32, and CX-33*.
>
> I hereby **EXCLUDE** from the evidentiary record *CX-1, CX-2, CX-6, CX-8, and CX-31* as these are inadmissible hearsay.

Order at 2 (emphasis in original). As Claimant and the Director correctly note, the administrative law judge's summary denial necessarily implies those exhibits are inadmissible merely because they are hearsay, which is contrary to criteria for admissibility. *Perales*, 402 U.S. 389. She did not inquire fully into, or issue findings on, whether the evidence is reliable, has probative value, and/or the fairness of its use in the proceedings.[9] *Id.*; *see also Woolsey*, 993 F.2d at 520 n.11. Her summary exclusion of

[8] In *Richardson*, the Supreme Court held that hearsay evidence, even in the presence of opposing evidence, may constitute substantial evidence to support a finding of disability under the Social Security Act. *Richardson*, 402 U.S. at 402.

[9] At the hearing, Employer alluded to this evidence being inadmissible as hearsay in part because it lacked relevancy to the issues involved in this case, HT at 7, but its argument at that time largely centered on all of Claimant's exhibits being inadmissible as untimely, *id.* at 7-20. In its response brief, Employer reiterates its hearsay contention and

Claimant's exhibits as "inadmissible hearsay" without consideration of the determinative factors or findings and a relevant rationale is neither in accordance with law nor the requirements of the APA.[10] *Id.*; *see* 5 U.S.C. §557(c)(3)(A); 33 U.S.C. §923(a); 20 C.F.R. §702.339. We thus vacate the administrative law judge's exclusion of this evidence[11] and remand for reconsideration of this issue.[12]

Section 20(a)

Claimant contends the administrative law judge erred in finding he did not establish a prima facie case of a work-related injury and thus concluding he is not entitled to the Section 20(a) presumption. He avers, contrary to the administrative law judge's findings, Dr. VanHouzen's opinion that it is "highly likely" Claimant's cancer "could be due" to exposure to burn pits with Employer in Iraq, as well as Claimant's own uncontested testimony regarding those work exposures, constitute substantial evidence establishing the working conditions element for purposes of invoking the Section 20(a) presumption. Employer counters that the administrative law judge acted within her discretion in refusing to credit Dr. VanHouzen's conclusory letters. It further asserts that while Claimant's testimony establishes his exposure to burn pits, it does not prove whether it was possible for that exposure to cause his lung cancer.

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further explains why each of the five exhibits is not relevant to the case at hand and, in essence, asks the Board to render a finding that they are indeed irrelevant. Emp. Br. at 11-17. These determinations are for the administrative law judge, rather than the Board, to address in the first instance.

[10] Moreover, as the Director suggests, the administrative law judge's error is not harmless as the exhibits in question appear to pertain to a relevant issue in this case, i.e., the working conditions element of Claimant's prima facie case at Section 20(a).

[11] As the Director states, official government entities generated some of the excluded documents. Moreover, burn pits have been the subject of protracted litigation. *See In Re: KBR, Inc., Burn Pit Litigation*, 893 F.3d 241 (4th Cir. 2018); *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014).

[12] If, on remand, the administrative law judge finds this evidence admissible, she must then determine, in accordance with her broad discretion, its credibility and weight relative to Claimant's burden to show that working conditions existed that could have caused his lung cancer, and thus is sufficient to invoke the Section 20(a) presumption. *Bis Salamis, Inc. v. Director, OWCP*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016).

After discussing Claimant's burn pit exposure in Iraq, Dr. VanHouzen stated "[i]t would be my opinion that, it is highly likely that this burn pit exposure could have caused his cancer. He was a non-smoker and had no other risk factors for cancer." CX 3; *see also* CX 33. The administrative law judge found Claimant established a physical harm, i.e., his lung cancer, but not the existence of working conditions which could have caused that harm. In this respect, she accorded no weight to Dr. VanHouzen's opinion because it lacks any underlying documentation, did not address how he excluded Claimant's years of non-covered work "with environmental contaminants" as potential causes,[13] and thus appeared to depend solely on Claimant's assertions. Decision and Order at 9. She also found Dr. VanHouzen's opinion unpersuasive because he did not appear "to have any experience or expertise in diagnosing cancer or determining a cancer's etiology." *Id.* She further found that although Claimant testified regarding his work for Employer in Iraq, that "testimony alone is insufficient to establish working conditions that could have caused his cancer." *Id.* She thus found Claimant not entitled to invocation of the Section 20(a) presumption.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a prima facie case that: (1) he suffered a harm; and (2) an accident occurred or conditions existed at work which could have caused that harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). The Section 20(a) presumption does not apply to aid a claimant in establishing his prima facie case. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Contrary to Claimant's contention, he has the burden of proving the existence of an injury or harm and the occurrence of an accident or working conditions that could have caused the harm; it is not sufficient to merely allege that working conditions could have existed. *See Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

