

WILLIAM SAULS

Claimant-Petitioner

v.

JACKSONVILLE SHIPYARDS

and

CNA COMMERCIAL INSURANCE

and

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,
INCORPORATED

Employer/Carriers-
Respondent

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT
OF LABOR

Respondent

DATE ISSUED: April 29, 2004

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

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

Dale J. Stone (McConnaughay, Duffy, Coonrod, Pope & Weaver, P.A.), Jacksonville, Florida, for employer and CNA Commercial Insurance.

Robert M. Sharp (Moseley, Warren, Prichard & Parrish), Jacksonville, Florida, for employer and St. Paul Fire and Marine Insurance Company, Incorporated.

Richard A. Seid (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (01-LHC-2976) of Administrative Law Judge Richard K. Malamphy 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, a retired rigger, alleged that he sustained a lung disease that is due in part to his exposure to asbestos and other irritants during the course of his thirty-plus years of employment at the Jacksonville Shipyards. Specifically, in July 1998, claimant was diagnosed with lung cancer, for which he underwent a left lung lobectomy and radiation therapy, and in 2000 he developed a recurrent lung cancer as well as laryngeal cancer. Claimant sought benefits for these conditions.¹

Employer controverted claimant's claim on the grounds that his exposure to asbestos was insufficient to establish both that he had asbestosis and that his lung cancer was related to his asbestos exposure. In his decision, the administrative law judge determined, based on Dr. Cagle's opinion, that "asbestosis has not been proven," Decision and Order at 29, and thus concluded that asbestos exposure did not result in claimant's lung or laryngeal cancer. Accordingly, benefits were denied.

On appeal, claimant asserts that the administrative law judge's decision does not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as he did not fully consider the medical evidence of record. The Director, Office of Workers' Compensation Programs (the Director), similarly argues that the administrative law judge did not provide a full rationale for his decision as required by

¹ Succumbing to his cancers, claimant died on January 20, 2003, after the hearing in this case. Claimant's widow, Lillie Sauls, subsequently filed a separate claim seeking survivor's benefits.

the APA, and therefore requests remand of this case. Employer responds, urging affirmance.

Claimant asserts that the administrative law judge did not independently analyze and discuss all of the relevant medical evidence in finding that claimant did not have asbestosis. Specifically, claimant contends that the administrative law judge did not fully consider the radiological evidence, including interpretations of that evidence by claimant's treating physician, Dr. Krainson, the deposition testimony of Dr. Mark, or the report of Dr. Hammer, all of which, claimant contends, compel a finding of causation and lessen the credibility of Drs. Cagle and Jones, upon whom the administrative law judge relied. The Director contends that the administrative law judge did not explain the basis for either of the two critical findings he made in this case, *i.e.*, that the Committee of the College of American Pathologists and the National Institute for Occupational Safety and Health (CAP/NIOSH) standard for defining asbestosis "seems sounder" than the Helsinki Consensus Conference (HCC) criteria, and that Dr. Cagle's opinions are most persuasive in determining whether a nexus existed between claimant's lung cancer and his asbestos exposure.² In response, employer maintains that the administrative law judge's findings are supported by substantial evidence and should therefore be affirmed. Employer's carrier, St. Paul Fire and Marine Insurance Company, Incorporated (St. Paul), asserts that it should be released from liability in this case because claimant's last occupational exposure to asbestos occurred subsequent to the time of its coverage. The Director urges rejection of St. Paul's assertion because it failed to file a cross-appeal.

The APA 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 record." 5 U.S.C. §557(c)(3)(A). Thus, the administrative law judge must adequately detail the rationale behind his decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence. 5 U.S.C. §557(c)(3)(A); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

We hold that the administrative law judge's summary of the evidence in the instant case comports with the APA as he set out all of the evidence of record in his decision, and subsequently discussed the relevant evidence in greater detail, in his

² Nonetheless, the Director noted that he supported the ultimate denial of benefits, despite his belief that the case should be remanded for further explanation, as Dr. Cagle's opinion is sound and supports that result.

consideration of the causation issue based on the record as a whole.³ *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table); *see also James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000) (the court declines to adopt the rule that an administrative law judge must explain why evidence contradicting his conclusion was rejected). In particular, the administrative law judge initially addressed all of the evidence of record, including the radiological evidence and specific x-ray interpretation of Dr. Krainson, as well as the letter provided by Dr. Hammer,⁴ and then further evaluated that evidence which he determined was most relevant to the issues at hand, *i.e.*, the reports of Drs. Mark, Pohl, DeGraff, Jones, and Cagle. The administrative law judge then placed the greatest significance on the opinions of the three pathologists offering causation opinions, Drs. Mark, Pohl and Cagle. In weighing these three opinions, the administrative law judge credited Dr. Cagle because he “is quite specific in his findings and conclusions.” Decision and Order at 29. In contrast, the administrative law judge found the opinions of Drs. Mark and Pohl less credible as Dr. Mark only made a general statement as to the findings of asbestos bodies and did not make specific designations as to those findings, and because Dr. Pohl’s report “seems to accept statements from Dr. Mark at face value.” Decision and Order at 29. In weighing this evidence, the administrative law judge looked at the premises supporting the opposing opinions and elected between the two distinct scientific interpretations to determine the medical evidence necessary to establish a causal connection between asbestos exposure and cancer. *Parks*, 32 BRBS at 93-94. In this regard, he relied on the CAP/NIOSH criteria as opposed to the HCC criteria as he found it “sounder,” and because “the evidence does not reflect that deference must be paid to the Helsinki report.” Decision and Order at 29.

³We note that the administrative law judge’s failure to analyze the causation issue pursuant to the Section 20(a) presumption, 20 U.S.C. §920(a), constitutes harmless error, as he ultimately weighed the evidence as a whole in making his determination on causation, and the evidence he relied upon in making that determination is sufficient to establish rebuttal. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O’Kelley v. Dep’t of the Navy/NAF*, 34 BRBS 39 (2000); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995); *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989).

⁴The only reference to Dr. Hammer’s opinion in the administrative law judge’s decision is in his summation of the parties’ contentions. Decision and Order at 5. Nevertheless, this reference indicates that the administrative law judge was cognizant of Dr. Hammer’s opinion and considered it, to the limited extent that it addresses the pertinent issue of causation, in rendering his decision.

Claimant correctly observes that the record contains evidence, *i.e.*, the opinions and deposition testimony of Drs. Pohl and Mark, the x-ray reading of Dr. Krainson, and the letter of Dr. Hammer, which, if credited, would cast doubt on the contrary opinion of Dr. Cagle. Conversely, however, the opinion of Dr. Cagle seriously questions the causation findings put forth by fellow pathologists, Drs. Pohl and Mark. In this regard, Dr. Cagle reviewed the slides interpreted by Dr. Pohl as indicative of asbestosis; Dr. Cagle rejected that conclusion because (1) one of the alleged asbestos bodies relied upon by Dr. Pohl in finding asbestosis is merely a “triangular piece of iron,” and thus, does not conform to the CAP/NIOSH description of an asbestos body, and (2) the pattern of fibrosis in claimant’s lung tissue “fits with fibrosis due to tobacco smoke and does not fit with fibrosis due to asbestos.” DX 9 at 65-68, 79-80. In addition, Dr. Cagle rejected the underlying premise of Dr. Mark’s opinion, *i.e.*, that claimant’s significant exposure to asbestos, without a confirmed diagnosis of asbestosis, is sufficient to attribute his cancer to that exposure, as the literature does not support such a conclusion; Dr. Cagle observed: “it would be unusual, if not virtually unheard of, for someone to have that [extensive] level of exposure to asbestosis, have an increased risk of lung cancer and not have asbestosis.”⁵ DX 9 at 15-17. Moreover, while Dr. Krainson interpreted the x-ray dated July 29, 2000, as showing: “interstitial lung disease consistent with asbestos exposure / asbestos related disease pleural thickening / pleural plaques consistent with asbestos exposure / asbestos related disease;” that interpretation falls short of an actual reading of asbestosis. Moreover, it does not provide any definitive information regarding the relevant issue of causation.⁶ Similarly, while Dr. Hammer questions Dr. Cagle’s methods in arriving at his finding of no asbestosis, Dr. Hammer does not make any personal determination regarding the pertinent issues in this case, *i.e.*, whether claimant had asbestosis and/or whether his cancer can be attributed to his occupational exposure to asbestos. In fact, Dr. Hammer specifically states that he did not have a sufficient specimen in order to do any asbestos digestion, and thus, he could not assess the validity of Dr. Mark’s or Dr. Cagle’s findings. Moreover, a review of Dr. Cagle’s deposition and report reveals that he, in contrast with claimant’s assertion, adequately and completely reviewed the relevant medical evidence, explained his findings in light of that evidence, and provided significant support for his ultimate conclusions. DXs 3, 9. Lastly, the administrative law judge’s reliance on the CAP/NIOSH criteria precludes, *per se*, any in

⁵ Dr. Jones’ discussion of the three pathologists’ reports similarly provides a number of reasons and thus supports rejection of the position of Drs. Pohl and Mark in favor of the contrary opinion of Dr. Cagle. DX 8 at 49-55.

⁶ Dr. DeGraff testified, however, that Dr. Krainson’s interpretation is sufficient to establish pulmonary fibrosis, and “that pulmonary fibrosis due to asbestos is asbestosis.” CX 17 at 65. In contrast, Dr. Jones also read the x-ray in question and completely disagreed Dr. Krainson’s findings as Dr. Jones saw no signs of any diffuse interstitial lung disease. DX 8 at 33, 52-53.

depth consideration of the opinions of Drs. Mark and Pohl since their conclusions are not premised on those criteria, but rather on a conflicting theory specifically rejected by the administrative law judge.

The instant case contains conflicting medical evidence, and it is well established that the administrative law judge is entitled to weigh the medical evidence of record and to draw his own inferences and conclusions from the evidence. *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); *Parks*, 32 BRBS 90. Moreover, the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. 33 U.S.C. §921(b)(3); *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

As indicated above, the administrative law judge evaluated the relevant evidence, considered its underlying documentation, and, in accordance with his discretion, rationally credited the opinion of Dr. Cagle over the contrary opinions of Drs. Pohl and Mark to conclude that claimant did not have asbestosis and thus, that his occupational exposure to asbestos did not, in any way, cause or contribute to his lung and laryngeal cancer. The administrative law judge's selection of the CAP/NIOSH criteria over the conflicting HCC criteria as "sounder" represents a rational inference he has made from the record, one which is supported by substantial evidence in this case, and which the Board is not empowered to reweigh. Moreover, these criteria support his reliance on the pathology reports of Dr. Cagle, since Drs. Mark and Pohl both align themselves with the HCC criteria, and Dr. Hammer did not express his beliefs on this subject. In light of this evidence, we affirm the administrative law judge's findings that claimant did not have asbestosis and thus that his occupational exposure to asbestos did not contribute, in any way, to his lung and laryngeal cancer, as they are supported by substantial evidence. Consequently, the administrative law judge's denial of benefits is affirmed.⁷

⁷ In his decision, the administrative law judge determined that "[a]s [claimant's] claim for benefits is denied there is no reason to address other issues such as responsible employer/carrier." Decision and Order at 29. We agree. Consequently, in light of our affirmance of the administrative law judge's denial of benefits, we decline to address St. Paul's contention regarding its potential liability for benefits in this case.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge