

BRB No. 92-922

EARL HORNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUN SHIP, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Disability Compensation and Awarding Medical Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Marc S. Jacobs (Galfand, Berger, Lurie & March), Philadelphia, Pennsylvania, for claimant.

Eleanor N. Ewing and Steve A. Reed (Pepper, Hamilton & Scheetz), Philadelphia, Pennsylvania, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.\*

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1725) of Administrative Law Judge Robert D. Kaplan denying benefits 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a metal stripper and rigger at Sun Ship, Incorporated from 1967 until his retirement on December 31, 1981. The parties do not dispute that claimant was exposed to asbestos on the job while employed by employer. Claimant participated in a union screening test for asbestos protection in 1987. Pursuant to this screening test,

\*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

claimant was examined on November 9, 1987, by Dr. Dupont, who made a diagnosis of asbestos-

related lung disease. On September 18, 1987, claimant's counsel provided employer with formal notice of injury. On September 13, 1989, claimant's counsel filed a claim with the district director,<sup>1</sup> seeking compensation and medical benefits for his occupational lung disease.

The administrative law judge found that as employer did not contend that timely notice was not given to the district director, or that it was prejudiced by untimely notice, the claim was not barred under Section 12 of the Act, 33 U.S.C. §912. The administrative law judge, however, found that inasmuch as claimant was aware, or should have been aware of the relationship between his disabling respiratory condition, his employment, and his disability when he retired on December 31, 1981, the claim filed on September 13, 1989, was time-barred pursuant to Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2), and denied disability benefits accordingly.<sup>2</sup>

On appeal, claimant contends that the administrative law judge erred in finding the claim time-barred as claimant was not advised by a doctor until 1987 that he suffered an asbestos-related occupational disease. Moreover, claimant contends that the administrative law judge erred in finding that the date of his injury was in December 1981, when he voluntarily retired, because his wage-earning capacity was not inhibited by his occupational lung disease at that time. Employer responds, urging affirmance of the administrative law judge's finding that the claim was time-barred.

We agree with claimant that the administrative law judge erred in finding his disability claim time-barred 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 statute of limitations does not begin to run until the employee is aware or should have been aware of the relationship between his employment, the disease, and the disability. 33 U.S.C. §913(b)(2); *Martin v. Kaiser Company, Inc.*, 24 BRBS 112 (1990). Thus, in an occupational disease case, the filing period does not begin to run until claimant is actually disabled, or in the case of a voluntary retired employee, until a permanent impairment exists. *See Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988); *Lindsay v. Bethlehem Steel Corp.*, 18 BRBS 20 (1986); 20 C.F.R. §§702.212(b), 702.222. Section 20(b), 33 U.S.C. §920(b), provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary...that sufficient notice of such claim was given." *See Fortier v. General Dynamics Corp.*, 15 BRBS 4 (1982)(Kalaris, concurring and dissenting), *aff'd mem.*, 729 F.2d 1441 (2d Cir. 1983). The Section 20(b) presumption applies to Section 13, placing the burden of proof on employer to produce substantial evidence that the claim was not timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

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<sup>1</sup>Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" in the statute.

<sup>2</sup>The administrative law judge found that claimant is entitled to Section 7, 33 U.S.C. §907, medical benefits as these are never time-barred. *See Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). This finding is unchallenged on appeal.

Credibility determinations fall within the purview of the trier-of-fact and may not be disturbed on appeal unless they are inherently incredible or patently unreasonable. *Rivera v. United Masonry, Inc.*, 24 BRBS 78 (1990). In the instant case, in finding that claimant's disability claim was barred by Section 13, the administrative law judge concluded that claimant retired due in part to his respiratory condition and that he was aware or should have become aware of the relationship between his respiratory condition and his shipyard employment by December 31, 1981. In making this determination, the administrative law judge relied solely on claimant's testimony, despite his finding that claimant's testimony was confused and conflicting. This characterization of claimant's testimony is supported by the record. Based upon the administrative law judge's finding, we hold that claimant's testimony cannot provide substantial evidence sufficient to rebut the Section 20(b) presumption.

As was noted by the administrative law judge, claimant did state at times that he felt short of breath for possibly up to 5-10 years before he retired, that this shortness of breath was one of the reasons that he retired, and that he first believed his shortness of breath was caused by his exposure to asbestos when he was examined by Dr. Fox in 1980. Claimant, however, also contradicted this testimony, stating that the reason he retired was that the company was changing over and they had given him a chance of "full benefit retirement or going with the new outfit," H.Tr at 19, and that he did not start feeling short of breath until 1983 or 1985, H.Tr. at 46. Moreover, claimant testified repeatedly that he did not put together the relationship between his work for employer and his respiratory problems at the time of his retirement.

We agree with the administrative law judge's determination that claimant's testimony regarding his date of awareness is confusing and conflicting. While an administrative law judge may credit a part of a witness's testimony in making a finding, he must have a rational basis for doing so. In this case, having accurately found it confusing and conflicting, the administrative law judge's determination to pick and choose parts of claimant's testimony to be credited lacks a rational basis. Most importantly, such highly equivocal testimony does not constitute affirmative evidence sufficient to meet employer's burden of rebutting the Section 20(b) presumption that the claim was timely filed. *See Shaller*, 23 BRBS at 140. It is employer's burden to introduce substantial evidence that the claim was not timely filed. Testimony which is inherently conflicting and confusing, as is claimant's testimony in this case, cannot meet this burden.

Moreover, even assuming that the administrative law judge properly found that claimant was aware at the time he retired in December 1981 that he had shortness of breath, that he had worked in dusty conditions, that this problem could be related to dust exposure, and that an x-ray performed by Dr. Fox indicated that he had a "cloud in his chest" of unknown origin, we conclude that claimant could not be charged with the requisite awareness necessary to start the Section 13(b)(2) two year statute of limitations running at that time. Claimant must be aware not only that he has an occupational disease related to his employment but that it is disabling. In this regard, the courts have held that a claimant is not injured for purposes of Section 13 until he becomes aware of the full character, extent and impact of the harm done to him. *See, e.g., Abel v. Director, OWCP*, 932 F.2d

819, 821, 24 BRBS 130, 134 (CRT)(9th Cir. 1991); *Love v. Owens-Corning Fiberglass Co.*, 27 BRBS 148 (1993). In the present case, even if there were credible evidence that claimant was or should have been aware that he was having breathing problems when he retired in 1981, he did not become aware of the true nature and full impact of his injury until November 1987, when Dr. Dupont diagnosed him as having a restrictive impairment due to asbestos-related pleural thickening which would not respond to bronchodilators.<sup>3</sup> Because there is no evidence of record which affirmatively establishes that claimant was aware or should have been aware of the relationship between his asbestos-related lung disease, disability, and employment at any time prior to Dr. Dupont's November 9, 1987, examination, and as claimant's claim was filed with two years of that examination, the administrative law judge's findings that employer has rebutted the Section 20(b) presumption and that the claim filed on September 13, 1989 is time-barred under Section 13(b)(2) are reversed. The case is remanded for consideration of all remaining issues.

Accordingly, the Decision and Order of the administrative law judge denying disability compensation is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

ROBERT J. SHEA  
Administrative Law Judge

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<sup>3</sup>Although claimant's notice of injury was filed September 17, 1987, prior to this date, it does not affect the timeliness of the September 1989 claim. After the initial screening test on March 19, 1987, claimant received a form from a doctor with a cover letter from the attorney in July 1987. While the form indicated that his x-rays reflected changes compatible with asbestos-related disease, the attorney noted that he had not been diagnosed with an asbestos-related condition at that time and that further testing was indicated. Claimant then had the November 1987 examination. Claimant's receipt of these results is not sufficient to start the Section 13(b)(2) statute of limitations running under the proper legal standard.