To establish a prima facie case, however, a claimant is not required to prove that his actual working conditions in fact caused his harm; rather, he need only show that the actual working conditions *could have caused* his harm. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *see also Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Claimant's theory as to how the injury arose must go beyond "mere fancy." *See generally Champion v. S & M Traylor*

[13] In her recitation of Claimant's testimony, the administrative law judge found Claimant held jobs prior to his work in Iraq involving "fixing and preventing environmental contamination that could cause illness," and that his post-Iraq FEMA job involved "determin[ing] long-term environmental problems." Decision and Order at 2-3 (citing HT at 58, 75).

Bros., 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990); *Sinclair*, 23 BRBS at 152. To meet this threshold, "all the claimant need adduce is *some* evidence tending to establish the prerequisites of the presumption." *Brown v. I.T.T./Cont'l Baking Co. & Ins. Co. of N. Am.*, 921 F.2d 289, 296, 24 BRBS 75, 80(CRT) (D.C. Cir. 1990); *see also Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 960, 31 BRBS 206, 210(CRT) (9th Cir. 1998) (claimant's uncontradicted testimony regarding working conditions is sufficient to invoke the Section 20(a) presumption). If the claimant establishes the two elements of his prima facie case, Section 20(a) applies to presume that the harm was caused by the work incident. *Hunter*, 227 F.3d 285, 34 BRBS 96(CRT); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Contrary to the administrative law judge's conclusion, Dr. VanHouzen's opinion appears to have documentation to support it as evidenced by his understanding of Claimant's work environment in Iraq, the chronology of Claimant's work exposures in 2004 and development of his initial symptoms in 2005, and his acknowledgement of research linking cancer to burn pit exposure.[14] EX 8; CXs 3, 33. The presently excluded documents addressing the link between burn pits and cancer could conceivably bolster Dr. VanHouzen's opinion.[15] Because we are remanding the case for reconsideration of the admissibility of that evidence, we vacate the administrative law judge's finding that Claimant did not establish the working conditions element of his prima facie case at Section 20(a). On remand, after making a determination on the admissibility of the exhibits in question, the administrative law judge must fully consider whether Claimant's testimony,

[14] Dr. VanHouzen noted Claimant's work for Employer involved daily operation of burn pits at a military base to dispose of refuse "mostly constituted of Styrofoam and plastic bottles and many other types of trash" which produced "a very foul kind of smoke that was frequently inhaled by" Claimant. CX 3 at 1. He further noted that "[a]pparently it has come to the attention of researchers that these military burn pits had caused certain lung disease in people who were highly exposed to them such as [Claimant]." *Id.* He then explained that Claimant conducted this work in 2004 and 2005 and it "was later in 2005 that he developed an enlarged lymph node in his chest" which "gradually progressed in size" and was ultimately shown to be, through a 2011 biopsy, "an atypical carcinoid tumor." *Id.*

[15] It is undisputed the administrative law judge may address the credibility of the evidence Claimant puts forth to meet his burden to produce evidence concerning the elements of his prima facie case. *Meeks*, 819 F.3d at 127, 130-131, 50 BRBS at 35-38(CRT).

Dr. VanHouzen's opinion and, if admitted, the documents addressing a link between burn pits and lung cancer, are sufficient to satisfy Claimant's burden to establish that working conditions existed sufficient to invoke the Section 20(a) presumption.[16]

Sections 12 and 13

Claimant contends the administrative law judge erred in finding his claim time-barred as she did not apply the proper standard for determining "awareness" under Sections 12 and 13 of the Act and did not sufficiently address or adequately weigh the relevant evidence in resolving this issue.[17] He contends the administrative law judge also erred in finding Employer established prejudice due to the late notice, as its bare allegations have no support in the record or in the law for satisfying its burden under Section 12(d)(2). The Director asserts the administrative law judge erroneously concluded, without explanation or adequate consideration of Section 20(b), 33 U.S.C. §920(b), that Claimant's knowledge of his cancer and interactions with his physicians were sufficient to establish he should have been aware of a connection between his work in Iraq and his illness in 2011.

Section 20(b) of the Act provides a claimant with a presumption that his notice of injury and claim were timely filed. 33 U.S.C. §920(b);[18] *Shaller v. Cramp Shipbuilding &*

[16] If, on remand, the administrative law judge finds Claimant entitled to the Section 20(a) presumption, his occupational disease is work-related as a matter of law, as Employer has not produced any evidence legally sufficient to rebut the presumption. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011). Conversely, if, on remand, she determines Claimant is not entitled to the Section 20(a) presumption, the ensuing issues discussed herein pertaining to Sections 12 and 13 are moot.

[17] Claimant states the administrative law judge did not make any credibility determinations regarding his testimony that he was not aware of any potential causal connection between his condition and work with Employer in 2011-2013, and that he did not gain such awareness until Dr. VanHouzen opined, in 2018, that his exposures to burn pits in Iraq could have caused his cancer.

[18] In order to rebut the Section 20(b) presumption, an employer must prove compliance with Section 30(a) or the time for filing a claim under Section 13 is tolled pursuant to Section 30(f). 33 U.S.C. §930(a), (f). Section 30(a) requires an employer to file a report of injury with the district director within 10 days of its knowledge of a claimant's injury. Employer did not file a Section 30(a) report in this case. It filed a notice of controversion on June 11, 2018, stating it first gained knowledge of Claimant's injury after the district director served his claim on Employer on April 23, 2018. If the statute of

Dry Dock Co., 23 BRBS 140 (1989). Section 12(a) of the Act requires a notice of injury, in a case involving an occupational disease which does not immediately result in disability, to be filed within one year 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 the employment, the disease, and the disability. 33 U.S.C. §912(a). Under Section 12(d), untimely notice will not bar the claim if: (1) the employer had actual knowledge of the injury or death; and (2) the employer was not prejudiced by the claimant's late notice. *See* 33 U.S.C. §912(d); 20 C.F.R. §702.216. Pursuant to the Section 20(b) presumption, an employer must establish it had no knowledge of the injury and was prejudiced by the late notice. *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). Section 13(b)(2), which governs the filing of claims, states that in the case of an occupational disease that does not immediately result in disability, a claim shall be timely "if filed within two years after the employee or 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 death or disability, or within one year of the date of the last payment of compensation, whichever is later." 33 U.S.C. §913(b)(2).

Addressing "awareness" for purposes of Section 12(a), the administrative law judge found the medical records belie Claimant's testimony that he did not connect his disease to his employment at any time between 2011 and 2013. In this regard, she found the Mayo Clinic confirmed the diagnosis of cancer in November 2011 and the corresponding treatment records demonstrate Claimant discussed his occupation as an environmental geologist with some environmental fume exposures with his physicians.[19] She further noted Claimant saw Dr. VanHouzen from 2011 through 2018, who provided the "sole medical opinion to connect the Claimant's occupational disease with his employment." Decision and Order at 6. Nevertheless, she found that, based on Claimant's 2011 knowledge of his lung cancer and "his constant interaction with doctors throughout that time period," he should have known, through the exercise of due diligence, the "connection between his disease and his employment in 2011." She thus concluded Claimant's 2018 notice of injury was untimely filed.

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limitations expires before the employer gains knowledge, Section 30(f) does not toll the statute of limitations. *Wendler v. American National Red Cross*, 23 BRBS 408 (1990); *see also Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

[19] The administrative law judge, however, did find it unclear whether Claimant's physicians told him that he had cancer connected to his employment prior to 2011.

The administrative law judge next found Section 12(d)(1) inapplicable because there is no allegation that Employer knew of Claimant's occupational disease prior to receiving notice in April 2018. She also found Section 12(d)(2) inapplicable because Employer produced substantial evidence that it was prejudiced due to the late notice. In this regard, she found that many of the employees who worked with Claimant are no longer with the company, and the fact that Claimant's surgery occurred in 2011 precluded it from obtaining a biopsy of the lung tissue or contemporaneous independent medical evaluations. She further found Claimant's inability to remember the pulmonologist who first diagnosed him with lung problems in 2005 or where he saw this physician reinforced Employer's claim of prejudice. She therefore found Claimant's untimely notice under Section 12(a) was not excused by Section 12(d). Moreover, based on her finding that Claimant's "date of awareness" occurred in 2011, she concluded his claim filed in 2018 is barred under Section 13(b) as it was not filed within two years of the date of awareness. For the reasons that follow, we vacate the administrative law judge's finding that Claimant's notice of injury and claim were untimely filed, and remand for further consideration.

Awareness

The administrative law judge's analysis of Claimant's "awareness" for purposes of Sections 12(a) and 13(b)(2) is flawed. First, she failed to give Claimant the benefit of the Section 20(b) presumption that his notice and claim were timely. *See generally Sabanosh v. Navy Exch. Serv. Command*, 54 BRBS 5 (2020). Second, in terms of Claimant's awareness, she generally stated, without citing any specific evidence, that Claimant's knowledge of his lung cancer in 2011 and "constant interaction with doctors throughout that time period" is sufficient to establish, through the exercise of reasonable diligence, that Claimant should have been aware of the connection between his disease and his work with Employer as of 2011.[20] Although the Mayo Clinic notes, upon which the administrative law judge seemingly relies, reflect that Claimant was "employed as an environmental geologist with some environmental fume exposures," there is no suggestion of a possible link between those exposures in Iraq and the lung cancer or any opinion on the possible cause of Claimant's disease.[21] Additionally, the administrative law judge's

[20] As the Director asserts, this contradicts her finding at Section 20(a) that Claimant's testimony about his working conditions is insufficient to establish those conditions could have caused his cancer.

[21] The administrative law judge noted Claimant's treatment records "demonstrate that there was a discussion of his occupation with doctors at the Mayo Clinic in 2011 as the doctors recorded that the Claimant is an environmental geologist with some environmental fume exposures." Decision and Order at 6. This merely reflects background

analysis contains no discussion of Claimant's testimony – particularly that he never made any connection between his work with Employer and his lung cancer in 2011-2013, HT at 91-92, or his explanation as to why he did not make that connection until 2018. HT at 90-91; EX 15, Dep. at 89-91. Moreover, as the Director notes, the administrative law judge did not identify any specific interactions demonstrating Claimant should have acquired such awareness in 2011.

Section 12(d)(2) - Prejudice[22]

In finding Employer established prejudice under Section 12(d)(2), the administrative law judge merely recited Employer's allegations without determining whether they are valid and whether prejudice was actually established. Although she stated her conclusion is "based on the evidence as a whole," and that Employer "provided substantial evidence," Decision and Order at 7, she did not sufficiently explain what evidence supports her conclusion. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). Mere conclusory allegations of prejudice or of an inability to investigate the claim when it was fresh are insufficient to render Section 12(d)(2) applicable. *ITO Corp. v. Director, OWCP* [*Aples*], 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989); *Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999). The administrative law judge's analysis under Section 12(d)(2) is thus legally insufficient.

In light of these errors, we vacate the administrative law judge's finding pertaining to Claimant's "awareness" under Sections 12(a) and 13(b)(2), her finding that Employer was prejudiced by Claimant's late notice under Section 12(d)(2), and her denial of Claimant's claim as time-barred. On remand, the administrative law judge must reconsider all of the issues relevant to these provisions, bearing in mind that in the absence of substantial evidence to the contrary, it is presumed pursuant to Section 20(b) of the Act, 33 U.S.C. §920(b), that the notice of injury and filing of the claim were timely. *Bath Iron Works Corp. v. U. S. Dep't of Labor*, 336 F.3d 51, 37 BRBS 67(CRT) (1st Cir. 2003); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). She must also discuss all the relevant

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information collected on Claimant – particularly given the Mayo Clinic notes provided no opinion on a possible cause of Claimant's lung cancer.

[22] We affirm, as unchallenged on appeal, the administrative law judge's finding that Employer did not have actual knowledge of Claimant's occupational disease pursuant to Section 12(d)(1), 33 U.S.C. §912(d)(1). Decision and Order at 7; *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

evidence and provide an evidentiary basis for her findings consistent with the requirements of the APA. *Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989).

Accordingly, we vacate the administrative law judge's Order of Admission/Exclusion of Claimant's Exhibits and the Decision and Order Denying Benefits and remand for reconsideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge