BRB No. 99-268

LUIGI INCATASCIATO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICES	)	DATE ISSUED: Nov. 19, 1999
	)	
and	)	
	)	
NEW YORK STATE LIQUIDATION BUREAU	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Andrew R. Topazio (Marciano & Topazio), Hoboken, New Jersey, for claimant.

Francis M. Womack, III (Weber, Goldstein, Greenberg and Gallagher), Jersey City, New Jersey, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-LHC-1193) of Administrative Law Judge Ralph A. Romano 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a longshoreman for employer from approximately 1963 until his

retirement in December 1989. He was diagnosed with lung cancer in 1993 and underwent surgery to have a portion of his lung removed. After the surgery, claimant experienced difficulty breathing and was diagnosed with chronic obstructive pulmonary disease. He sought permanent total disability benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant failed to establish that he was exposed to asbestos while working for employer, and thus failed to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), that his lung cancer was causally related to work-related asbestos exposure. The administrative law judge then found that there is evidence that claimant was exposed to pulmonary irritants and that he suffered a harm, namely chronic obstructive pulmonary disease; thus, Section 20(a) was invoked to relate that condition to his employment. However, the administrative law judge found that Dr. Karetsky's opinion was sufficient to rebut this presumption. After weighing the evidence as a whole, the administrative law judge gave greater weight to the opinion of Dr. Karetsky and concluded that claimant did not suffer from work-related chronic obstructive pulmonary disease. Thus, the administrative law judge denied benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that claimant did not establish that he was exposed to asbestos during his employment and that the administrative law judge erred in finding that claimant's chronic obstructive pulmonary disease was not work-related. Claimant incorporates his contentions made below into his appellate brief. Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence.

Initially, claimant contends that the administrative law judge erred in finding that the evidence was insufficient to establish that claimant was exposed to asbestos while working for employer. Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). However, initially claimant must establish a *prima facie* case by establishing that he suffered an injury and that working conditions existed which could have caused the harm alleged. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129 (1988).

In the present case, the administrative law judge found that while claimant testified that he was exposed to "white dust" while working for employer, the identification of the dust is speculative and does not satisfy claimant's burden of proof that the substance was asbestos. Claimant testified that he worked with a number of substances that appeared as white dust such as tapioca and rubber talc separation material. When questioned on cross-examination regarding his basis for knowledge that the dust was asbestos, claimant stated that he had overheard it from other people. The administrative law judge found that speculation based on second-hand statements of co-workers does not constitute probative,

material and competent evidence to establish that the substance was asbestos.[1] As the administrative law judge thoroughly reviewed the evidence of record and claimant has raised no reversible error in the administrative law judge's weighing of the evidence, *see generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961), we affirm the administrative law judge's finding that claimant has failed to establish that he was exposed to asbestos while working for employer. Thus, the administrative law judge's conclusion that Section 20(a) was not invoked to link claimant's lung cancer and his employment is also affirmed.

Claimant next contends that the administrative law judge erred in finding that he did not suffer from work-related chronic obstructive pulmonary disease. The administrative law judge found that claimant established invocation of the Section 20(a) presumption to link his chronic obstructive pulmonary disease to his employment, and this finding is unchallenged. Once the presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's disabling condition was not caused or aggravated by his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, and render a decision supported by the record. *Bath Iron Works Corp. v. Brown*, ___ F.3d ___, __ BRBS __(CRT), No. 98-2010 (1st Cir. Oct. 8, 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997).

In the instant case, the administrative law judge found that Dr. Karetsky's opinion was "sufficiently specific and comprehensive to rebut this presumption." Decision and Order at 7. Dr. Karetsky opined that claimant suffers from minimal chronic obstructive pulmonary

[1]While Mr. Pizzariello and Mr. Lysick testified they had no knowledge of asbestos being cargoed or handled by employer, and it is correct that this testimony does not directly contradict claimant's testimony that he worked with asbestos, the administrative law judge properly rejected the notion that their inability state definitively that asbestos was not present somehow aids claimant in meeting his burden. As he stated, it is not employer's burden to prove the "non-presence" of asbestos. *See* Decision and Order at 5, n.4.

disease and that claimant's cigarette smoking caused the mild degree of chronic obstructive disease that claimant has. *See* H. Tr. at 109-121. He also testified that the irritants to which claimant was exposed would cause temporary irritation, but not lung disease, *see* H. Tr. at 123-124, and concluded in his report that there is no evidence of exposure in his work place to be responsible for his obstructive lung disease or carcinoma of the lung. EJX 1. Thus, we affirm the administrative law judge's finding that Dr. Karetsky's opinion is sufficient to establish rebuttal of the Section 20(a) presumption. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

As the presumption was rebutted, the administrative law judge evaluated all of the evidence to reach a decision based on the record as a whole. The administrative law judge found that Dr. Eisenstein's opinion on causation included an unsupported history of the scope of exposure, an inaccurate timing of commencement of symptoms, and a misleading and incorrect reference to medical textual authority to support his conclusions. Dr. Eisenstein testified that he does not make formal notes on the longshoremen's exposure because "they are all so similar and also dissimilar," Cl. Ex. 14(b) at 94, and that "this is generally what most longshoremen are exposed to." Cl. Ex. 14 (b) at 95. Dr. Eisenstein also noted that claimant's breathing difficulties began several years prior to his October 1994 report, Cl. Ex. 2, but claimant testified that he had no breathing problems prior to his lung surgery eight months prior to this examination. H.Tr. at 95, 96. The administrative law judge also noted that of the substances Dr. Eisenstein stated were known causes of chronic obstructive pulmonary disease, the medical text referred to lists only cement dust that would cause chronic obstructive pulmonary disease. Decision and Order at 7; Cl. Exs. 10; 14(a) at 32, 33.

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 v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Thus, we affirm the administrative law judge's decision to credit the opinion of Dr. Karetsky over the contrary opinion of Dr. Eisenstein as it is rational and claimant has identified no reversible error on appeal. Consequently, we affirm the administrative law judge's determination, based on the record as a whole, that claimant does not suffer from work-related chronic obstructive pulmonary disease. *See Duhagon v. Metropolitan Stevedore Company*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT)(9th Cir. 1999).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge