

BRB Nos. 12-0518
and 12-0518A

JAMES KELLY)	
(Deceased))	
)	
Claimant-Respondent)	
Cross-Respondent)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATED ISSUED: <u>MAY 16 2013</u>
)	
Self-Insured)	
Employer-Respondent)	
Cross-Petitioner)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Carrier-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order Granting Summary Decision for the Claimant and Cancelling Hearing of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Jeffrey E. Estey, Jr. (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

Michael J. McAuliffe (Pomeranz, Drayton & Stabnick), Glastonbury, Connecticut, for ACE American Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

ACE American Insurance Company (ACE) appeals, and self-insured employer cross-appeals, the Decision and Order Granting Summary Decision for the Claimant and Cancelling Hearing (2012-LHC-00554) of Administrative Law Judge Jonathan C. Calianos 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 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).

Claimant was employed by employer in various occupations between 1951 and 1997. It is undisputed that he was exposed to asbestos while working in employer's machine shop and various shipyard buildings during the 1950s. During the period from 1962 to 1974, claimant worked first as a messenger and then as a technical aide; claimant deposed that he worked around asbestos-wrapped steam pipes during this period. In September 1974, claimant commenced the duties of recording secretary for his union. He continued in this position until he retired in February 1997. Employer was insured by ACE through March 31, 1973; as of April 1, 1973, employer was self-insured.

Claimant, who was diagnosed in 2011 with an asbestos-related lung disease, filed a claim for permanent partial disability benefits commencing October 4, 2011, pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23).¹ Claimant, employer, and ACE each filed a motion for summary decision with the administrative law judge. Specifically, claimant filed a motion for summary decision seeking permanent partial disability benefits from October 4, 2011 to February 9, 2012, payable by employer in its self-insured capacity; employer sought a summary decision holding ACE liable for the payment of claimant's benefits; and ACE sought summary decision arguing that, as claimant was exposed to asbestos after its coverage of employer ended on March 31, 1973, it should be dismissed from the claim. On June 5, 2012, the administrative law judge convened a telephone conference call with the parties during which time he informed them that, based upon his determination that claimant's deposition testimony regarding his alleged exposure to asbestos subsequent to the 1950s was vague and uncertain, it was his intent to find that claimant experienced no injurious exposure to asbestos after 1959 and that, consequently, ACE would be held liable for any disability benefits due claimant. In a Decision and Order Granting Summary Decision for the Claimant and Cancelling Hearing dated June 12, 2012, the administrative law judge adopted and incorporated the statements he made during the telephonic conference. He thus found that there was insufficient evidence to establish that claimant was exposed to

¹Claimant died on February 9, 2012. Appeals in the claim of his widow are pending before the Board. BRB Nos. 13-0254/A.

asbestos after March 31, 1973, when employer was self-insured. The administrative law judge thus held ACE liable as the responsible carrier for permanent partial disability benefits due decedent for a 65 percent impairment pursuant to Section 8(c)(23) of the Act.

On appeal, ACE challenges the administrative law judge's finding that it is the carrier responsible for the payment of claimant's benefits. BRB No. 12-0518. Employer and claimant respond, urging affirmance of this finding. In its cross-appeal, employer alleges that, as it submitted evidence that decedent's employment duties for employer between 1973 and 1997 were not covered by the Act, the administrative law judge erred in denying its motion for summary decision. BRB No. 12-0518A. Claimant responds that his work was covered by the Act. 33 U.S.C. §§902(3), 903(a).

ACE contends that it is not the responsible carrier as it last insured employer on March 31, 1973, and claimant's deposition testimony establishes that he continued to be exposed to asbestos through 1974, at which time employer was self-insured. Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2^d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible carrier or employer is the last carrier or employer during whose employment the claimant was exposed to injurious stimuli, prior to his awareness that he was suffering from an occupational disease. *General Dynamics Corp., Electric Boat Div. v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2^d Cir. 1977); *Perry v. Jacksonville Shipyards, Inc.*, 18 BRBS 219 (1986).

ACE asserts that claimant's August 11 and October 26, 2011 deposition testimony clearly indicates his opinion that he was exposed to asbestos while working for employer until September 1974. Specifically, ACE cites claimant's belief that he was exposed to asbestos from the steam heating pipes in the buildings where he worked through September 1974. *See* August 11, 2011 dep. at 23-25; October 26, 2011 dep. at 8-9. The administrative law judge disagreed with ACE's interpretation, finding claimant's testimony to be "a little bit wishy-washy" and "vague," and concluding that claimant was uncertain at the time of his depositions whether asbestos had been removed from the steam pipes and consequently whether he was exposed to asbestos in the 1970s. *See* June 5, 2012 Telephone Conference Transcript at 5, 13-14. Consequently, the administrative law judge concluded that the record contains insufficient evidence to establish that claimant was exposed to asbestos after April 1973. Thus, he found ACE responsible for the payment of any benefits due claimant.² *See id.* at 14; Decision and Order Granting Summary Decision at 3.

²We note that the Administrative Procedure Act (APA), which applies to hearings of claims arising under the Act, 33 U.S.C. §919(d), requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the

In this case, ACE has not established reversible error in the administrative law judge's determination that it is liable for claimant's benefits. It is well established that an administrative law judge has considerable discretion in evaluating and weighing the evidence of record and may draw inferences therefrom. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *see 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). The Board may not disregard the administrative law judge's findings on the ground that other inferences might have been more reasonable. *See, e.g., Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). The administrative law judge's finding that claimant's deposition testimony is too vague to establish that he actually was exposed to asbestos after March 31, 1973 is rational and within his discretion. *See generally Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2^d Cir. 2008); *Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2^d Cir. 1993). Consequently, as the administrative law judge addressed claimant's specific statements upon which ACE relies, and he rationally found them insufficient to establish that claimant was exposed to asbestos during the time employer was self-insured, we affirm the administrative law judge's finding that ACE is the carrier responsible for the payment of claimant's permanent partial disability benefits as it is supported by substantial evidence and in accordance with law. *Cardillo*, 225 F.2d 137.

In its protective cross-appeal, self-insured employer urges the Board to reverse the administrative law judge's decision to dismiss its motion for summary decision. In its motion, employer asserted that claimant was not engaged in maritime employment at a covered situs while he worked for employer in its self-insured capacity after March 31, 1973. The administrative law judge did not address these contentions because he found ACE liable for benefits due to claimant's lack of exposure to asbestos after March 31, 1973. As we have affirmed the administrative law judge's finding regarding claimant's last exposure to asbestos, and his resulting determination that ACE is liable for the payment of permanent partial disability benefits, employer's contentions regarding the Act's coverage provisions are moot.

record.” 5 U.S.C. §557(c)(3)(A). In this case, no party challenges the administrative law judge's decision to incorporate his telephonic conference statements into his Decision and Order Granting Summary Decision rather than to make written findings of fact; to the contrary, the parties rely on both the transcript of the conference and the administrative law judge's subsequent decision.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision and Order for the Claimant and Cancelling Hearing is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge