

BRB No. 91-2045

ELLA DUNN)	
(Widow of JULIUS DUNN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
METROPOLITAN STEVEDORE)	DATE ISSUED:
COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Ella Dunn, Compton, California, *pro se*.

Barry F. Evans (Evans, Cumming & Malter), Woodland Hills, California, for employer.

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

PER CURIAM:

Claimant, *pro se*, appeals the Decision and Order (89-LHC-3647) of Administrative Law Judge Alexander Karst 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).

Decedent, claimant's husband, worked as a longshoreman for various employers from 1943 to 1970, when he retired for health reasons. After 1966, decedent was employed as a jitney operator for Metropolitan Stevedore Company, among other employers. Claimant alleged that during her husband's longshore career he was exposed to asbestos, coke and coal dust that contributed to the lung disease that disabled decedent and caused his death. Decedent was diagnosed as suffering from tuberculosis in 1966 and was confined for six months to the Olive View Sanitarium. Decedent returned to work as a longshoreman several months following discharge. Decedent's pulmonary condition continued to worsen and he was treated for emphysema, asthma, and chronic bronchitis. Decedent retired in 1970 due to his health problems and the last three or four years of his life he was oxygen dependent. Decedent died on May 17, 1979 from cardiac and respiratory failure due to

severe chronic obstructive pulmonary disease and cor pulmonale. Claimant sought permanent total disability and death benefits under the Act. Claimant also settled claims against two third-party asbestos manufacturers for the net amount of \$3050.

The administrative law judge found that the claim was not barred by Section 33(g)(2) of the Act, 33 U.S.C. §933(g)(2)(1988), because employer received notice of the third-party settlements before an award was entered or before it made any payments to claimant. Decision and Order at 2. The administrative law judge also found that the evidence was insufficient to establish that decedent's death and disability were caused, even in part, by his work environment in the longshoring industry. Accordingly, he denied benefits.

Since claimant appeals the administrative law judge's decision without representation, we will review the decision in order to ascertain whether it is rational, supported by substantial evidence, and in accordance with law. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The record contains the opinions of two physicians and an autopsy report which are relevant to the issue of causation. Dr. Thompson, decedent's treating physician, testified from a review of the medical records, not his independent recollection of decedent's case. Dr. Thompson stated at a deposition on March 11, 1991 and at the hearing that he never diagnosed asbestosis, that the autopsy report was nondescript, and that exposure to dust and fumes could contribute to the progression of lung disease. However, he did not testify that decedent in this case was exposed to irritants that contributed to the progression of his lung disease. Dr. Bierer, following a review of the medical records, testified at a deposition on April 3, 1991 that asbestos was not found in decedent's lungs at the autopsy and that the anthracotic material observed in decedent's lungs was similar to that in the lungs of any city-dweller. He also noted that there was no mention of secondary occupational involvement in the medical records. Dr. Bierer testified that if decedent had been exposed to asbestos or coal dust, the effect on his condition was nil or negligible. He stated that the damage to decedent's lungs was extensive, and was due to the tuberculosis, three episodes of collapsed lung, asthma, chronic bronchitis, and emphysema due to smoking. Although the administrative law judge did not address the issue of causation under Section 20(a) of the Act, 33 U.S.C. §920(a), he reviewed the reports and testimony of the two physicians of record and found that Dr. Bierer's testimony and report was more persuasive than Dr. Thompson's because of his better credentials and because his views are supported by standard medical texts.

In addition, claimant testified that prior to 1966 her husband would come home looking either "blackish" or "grayish" and he would tell her he had either been working with coal or asbestos respectively. Claimant also testified that decedent had been confined to the sanitarium for emphysema, not tuberculosis, and that she did not know what type of cargo he was involved with as a jitney or forklift operator. The administrative law judge gave claimant's testimony little weight as he found it to be vague and unpersuasive regarding the decedent's exposure to coal dust, asbestos, or industrial pollutants. The administrative law judge also found that there is an absence of any mention in decedent's medical records of industrial exposures.

In order to invoke the Section 20(a) presumption, a claimant must show the existence of working conditions which could conceivably cause the harm alleged. *Martin v. Kaiser Company*,

Inc., 24 BRBS 112 (1990). In the instant case, there is no mention in any of the medical records of occupational exposure to asbestos or coal. The only evidence offered that decedent worked with irritants such as asbestos, coal and coke was claimant's testimony and the administrative law judge found that to be vague and unpersuasive, a finding within his discretion as the fact-finder. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331. 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Further, the administrative law judge rationally credited the opinion of Dr. Bierer over that of Dr. Thompson. *Id.* Dr. Bierer's opinion that any industrial exposure decedent might have had played no role in his disability due to obstructive and restrictive lung disease or his death due to obstructive lung disease supports the administrative law judge's finding that there is no causal relationship between decedent's disability and death, and his employment. Therefore, although the administrative law judge in this case did not review the evidence pursuant to the Section 20(a) presumption, we hold that any error is harmless, as the administrative law judge's conclusion is rational and supported by substantial evidence in the record. *See generally Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336 (1981).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge