

BRB Nos. 93-0597
and 93-0597A

MARY COSMI)
(Widow of VINCENT COSMI))
)
 Claimant-Petitioner)
 Cross-Respondent)
)
 v.)
)
 COASTAL MARINE ENGINEERING) DATE ISSUED:
)
 and)
)
 STATE COMPENSATION)
 INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents)
 Cross-Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Victoria Edises and Anne Landwehr (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

Michael L. Mowrey (State Compensation Insurance Fund), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (91-LHC-1498) of Administrative Law Judge Thomas Schneider 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 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's husband, employed as a welder/boilermaker for employer from 1969 to 1975 and from 1978 to March 27, 1979, died of lung cancer on October 25, 1981. Claimant's Ex. 7. Claimant

filed a claim for death benefits and for accrued disability benefits on March 1, 1989. Claimant's Ex. 22. In his Decision and Order, the administrative law judge concluded that claimant's notice of injury and claim for benefits were timely filed pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, after finding that claimant's date of awareness of the relationship between her husband's death and his employment occurred on October 19, 1989. The administrative law judge awarded permanent partial disability benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23)(1988), from January 1, 1981 to October 25, 1981, death benefits under Section 9 of the Act, 33 U.S.C. §909, from September 28, 1984, the effective date of the 1984 Amendments, funeral expenses, interest and a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, claimant challenges the administrative law judge's award of death benefits from September 28, 1984, contending benefits are payable from the date of death. Employer challenges the administrative law judge's findings that the notice of injury and claim for benefits were timely filed pursuant to Sections 12 and 13, as well as the interest calculations by the Office of Workers' Compensation Programs (OWCP). Claimant has filed a response to employer's cross-appeal in support of the administrative law judge's findings pursuant to Sections 12 and 13.

We first address employer's challenge to the administrative law judge's findings pursuant to Sections 12 and 13. Sections 12 and 13 provide that in the case of a death due to an occupational disease, the notice of injury and claim for benefits must be given within one year and two years, respectively, after 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. *See generally Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989)(same standard under Section 10(i)); 33 U.S.C. §§912, 913 (1988). Under Section 20(b), 33 U.S.C. §920(b), there is a presumption that the notice of injury and claim for benefits were timely filed. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Employer contends that the administrative law judge erred in finding that claimant's date of awareness occurred on October 19, 1989, instead of in 1981 or 1982, when it alleges claimant should have been aware based on a report from Dr. Warnock dated December 12, 1981, which connected the death of claimant's husband from lung cancer to asbestos exposure. After discussing and weighing the opinions of Drs. Warnock and Raybin, as well as the January 31, 1989, letter from the Boilermakers' Union, the administrative law judge found claimant's date of awareness occurred on October 19, 1989. Decision and Order at 4-5. The administrative law judge concluded that claimant was not told by Dr. Warnock in 1981 or 1982 of the relationship between the decedent's cancer and his asbestos exposure. Decision and Order at 4; Tr. at 54-55, 67, 71-72, 75-76. Although the administrative law judge found that the January 31, 1989, letter from the Boilermakers' Union was the first notice that claimant received of a possible relationship between the decedent's cancer and his asbestos exposure,¹ the administrative law judge concluded that it was not until Dr. Raybin's report in October 1989, that claimant was aware of a medical opinion linking the exposure to the

¹The letter from the Boilermakers' Union stated that the decedent's disease and death may have been caused by asbestos exposure. Claimant's Ex. 15.

decedent's cancer. Decision and Order at 4-5; Claimant's Exs. 10, 15. The administrative law judge, therefore, found that the date of awareness occurred on October 19, 1989, the date Dr. Raybin's report was received by claimant's counsel, and that claimant's March 1989 claim therefore was timely. Decision and Order at 5; Claimant's Ex. 10.

We affirm the administrative law judge's conclusion that claimant was not told by Dr. Warnock in 1981 or 1982 of the relationship between decedent's lung cancer and his asbestos exposure as the administrative law judge found, based on Dr. Warnock's testimony, that Dr. Warnock did not send claimant a copy of her 1981 report. Decision and Order at 4; Claimant's Ex. 9; Tr. at 54-55. Additionally, we note that claimant testified that she could not recall seeing any of Dr. Warnock's letters. Claimant's Ex. 1 at 37-40.

Employer also contends that a February 3, 1982, letter to claimant from Dr. Warnock, as well as a mid-February 1982 telephone interview between Dr. Warnock and claimant, should have made claimant aware of the relationship between the decedent's death, disease and employment. Several months after the death of claimant's husband, Dr. Warnock wrote to claimant requesting her help in a research project and asked claimant to provide a listing of all the places the decedent lived, as well as an occupational history and a smoking history. Dr. Warnock's letter also requested a telephone interview asking for this information that would take no longer than 20 minutes. Traveler's Ex. 7. Subsequently, claimant had a telephone interview with Dr. Warnock in which claimant provided the requested information to Dr. Warnock. Traveler's Ex. 7. Despite this letter and telephone interview between Dr. Warnock and claimant, there is no mention in Dr. Warnock's February 1982 letter, telephone interview notes or deposition testimony that Dr. Warnock informed claimant of a possible connection between her husband's death from lung cancer and his employment-related asbestos exposure. Traveler's Exs. 5, 7. We hold, therefore, that any error in the administrative law judge's failure to address whether claimant should have been aware of the relationship between the disease, death and employment in 1982 is harmless as there is no evidence from which the administrative law judge could infer that claimant should have been aware of this relationship based on this interaction.

As the administrative law judge rationally found that claimant's date of awareness occurred on October 19, 1989, based on Dr. Raybin's opinion, and claimant filed her claim for benefits on March 1, 1989, the administrative law judge's findings that the notice of injury and claim for benefits were timely filed is affirmed as it is rational, supported by substantial evidence, in accordance with law, and contains no reversible error. *O'Keeffe*, 380 U.S. at 359; *Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993).

We next address claimant's challenge to the administrative law judge's award of death benefits from September 28, 1984, the effective date of the 1984 Amendments. The administrative law judge determined that the holding in *Taddeo v. Bethlehem Steel Corp.*, 22 BRBS 52 (1989), precluded him from awarding death benefits for a retiree's death due to an occupational disease earlier than the enactment date of the 1984 Amendments on September 28, 1984. Decision and Order at 6-7. In *Taddeo*, the issue involved the calculation of the average weekly wage based on when claimant's claim for death benefits accrued. The Board held that claimant's cause of action for

a retiree's 1965 death due to an occupational disease arose on the enactment date of the 1984 Amendments, *see* 33 U.S.C. §910(d)(i), and that since claimant's awareness of the work-relatedness of the death was in 1982, the 1972 version of Section 9 applied to the amount of compensation due. *Id.* at 55. *Taddeo*, however, is silent as to the date from which death benefits are payable.² The issue in this case is not the date on which the right to seek death benefits accrued but the date from which benefits are payable, and we hold that claimant is entitled to death benefits from October 25, 1981, the date of death. 33 U.S.C. §§906, 909.

Employer objects to the interest computed by OWCP. Employer does not explain, however, why these calculations are in error and thus does not adequately raise any issues for the Board to address. *Collins v. Oceanic Butler, Inc.*, 23 BRBS 227 (1990); *Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986); 20 C.F.R. §802.211; Employer's Br. at 8.

Accordingly, the administrative law judge's Decision and Order is modified to reflect that death benefits will commence on October 25, 1981. In all other respects, the administrative law judge's decision is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

²The facts of *Taddeo* suggest that claimant therein received death benefits from the date of death in 1965. *See Taddeo*, 22 BRBS at 55.