



BRB No. 17-0094

JESSE COOLEY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS,	)	DATE ISSUED: <u>Aug. 30, 2017</u>
INCORPORATED – PASCAGOULA	)	
OPERATIONS	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jesse Cooley, Jr., Tuscaloosa, Alabama.

Susan F. E. Bruhnke (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order (2014-LHC-00126) of Administrative Law Judge Larry W. Price 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). In an appeal by a claimant without representation, the Board will review the administrative law judge’s decision to determine if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). If they are, they must be affirmed.

Claimant began working for employer as a pipefitter on March 15, 1976. He was laid off nine days later. Employer rehired claimant as an electrician trainee on July 20,

1976, and he worked on and off in this capacity until July 19, 1979, when he was injured in an automobile accident. EX 17. Claimant has not worked since this accident.<sup>1</sup> EX 16 at 6-7; Tr. at 25-28. Claimant filed a claim for compensation on June 23, 2011, alleging permanently disabling lung diseases (asbestosis and tuberculosis) and ear and gallbladder conditions due to prolonged exposure to asbestos. EX 2; Cl. Affidavit (Aug. 23, 2016).

Claimant testified that, during his employment, he worked in the engine room, which he believed was “infested with asbestos.” Tr. at 12. Claimant also reported to Dr. Durham on November 5, 2012, that he worked adjacent to the application of asbestos insulation to the piping system, which created a dusty work environment where he potentially inhaled and ingested fibers. EX 12 at 2. However, the administrative law judge found that no evidence corroborated claimant’s testimony. Thus, the administrative law judge found claimant’s description of his working conditions to be unsupported conjecture and not credible. Decision and Order at 7-9.

With respect to claimant’s assertions that his latent tuberculosis, gallbladder disease, and left ear condition are related to asbestos exposure, the administrative law judge found that no physician of record attributed any of these conditions to asbestos exposure. With respect to the alleged asbestosis and asbestos-related lung conditions, the administrative law judge addressed the opinions of Drs. Durham and Epler. In November 2012, claimant was evaluated by Dr. Durham, who interpreted an x-ray of May 14, 2012, as grade-three quality and showing bilateral interstitial fibrosis in all six lung zones with a 1/0 profusion. Based on the x-ray and claimant’s self-reported history of asbestos exposure at work, Dr. Durham opined that claimant suffers from bilateral asbestos-related lung disease. EX 12. By contrast, after reviewing Dr. Durham’s x-ray and claimant’s other medical records, Dr. Epler opined that claimant does not have asbestosis or an asbestos-related lung disease.<sup>2</sup> EX 5. Based on Dr. Epler’s superior pulmonary

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<sup>1</sup> Following his accident, claimant was placed on a non-industrial leave of absence until his position was terminated on March 11, 1981, pursuant to company policy for being out on non-industrial leave for more than one year. EX 17 at 31, 37.

<sup>2</sup> Specifically, Dr. Epler stated that asbestosis is established by lung biopsy, or by sufficient exposure and appropriate latency in conjunction with four clinical criteria: 1) persistent bilateral crackles; 2) an abnormal vital capacity; 3) an abnormal diffusing capacity; and 4) radiographic finding of small bilateral linear opacities at the lung bases. Dr. Epler reviewed claimant’s x-rays and medical records, including the May 2012 x-ray on which Dr. Durham premised his opinion. Dr. Epler opined that claimant does not have asbestosis because there were no bilateral crackles, claimant’s vital capacity was measured as normal on November 29, 2012, his diffusing capacity was not measured, and the May 2012 chest x-ray showed no small linear opacities. EX 5 at 5. Dr. Epler further explained that claimant does not have an asbestos-related lung condition because x-rays

credentials and his review of claimant's medical records, the administrative law judge found Dr. Epler's medical opinion entitled to greater weight.<sup>3</sup> Further finding that claimant's medical records are inconsistent with Dr. Durham's opinion but are consistent with Dr. Epler's opinion, the administrative law judge found that claimant did not establish he has asbestosis or an asbestos-related lung condition.<sup>4</sup> Thus, the administrative law judge determined that claimant failed to establish either element of his prima facie case. Decision and Order at 7-9.

Assuming, *arguendo*, claimant established a prima facie case, the administrative law judge found employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption with the report of Dr. Epler. Weighing the record as a whole, he found claimant failed to establish by a preponderance of the evidence that he sustained any work-related injuries. Accordingly, the administrative law judge denied benefits. Decision and Order at 9-10.

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taken in November 2014, January, March and August 2015, show no abnormalities, the November 2012 x-ray report stated there were no pleural plaques, and Dr. Epler's review of the May 2012 and January 2015 x-rays showed no pleural plaques or calcified plaques. *Id.* at 2, 5.

<sup>3</sup> The administrative law judge found that Dr. Durham is board certified in internal medicine and is a NIOSH certified B reader. EX 12. The administrative law judge found that Dr. Epler is board certified in internal medicine and pulmonary medicine, is a pulmonary consultant for both a hospital and cancer institute, is a clinical professor at a medical school, and has authored two books and 110 articles on the lungs and lung-related diseases. EX 6.

<sup>4</sup> The administrative law judge stated: "weighing against Dr. Durham's opinion, is quite literally, every other medical opinion, report, and finding" in this case. Decision and Order at 8. Specifically, in addition to the reports of Drs. Durham and Epler, the record contains the following evidence relevant to claimant's lung condition: 1) a June 14, 2011 x-ray interpretation, stating there were no infiltrates, adenopathy, or nodules, EX 9 at 5; 2) a medical report notation that a July 19, 2013 x-ray was interpreted as "unremarkable," EX 13 at 110; 3) a November 6, 2014 treatment record stating that claimant's lungs were clear with no wheezes, rhonchi, or rales on physical examination, EX 13 at 111; 4) a January 1, 2015 treatment record, noting "faint bilateral wheezes" on physical examination, EX 13 at 86; 5) January 1, March 26, and September 14, 2015 x-ray reports, stating there were no acute findings, no infiltrate, atelectasis, or effusion, and no evidence of acute or active abnormality, cardiopulmonary disease, or pleural disease, EX 13 at 7, 61, 87, 95; 6) Dr. Chandra's medical reports, dated August 5 and September 17, 2015, stating that claimant's 2015 chest x-rays show no signs of asbestosis or pleural plaques, his physical exam was normal with respect to his lung condition, and that claimant was unable to complete a pulmonary function test. EX 7 at 3, 7.

Claimant, without the benefit of legal counsel, appeals. Employer responds, urging affirmance. Claimant replied, generally asserting that Dr. Durham's opinion establishes his entitlement to benefits.

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 Bis Salamis, Inc. v. Director, OWCP*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016); *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000). 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).

Substantial evidence supports the administrative law judge's finding that claimant does not have asbestosis or an asbestos-related lung condition. The administrative law judge rationally found Dr. Epler's credentials to be superior to those of Dr. Durham, Dr. Epler reviewed additional medical records, and his opinion is consistent with all medical evidence of record, whereas Dr. Durham's opinion is not consistent with that evidence. Decision and Order at 8; EXs 6, 12. Therefore, the administrative law judge rationally credited Dr. Epler's well-reasoned opinion that claimant does not have asbestosis or an asbestos-related lung disease over the contrary opinion of Dr. Durham. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). We, therefore, affirm the administrative law judge's finding that claimant did not establish the existence of the physical harms alleged.<sup>5</sup> *See Bis Salamis, Inc.*, 819 F.3d at 129-130 50 BRBS at 37-38(CRT); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988). As claimant failed to establish an element of his prima facie case, we affirm the denial of benefits.<sup>6</sup> *Bis Salamis, Inc.*, 819 F.3d at 129-130 50 BRBS at 37-38(CRT).

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<sup>5</sup> As substantial evidence supports the administrative law judge's finding that no physician of record attributed claimant's latent tuberculosis, gallbladder disease, or left ear condition to asbestos exposure, we affirm the administrative law judge's finding that claimant did not establish the work-relatedness of these conditions. Decision and Order at 7 n.4.

<sup>6</sup> The administrative law judge also found claimant did not establish the working conditions element of his prima facie case. That finding was based, in part, on the testimony of Mr. Daughdrill, whose deposition was taken in an unrelated case. Decision and Order at 6, 9. As claimant did not have the opportunity to cross-examine Mr. Daughdrill, the administrative law judge's reliance on Mr. Daughdrill's testimony in

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge

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finding claimant was not exposed to asbestos was in error. *See* 5 U.S.C. §556(d); *Southern Stevedoring Co. v. Voris*, 190 F.2d 275 (5th Cir. 1951) (relaxed admissibility standard for evidence does not dispense with the right of cross-examination). However, as substantial evidence supports the administrative law judge's finding that claimant failed to establish the harm element of his prima facie, any error in finding claimant also failed to establish the working conditions element is harmless.