

BRB No. 99-0401

ROSEMARY LIUZZA)
(Widow of JAKE LIUZZA))
)
 Claimant-Respondent)
)
 v.)
)
 COOPER/T. SMITH) DATE ISSUED:
 STEVEDORING COMPANY,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Amending Decision and Denying Employer’s Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor. John F. Dillon, New Orleans, Louisiana, for claimant.

Alan G. Brackett and Daniel J. Hoerner (Mouledoux, Bland, Legrand & Brackett, L.L.C.), New Orleans, Louisiana, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Amending Decision and Denying Employer’s Motion for Reconsideration (97-LHC-1704) of Administrative Law Judge Clement J. Kennington 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Jake Liuzza (decedent) worked as a longshoreman for multiple employers between 1947 and 1984, during which time it is alleged that he was exposed to asbestos. Decedent

voluntarily retired in 1984. In May 1993, decedent was diagnosed as suffering from malignant lung cancer, specifically squamous cell carcinoma; that same month, decedent underwent a left upper pulmonary lobectomy. Decedent's cancer reappeared in August 1994, at which time a second resection was performed; decedent died on September 30, 1994, as a result of his lung cancer. Claimant, decedent's widow, thereafter filed a claim under the Act seeking permanent partial disability as well as death benefits.

In his Decision and Order, the administrative law judge initially determined that the instant claim was timely filed and that employer was liable for any benefits due as the responsible employer. Next, the administrative law judge concluded, based upon the testimony of claimant and decedent's son, that claimant established the existence of working conditions, specifically exposure to asbestos, which could have contributed to the onset of his lung cancer, that claimant was therefore entitled to the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer had rebutted it. Based upon his weighing of the evidence as a whole, the administrative law judge then found that claimant established a causal relationship between decedent's employment and his lung cancer. The administrative law judge subsequently determined that decedent was totally disabled from May 18, 1993 through the date of his death. Accordingly, he awarded claimant permanent partial disability compensation based upon a 100 percent impairment from May 18, 1993 through September 30, 1994, pursuant to Section 8(c)(23), death benefits thereafter, and funeral expenses. *See* 33 U.S.C. §§908(c)(23), 909. Employer's motion for reconsideration was denied.

On appeal, employer contends that the administrative law judge erred in concluding that it is the employer responsible for the payment of any benefits due claimant, that claimant established a causal relationship between decedent's employment and his ultimately fatal lung cancer, and that decedent was totally disabled during the period between his successful surgery and his death.¹ Claimant responds, urging affirmance of the administrative law judge's decision in its entirety.

Working Conditions

Employer initially challenges the administrative law judge's determination that claimant established the existence of working conditions which could have caused decedent's lung cancer. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions

¹Employer alleges no error in the administrative law judge's determination that the instant claim was timely filed; accordingly, that finding is affirmed.

existed which could have caused the harm in order to establish her *prima facie* case. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). 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*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, employer does not dispute that decedent suffered a harm, *i.e.*, lung cancer, but argues that claimant failed to establish the existence of working conditions which could have caused that condition. In concluding that claimant affirmatively established the existence of working conditions which could have caused decedent's lung cancer, the administrative law judge credited claimant's testimony that she witnessed decedent loading and unloading asbestos on the waterfront, and that decedent would return home covered with raw asbestos. The administrative law judge also relied upon the testimony of Kerry Liuzza, decedent's son, that both he and decedent were exposed to asbestos while working for employer. Based upon this testimony, the administrative law judge concluded that claimant established her *prima facie* case. We hold that the administrative law judge's finding is supported by substantial evidence, and employer has established no reversible error committed by the administrative law judge in rendering his credibility determinations. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 371 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Shaller v. Cramp Shipbuilding & Dry Dock*, 23 BRBS 140 (1989). Accordingly, we affirm the administrative law judge's finding that claimant established her *prima facie* case, and his consequent invocation of the Section 20(a) presumption. See *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Causation

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition is not caused or aggravated by his employment. See *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Where, as in the instant case, employer establishes rebuttal of the presumption, the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. See *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); see also *Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43 (CRT).

In the instant case, employer challenges the administrative law judge's finding that claimant established a casual relationship between decedent's employment and his lung cancer based on the record as a whole; specifically, employer assigns error to the

administrative law judge's decision not to rely upon the testimony of Drs. Emory and Cagle. After considering at length the totality of the evidence of record, the administrative law judge credited the opinion of Dr. Liuzza² in concluding that decedent's lung cancer was causally related to his employment. Specifically, Dr. Liuzza, who believes that a diagnosis of asbestosis is not necessary for asbestos exposure to contribute to a lung carcinoma, opined that decedent's exposure to asbestos contributed to the development of his lung malignancy which resulted in his death. *See* CX-9, p. 47, Exhibit 4; *see also* CX-15. In support of his opinion, Dr. Liuzza testified that the two risk factors for the type of cancer experienced by decedent, *i.e.*, squamous cell carcinoma, are smoking and exposure to asbestos, and that a smoker with a significant asbestos exposure history is at a much greater risk of developing lung cancer than either a smoker without asbestos exposure or a non-smoker with asbestos exposure. While Dr. Liuzza acknowledged that the exact mechanisms of this synergistic effect are not well defined, and that the relative contributions of both smoking and asbestos exposure to lung cancer cannot be determined, it was his opinion that both factors contributed to decedent's condition. In declining to credit the contrary opinions of Drs. Emory and Cagle, the administrative law judge initially noted that these physicians based their respective opinions that decedent's lung cancer was unrelated to his exposure to asbestos on the premise that a diagnosis of asbestosis is necessary before such a casual connection can be found to exist. Next, the administrative law judge found that Dr. Emory acknowledged that a synergistic effect exists between asbestos exposure and smoking, and that medical literature generally indicates that there is a higher incidence of lung cancer related to individuals who have asbestos exposure and are tobacco users. *See* Tr. at 55. Lastly, the administrative law judge stated that Dr. Cagle acknowledged a significant asbestos exposure by decedent as evidenced by the presence of two asbestos bodies on decedent's autopsy slides. *See* EX 9 at 2.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck*, 306 F.2d at 693; *Donovan*, 300 F.2d at 741; *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In the instant case, the administrative law judge rationally credited the opinion of Dr. Liuzza that decedent's employment exposure to asbestos contributed to his lung cancer, and his decision is thus supported by substantial evidence. We therefore affirm the administrative law judge's determination that decedent's lung cancer was causally related to his employment with employer. *See generally Sinclair*, 23 BRBS at 148.

²Dr. Liuzza is not related to claimant or decedent.

Responsible Employer

Employer next challenges the administrative law judge's determination that it is the responsible employer; specifically, employer asserts, as it did before the administrative law judge, that claimant has failed to affirmatively establish that decedent was last exposed to asbestos while working for employer. The standard for determining the responsible employer was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), which held that the last employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation. Contrary to employer's assertion on appeal, it is well-settled that employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that claimant was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer.³ See *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996); *Maes v. Barrett & Hilp*, 27 BRBS 128, 131 (1993). In the instant case, the record supports that administrative law judge's determination that employer failed to offer any evidence that decedent was exposed to asbestos while working for a subsequent employer.⁴ As employer thus did not meet its burden of establishing that it is not the last employer covered by the Act to expose decedent to asbestos, we affirm the administrative law judge's finding that employer is liable for

³We note that although the administrative law judge directed employer to controlling Fifth Circuit case law on this issue, *see* Decision and Order at 21, employer has on appeal reiterated its prior contention that the burden of proof remains with claimant.

⁴Although Kerry Liuzza, decedent's son, acknowledged that he and decedent were exposed to asbestos while working for a number of employers and that he could not affirmatively state when decedent was last exposed to asbestos, Mr. Liuzza further testified that the decedent believed that he was last exposed while working for employer. *See* CX-12 at 24, 39, 59.

claimant's benefits. See *Flanagan v. McAllister Bros., Inc.*, BRBS , BRB Nos. 99-0455/A (Dec. 23, 1999).

Extent of Permanent Partial Disability

Lastly, employer argues that the administrative law judge erred in determining the extent of decedent's impairment prior to his death on September 30, 1999. For the reasons that follow, we agree that the administrative law judge's finding on this issue cannot stand.

Under the Act, "disability" in cases of voluntary retirees is defined as permanent impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA Guides). See 33 U.S.C. §§902(10), 908(c)(23), 910(d)(2)(B)(1994). Thus, a voluntary retiree's recovery under the Act is limited to an award for permanent partial disability based on the extent of his medical impairment as measured pursuant to the AMA Guides. See *Larrabee v. Bath Iron Works Corp.*, 25 BRBS 185 (1991). The AMA Guides for the evaluation of lung cancer provides guidance for the determination of an impairment rating after lung cancer has been detected. See AMA Guides, Chapter 5 (4th edition 1993).

In the instant case, the administrative law judge initially determined that, although no physician of record had assigned a specific degree of impairment to decedent prior to his death, the record "clearly supports a finding that Decedent was 100% disabled during the appropriate period." See Decision and Order at 22. On reconsideration, the administrative law judge stated that his finding that decedent was 100 percent disabled was based upon decedent's post-surgical limitations, prescriptions, and the fact that decedent's lung cancer reoccurred within 14 months; in a footnote, the administrative law judge summarily stated that this determination is "further bolstered by the AMA Guides. See Order Amending Decision at 2, n.1. Although the administrative law judge set forth the medical evidence upon which he relied in determining the extent of decedent's permanent partial disability, he did not consider that evidence in light of the AMA Guides. Moreover, claimant concedes that the record contains the results of a pulmonary function study undertaken by decedent on July 27, 1994; this evidence, which is directly applicable to decedent's post-surgical impairment, was not considered by the administrative law judge. See EX-5 at 425-427. We therefore vacate the administrative law judge's finding regarding the extent of decedent's permanent partial disability and we remand the case for reconsideration of this issue in light of the AMA Guides. On remand, the administrative law judge must address all of the medical evidence of record which pertains to the issue of decedent's impairment subsequent to his May 1993 surgery.

Accordingly, the administrative law judge's determination of the extent of decedent's permanent partial disability is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Order Amending Decision and Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge