

L.P. )  
(Widow of W.P.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
BATON ROUGE MARINE ) DATE ISSUED: 02/25/2009  
CONTRACTORS )  
 )  
and )  
 )  
LOUISIANA INSURANCE GUARANTY )  
ASSOCIATION )  
 )  
Employer/Carrier- )  
Respondents ) DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John F. Dillon, Folsom, Louisiana, for claimant.

Henry G. Terhoeve and Stephen Dale Cronin (Guglielmo, Marks, Schutte, Terhoeve & Love), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2007-LHC-0102) of Administrative Law Judge Patrick M. Rosenow 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's husband (the decedent) was exposed to asbestos during his work as a longshoreman with several employers at the Port of Baton Rouge, Louisiana; he was diagnosed with asbestosis on November 21, 1997, and was receiving permanent partial disability benefits for a 100 percent respiratory impairment at the time of his death on September 13, 2004, at the age of 90.<sup>1</sup> The death certificate states that decedent died from metastatic prostate cancer. CX 4. Following the decedent's death, claimant filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's work-related asbestosis contributed to his death. In his Decision and Order, Administrative Law Judge Rosenow (the administrative law judge) denied the claim, finding the evidence insufficient to establish that it is more likely than not that decedent would have lived any longer had he not suffered from asbestosis.

Claimant appeals, contending the administrative law judge erred in failing to give collateral estoppel effect to the decisions on the *inter vivos* claim. Claimant also contends the administrative law judge erred in finding that decedent's death is not compensable as the administrative law judge applied incorrect legal standards and inappropriately credited the opinion of Dr. Hodges. Employer responds, urging affirmance.

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<sup>1</sup> The procedural history of the decedent's underlying claim is as follows. The decedent filed a claim for benefits under the Act in July 1996, listing Baton Rouge Marine Contractors (employer), for whom he had worked from the early 1950s until his retirement in 1976, as the responsible employer. Administrative Law Judge Kerr found the claim timely filed and awarded decedent permanent total disability benefits for asbestosis commencing May 12, 1998, as well as medical benefits pursuant to Section 7, 33 U.S.C. §907. On appeal, the Board affirmed Judge Kerr's findings that employer is the responsible employer and the award of medical benefits but vacated his findings regarding the commencement date for benefits and the award of permanent total disability benefits as decedent's status as a voluntary retiree limited him to a permanent partial disability award based upon the degree of his impairment. The case was remanded for further consideration. *[W.P.] v. Baton Rouge Marine Contractors*, BRB Nos. 99-0410/A (Jan. 11, 2000)(unpub.). On remand, Judge Kerr awarded benefits for a 100 percent permanent partial disability pursuant to 33 U.S.C. §908(c)(23) as of May 12, 1998. The Board affirmed the decision on remand. *[W.P.] v. Baton Rouge Marine Contractors*, BRB Nos. 00-0818, 08-0865 (May 10, 2001)(unpub.). Employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit, which affirmed. *Louisiana Insurance Guaranty Ass. v. [W.P.]*, No. 01-60469 (5<sup>th</sup> Cir. Feb. 27, 2002)(unpub.).

Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors “if the injury causes death.” In establishing entitlement to benefits, claimant is aided by Section 20(a) of the Act, 33 U.S.C. §920(a), which presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See, e.g., American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir. 1998). In addressing the scope of Section 9 where the immediate cause of death is not work-related, the Board has applied the maxim that “to hasten death is to cause it,” as this principle is consistent with the aggravation rule. *See Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, C.J., dissenting); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992).

We reject claimant’s contention that employer is collaterally estopped from contesting the cause of decedent’s death on the ground that he was adjudged to have a 100 percent permanent disability due to asbestosis. Under the principle of collateral estoppel, a party is barred from relitigating an issue decided in prior litigation if: (1) the issues at stake are identical in both cases; (2) the issue was actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier action. *Figuroa v. Campbell Industries*, 45 F.3d 311, 315 (9<sup>th</sup> Cir. 1995); *see generally Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 322 (1955); *Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991). In this case, the issue of whether decedent’s death was caused or hastened by his asbestosis was not at issue in the *inter vivos* claim and thus was not “actually litigated.” Therefore, the administrative law judge properly found that collateral estoppel is not applicable on the issue of the cause of decedent’s death. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999); Decision and Order at 16.

Claimant next contends the administrative law judge erred in relying on the opinion of Dr. Hodges to find the Section 20(a) presumption rebutted. Claimant contends Dr. Hodges’s opinion is based on assumptions inconsistent with the findings of fact in the *inter vivos* claim to which collateral estoppel applies. Thus, claimant contends Dr. Hodges’s opinion should not have been admitted into evidence pursuant to the Federal Rules of Evidence or assigned any weight by the administrative law judge.

Section 20(a) provides claimant with a presumption that decedent's death was work-related, where, as here, she produces evidence that decedent's death could have been due, at least in part, to his work-related exposure to asbestos.<sup>2</sup> *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT). In order to rebut the Section 20(a) presumption, employer must produce substantial evidence that decedent's death was not caused or hastened by his work injury. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5<sup>th</sup> Cir.), *cert. denied*, 540 U.S. 1056 (2003). If the presumption is rebutted, it falls from the case and claimant bears the burden of establishing that decedent's death was caused or hastened by his work injury. *Casey v. Georgetown Univ. Med. Ctr.*, 31 BRBS 147 (1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

Claimant contends the opinion of Dr. Hodges is so flawed and speculative that it should not have been admitted into evidence, pursuant to Federal Rule of Evidence 702.<sup>3</sup> We reject this contention, as Section 23(a) of the Act, 33 U.S.C. §923(a), provides that the administrative law judge is not bound by formal rules of evidence. *Casey*, 31 BRBS at 152. Rather, the administrative law judge is to admit "relevant evidence," which is defined as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." 29 C.F.R. §18.401; 20 C.F.R. §§702.338, 702.339. In this case, claimant's contention goes to the sufficiency of Dr. Hodges's report as support for the administrative law judge's finding that employer rebutted the Section 20(a) presumption

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<sup>2</sup> The administrative law judge found the Section 20(a) presumption invoked based on medical evidence stating decedent's death was hastened by his work-related respiratory impairment. Decision and Order at 16.

<sup>3</sup> Federal Rule of Evidence 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

rather than to its admissability.<sup>4</sup> See *Brown v. Washington Metropolitan Area Transit Authority*, 16 BRBS 80 ( 1984), *aff'd mem.*, No. 84-1076 (D.C. Cir. May 17, 1985).

In this regard, we agree with claimant that the administrative law judge's finding that Dr. Hodges's opinion rebuts the Section 20(a) presumption cannot be affirmed. Dr. Hodges opined that, based on decedent's medical records from 1994 to 1996, asbestosis was a reasonable diagnosis. CX 11 at 4. Dr. Hodges stated, however, that decedent's pulmonary function studies did not significantly decline after 1996 and that decedent had some sudden illness in 1997 that caused respiratory failure for the rest of decedent's life. Dr. Hodges stated this likely was not asbestosis and may have been a pulmonary embolism. *Id.* at 24-26. He concluded that even if asbestosis were present, the decedent's upper respiratory failures were not attributable to it in any significant way and that asbestosis was neither a cause nor a significant co-contributor to the decedent's death. *Id.* at 14, 23. The administrative law judge found this opinion sufficient to rebut the Section 20(a) presumption. Decision and Order at 16.

We must vacate this finding and remand the case for further analysis. Initially, in the prior proceeding, Judge Kerr found that decedent, as of 1998, had a work-related Class IV respiratory impairment due to his asbestosis. This finding of fact is entitled to collateral estoppel effect.<sup>5</sup> *Bath Iron Works Corp. v. Director, OWCP [Acord]*, 125 F.3d 18, 31BRBS 109(CRT) (1<sup>st</sup> Cir. 1997). Accordingly, the cause of claimant's respiratory impairment in 1998 is not at issue, as the prior decision conclusively determined that it was work-related. Thus, the work-related condition which claimant must establish is a cause of death is the respiratory impairment for which decedent received 100 percent permanent partial disability benefits. Since Dr. Hodges's opinion concerning the likelihood of the occurrence of a pulmonary embolism in 1997 appears relevant to the cause of claimant's respiratory impairment at that time, whether it can rebut Section 20(a) must be reconsidered consistent with collateral estoppel effect due the prior finding that

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<sup>4</sup> Similarly, the administrative law judge did not err in admitting into evidence the opinion of Dr. Gomes because he is a "non-testifying" expert. 33 U.S.C. §923(a); 29 C.F.R. §18.401.

<sup>5</sup> Findings of fact, made in prior decisions such as the existence and extent of the decedent's work-related impairment are entitled to "offensive non-mutual" collateral estoppel effect in this proceeding. See *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4<sup>th</sup> Cir. 2006) (employer collaterally estopped from contesting existence of pneumoconiosis in widow's claim as its existence was established in living miner's claim). While Section 22, 33 U.S.C. §922, provides a basis for setting aside traditional notions of *res judicata* and collateral estoppel, that section is not at issue in this case.

claimant's 1998 respiratory impairment was work-related.<sup>6</sup> The administrative law judge must address these issues and properly apply collateral estoppel to the prior decision in order to determine whether Dr. Hodges's opinion that decedent did not have a pulmonary condition related to his employment that caused or contributed to his death, CX 11 at 14, is sufficient to rebut Section 20(a).

The administrative law judge also applied an improper standard in determining whether rebuttal was established. In order to rebut the Section 20(a) presumption, employer must produce substantial evidence that decedent's work-related respiratory impairment did not cause or hasten his death. *See generally McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005). Evidence that the respiratory impairment was not a *significant* contributor to death does not establish the absence of hastening. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9<sup>th</sup> Cir. 1993). As decedent here had a work-related Class IV respiratory impairment, the issue is whether employer produced substantial evidence that this impairment did not hasten his death. In this regard, Dr. Hodges's opinion that the decedent had a severe lung impairment which left him with "very little organ reserve" may preclude a finding that the opinion rebuts the presumed causal connection between the work injury and the death. CX 11 at 57. Dr. Hodges stated that the decedent's breathing capacity and upper respiratory failures were, in part, related to his death. *Id.* at 16. Thus, the administrative law judge must reevaluate whether Dr. Hodges's opinion rebuts the Section 20(a) presumption. If, on remand, the administrative law judge finds that Dr. Hodges's opinion does not constitute substantial evidence to rebut the Section 20(a) presumption, the administrative law judge should address whether any other evidence is legally sufficient to rebut the presumption under the proper standard and case precedent.

Claimant also contends the administrative law judge applied an improper legal standard in evaluating the evidence as a whole. We agree. The administrative law judge incorrectly required claimant to establish that decedent would have lived any longer had he not suffered from work-related asbestosis. *See* Decision and Order at 16-18. He found that claimant did not meet this burden and denied the claim. However, the issue, properly stated, is whether claimant established that decedent's work-related Class IV

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<sup>6</sup> We note that the totality of decedent's medical and hospital records do not include a diagnosis of an embolism. Moreover, even assuming decedent had an embolism in 1997 in addition to his asbestosis, pursuant to the aggravation rule, if his asbestosis contributed to his impairment at that time, the entire condition would still be work-related. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982). The aggravation rule could thus support a result consistent with Judge Kerr's 1998 decision.

respiratory impairment hastened his death. *Fireman*, 27 BRBS at 108-109. If this impairment hastened death, the death is compensable regardless of how much longer the decedent would have lived absent his lung condition. *Woodside*, 14 BRBS at 603. This showing can be accomplished through creditable evidence that the respiratory impairment in fact hastened death or impeded treatment for the condition that was the immediate cause of death. Claimant need not establish that decedent's respiratory impairment *significantly* contributed to or *significantly* hastened his death. Therefore, we vacate the finding, based on the record as a whole, that decedent's death is not work-related. If, on remand, the administrative law judge again finds the Section 20(a) presumption rebutted, he must reevaluate the evidence as a whole under the proper "hastening" standard.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further findings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge