

WILLIAM F. LARKIN)	
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Claimant-Petitioner)	
)	
v.)	
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NAVY EXCHANGE SERVICE)	DATE ISSUED: <u>10/22/99</u>
COMMAND)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Motion for Reconsideration of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Thomas R. Ulaise (Ulaise and Ulaise, P.C.), Haddon Heights, New Jersey, for claimant.

Francis M. Womack III (Weber Goldstein Greenberg and Gallagher), Jersey City, New Jersey, for self-insured employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Motion for Reconsideration (97-LHC-01367) of Administrative Law Judge Robert D. Kaplan 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.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

In December 1993, claimant began working for employer at its Fashion Distribution

Center in Bayonne, New Jersey. In July 1994, claimant complained of coughing, phlegm, and painful breathing. He sought treatment from Dr. Medrano, who ordered a tuberculosis (TB) test. On August 13, 1994, claimant was hospitalized with TB. He was discharged on October 3, 1994. Claimant alleged that he contracted TB during the course of his employment with employer. He sought benefits under the Act for temporary total disability from August 13, 1994, to September 7, 1995. The sole issue before the administrative law judge was whether claimant's TB is casually related to his employment with employer.

In his Decision and Order Awarding Benefits the administrative law judge found that claimant established entitlement to the Section 20(a) presumption, 33 U.S.C. §920(a), as he suffered a harm, TB, and he established working conditions that could have caused the harm. Specifically, the administrative law judge credited evidence that employer's facility is poorly ventilated, 27 of 101 co-workers tested positive for TB after claimant was diagnosed with TB, claimant's TB became symptomatic seven months after he began working for employer, and Dr. Medrano stated that claimant could have contracted TB at work if he had a long period of exposure to TB from a co-worker. Employer's rebuttal evidence was rejected. The administrative law judge found equivocal Dr. Reichman's conclusion that claimant's TB is not related to his employment. Moreover, he found that not all of claimant's co-workers were tested and, of the 129 employees tested, 28 did not return for a test reading. Thus, the administrative law judge awarded the temporary total disability benefits claimed.

Employer filed a motion for reconsideration. In his Decision and Order Denying Benefits Upon Motion for Reconsideration, the administrative law judge agreed with employer that claimant is not entitled to the Section 20(a) presumption as claimant failed to identify a single co-worker from whom he could possibly have contracted TB. He credited evidence that TB can be contracted only from a person with active TB, and, while 27 co-workers tested positive for exposure to TB, none was identified as having active TB. The administrative law judge found that claimant's burden to establish the working conditions element necessary for invocation of the Section 20(a) presumption requires that he show an employee with active TB who could have caused claimant's active TB. In the absence of such evidence, the administrative law judge concluded that claimant is not entitled to the presumption that his TB is casually related to his employment, and he accordingly denied the claim.

On appeal, claimant contends that the administrative law judge erred by requiring him to establish the existence of a co-worker with active TB in order to establish the working conditions element for invocation of the Section 20(a) presumption. Employer responds, urging affirmance.

In order to be entitled to invocation of the Section 20(a) presumption, claimant must establish affirmatively that he suffered a harm, and that an accident occurred or working conditions existed which could have caused the harm. See *Brown v. I.T.T./Contintental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990). It is well-established that claimant's theory as to how the injury arose must go beyond "mere fancy." *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191, 193-194 (1990). In the instant case, claimant argues that he produced substantial evidence to establish working conditions that could have caused his TB. Specifically, claimant relies on the administrative law judge's finding in his initial Decision and Order that claimant possibly could have contracted TB from one of the 28 co-workers who were tested for TB but who never returned for a reading of the test result.

We hold, based on the facts of this case, that the administrative law judge properly required that claimant establish the existence of a co-worker with active TB from whom he could have contracted TB in order to establish the working conditions element necessary for invocation of the Section 20(a) presumption. See *Stevens*, 23 BRBS at 193-194. The uncontradicted evidence of record establishes that claimant could have contracted TB only from a person with active TB. EXS 96, 97. Claimant need not affirmatively establish that he contracted TB from a co-worker, but his reliance on the incomplete test results from 28 co-workers is mere speculation. Without identifying anyone at work from whom he could have conceivably contracted TB, claimant has not established an essential element of his *prima facie* case. See generally *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). Accordingly, we affirm the administrative law judge's finding that claimant is not entitled to the benefit of the Section 20(a) presumption, and the consequent denial of benefits.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Motion for Reconsideration is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge