BRB No. 99-1209

ANTHONY GRANUCCI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	DATE ISSUED: 08/11/2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Walter J. Curtis (Baker, Garber, Duffy & Pedersen), Hoboken, New Jersey for claimant.

Francis M. Womack III (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-LHC-2369) of Administrative Law Judge Ralph A. Romano 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).

Claimant worked as a longshoreman for employer from 1945 until his retirement in 1987. He primarily worked as a sorter, but testified that he also performed the duties of a location man, sling man, driver, cooper, checker, and extra laborer. Tr. at 21-23. According to claimant, throughout the history of his employment with employer, he was exposed to

asbestos and other deleterious substances such as dust, smoke, powders and fumes. Tr. at 43-45, 55-56. In 1997, claimant was hospitalized due to shortness of breath with minimal exertion, and he was diagnosed with chronic obstructive pulmonary disease (COPD) with acute exacerbation, hypertension, and diabetes mellitus. Cl. Ex. 3. Later that year, claimant underwent an examination with Dr. Hermele who diagnosed chronic bronchitis, COPD, small airways disease, and pleural asbestosis. Cl. Ex. 2. Claimant filed a claim for compensation under the Act, and employer controverted the claim, paying neither disability nor medical benefits.

The administrative law judge found that claimant failed to establish either the existence of asbestosis or working conditions which might have caused that disease. Decision and Order at 5. Thus, he determined that claimant was not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), relating any such condition to his employment. The administrative law judge also noted that even if he were to have found the presumption invoked, it was rebutted by testimony from Dr. Karetzky and Mr. Lysick. Decision and Order at 6 n.5. The administrative law judge then determined that claimant established a history of exposure to other pulmonary irritants such as dirt, powders, dusts, and fumes, which could have resulted in his contracting COPD, chronic bronchitis, and small airways disease. Thus, he invoked the Section 20(a) presumption relating those conditions to his employment. However, the administrative law judge found that the opinion of Dr. Karetzky was sufficient to rebut the presumption. On weighing the evidence as a whole, the administrative law judge credited employer's evidence over claimant's and concluded that claimant did not suffer a work-related pulmonary disability. Decision and Order at 7. Consequently, he denied benefits under the Act. Claimant appeals the decision, and employer responds, urging affirmance.

Initially, claimant contends the administrative law judge erred in failing to invoke the Section 20(a) presumption with regard to his exposure to asbestos and the existence of asbestosis. 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, *i.e.*, the claimant demonstrates that he suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). In the instant case, claimant testified to being exposed to asbestos, and he described it as looking like "cotton, dirty cotton, a grayish color." Tr. at 44-45. When asked how he knew this was asbestos, he stated that he had "the sheet" which identified the markings on the bags as being bales of asbestos. Tr. at 46. However, when later asked, he stated that the sheet did not identify the nature of the cargo and also that "[w]e didn't know what it was." Tr. at 52, 87. In light of these discrepancies, the administrative law judge concluded that claimant testified inconsistently and that he did

not present a reliable or probative identification of the substance which could be verified. Thus, he concluded that claimant did not establish working conditions which may have exposed him to asbestos. Decision and Order at 5. As questions of witness credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), and as the Board may not interfere with credibility determinations unless they are "inherently incredible" or "patently unreasonable," *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), we affirm the administrative law judge's finding that claimant's testimony was not reliable and his conclusion that claimant failed to demonstrate exposure to asbestos at work and, therefore, failed to establish a *prima facie* case. *See Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

Nevertheless, the administrative law judge continued his analysis and also found that claimant failed to establish the existence of asbestosis, further supporting his determination that the Section 20(a) presumption should not be invoked. Decision and Order at 5-6. Specifically, the administrative law judge found that claimant's own experts failed to establish the presence of asbestosis, as one physician acknowledged that the diagnosis is not medically evidenced and the other stated that claimant's pleural plaques may have been caused by something other than exposure to asbestos. *Id.* As the administrative law judge may accept or reject any or all testimony according to his judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969), we affirm his conclusion that claimant has not demonstrated that he has asbestosis and is not entitled to invocation of the Section 20(a) presumption to link any alleged asbestosis to his employment. *See generally Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). Even were we to hold that the administrative law judge erred in failing to invoke the presumption on claimant's behalf, that error would be harmless, as the administrative law judge noted that the presumption would be rebutted by credible testimony from Dr. Karetzky (as to harm) and Mr. Lysick (as to exposure), and the decision clearly reflects the administrative law judge's determination that Dr. Karetzky's opinion is more persuasive than those of claimant's experts. *See Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). We, therefore, affirm the denial of benefits on the asbestosis claim.

Claimant also contends that the administrative law judge erred in finding that he does not suffer from work-related COPD. Specifically, he argues that employer's evidence is insufficient to rebut the Section 20(a) presumption as it pertains to this condition. The administrative law judge found that claimant presented evidence establishing pulmonary disabilities and work exposure to various pulmonary irritants, thereby invoking the Section 20(a) presumption. This finding has not been challenged. Once the claimant establishes his *prima facie* case, Section 20(a) applies to relate his injury to his employment, and the

employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d at 1066, 32 BRBS at 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. *Moore*, 126 F.3d at 256, 31 BRBS at 119(CRT).

The administrative law judge found that Dr. Karetzky's opinion is sufficient to rebut the presumption. Decision and Order at 6. Dr. Karetzky determined that, although claimant has evidence of some pleural thickening or plaque formation with calcification, such formation does not impair pulmonary function, and claimant does not have pulmonary disease or evidence of pulmonary disability, as his pulmonary function test results are normal. Emp. Ex. C; Tr. at 118, 122, 129, 154. Further, he noted claimant's 20-year history of smoking, and he opined that the substances to which claimant was exposed at work would cause merely temporary respiratory irritation, but not obstructive or restrictive lung disease. Tr. at 115, 147. Dr. Karetzky also concluded that, in light of claimant's normal pulmonary function test results and lack of evidence of a pulmonary disability, claimant's true health problems are heart-related and not lung-related. Tr. at 140. Dr. Karetzky's testimony is sufficient to sever the causal relationship between claimant's employment and his alleged lung condition; therefore, we affirm the administrative law judge's determination that the Section 20(a) presumption was rebutted. *See O'Kelley v. Department of the Army/NAF*, __ BRBS __, BRB No. 99-810 (May 2, 2000); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Because employer rebutted the presumption, the administrative law judge evaluated the record as a whole. Dr. Hermele and Dr. Szeinuk each stated that claimant has several lung ailments, including chronic bronchitis, COPD, small airways disease, pleural thickening, and mixed dust pneumoconiosis. Cl. Exs. 2, 5. The administrative law judge, however, found that the opinions of Drs. Karetzky and Rosenman are more well-reasoned and documented than the opinions of Drs. Hermele and Szeinuk and that the qualifications of the former two physicians are superior to those of the latter two. Decision and Order at 6. In this regard, the administrative law judge gave great weight to the conclusion of Drs. Karetzky and Rosenman that claimant's pulmonary function test results are normal, demonstrating no evidence of pulmonary disability. Decision and Order at 6-7; Emp. Exs. A, C-D; Tr. at 137, 154. Further, the administrative law judge credited Dr. Karetzky's explanation of the pulmonary function test results and how the test administered by Dr. Hermele was poorly performed. Decision and Order at 7; Tr. at 130.

It is well-established that an administrative law judge is entitled to weigh the evidence, and is not bound by any opinion in particular; rather, he may draw his own

inferences and conclusions from the evidence. *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). Additionally, the Board may not reweigh the evidence, but may assess only whether there is substantial evidence to support the administrative law judge's decision. *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981). We affirm the administrative law judge's decision to credit the opinions of Drs. Karetzky and Rosenman over that of claimant's experts, as it is rational, and claimant has identified no error in the administrative law judge's weighing of the evidence. Consequently, we affirm the administrative law judge's determination, based on the record as a whole, that claimant does not suffer from a work-related pulmonary disease. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge