

BRB No. 02-0724

ELEANOR SEELY)
(Widow of LUTHER SEELY))
)
Claimant-Respondent)
)
v.)
)
NEWPORT NEWS SHIPBUILDING) DATE ISSUED: JUN 30, 2003
AND DRY DOCK COMPANY)
)
Self-Insured)
Employer-Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr.,
Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom & Watkins), Newport News,
Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.),
Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order (01-LHC-2890) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 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. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant's husband (decedent) worked for employer as a welder from 1942 until his retirement in 1985; it is undisputed that during the course of his

employment, decedent was exposed to asbestos. In 1989, decedent was diagnosed with bilateral asbestos-related pleural disease. CX 4. In April 1996, Dr. Kane diagnosed decedent with lung cancer and asbestosis. CXs 5, 6, 12-15. Decedent's lung cancer ultimately proved fatal on June 9, 1996. CX 1. Decedent's death certificate listed the cause of death as lung cancer due to smoking and asbestos exposure. CX 1. Claimant subsequently filed a claim for death benefits under the Act pursuant to Section 9, 33 U.S.C. §909.

At the formal hearing held on March 13, 2000, employer's counsel presented exhibits on behalf of both parties and agreed to have the case decided on the record. Tr. at 4-5. In his Decision and Order, the administrative law judge initially invoked the Section 20(a), 33 U.S.C. §920(a), presumption linking decedent's death to his employment. Next, the administrative law judge determined that employer did not establish rebuttal of that presumption. Therefore, the administrative law judge awarded claimant death benefits and funeral expenses of \$3,000. Lastly, the administrative law judge denied employer relief from continuing liability for compensation under Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, employer challenges the administrative law judge's finding that it failed to present evidence sufficient to rebut the invoked statutory presumption of causation. Claimant responds, urging affirmance.

Section 9 of the Act provides for death benefits to certain survivors "if the injury causes death." 33 U.S.C. §909. In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the death to the employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to the employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); see *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4

BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966). In this regard, pursuant to the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Following this rule in a death benefits case where the immediate cause of death is not work-related, the Board has applied the maxim that “to hasten death is to cause it.” 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 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993) (applying same rule in a black lung case). Thus, application of Section 20(a) presumes that the work injury aggravated or contributed to the pre-existing condition, and the employer must present evidence addressing aggravation or contribution in order to rebut it. 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). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Moore*, 126 F.2d 256, 31 BRBS 119(CRT); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, the administrative law judge found, and the parties do not dispute, that decedent died of lung cancer, thereby establishing a harm, and that decedent was exposed to asbestos while working for employer. Drs. Maddox and Abraham each opined that decedent’s exposure to asbestos contributed to his lung cancer and ultimate demise. See CXs 16, 18. The administrative law judge thus properly found that claimant was entitled to invocation of the Section 20(a) presumption. See *Jones*, 35 BRBS 37.

Employer contends that the administrative law judge erred in concluding that the opinions of Drs. Churg, Hutchins and Cagle are insufficient to rebut the Section 20(a) presumption.¹ We disagree. In addressing this issue, the administrative law

¹ Contrary to employer’s position on appeal, the United States Supreme Court’s decision in *Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT), does not alter employer’s burden of proof with respect to rebuttal of the Section 20(a) presumption. Indeed, the Court in *Greenwich Collieries* explicitly cited Section 20(a) of the Act as providing a statutory presumption easing claimants’ burden of proof. 512 U.S. at 280, 28 BRBS at 47(CRT). Thus, the Court’s holding in *Greenwich*

judge initially found that employer based its case entirely on the argument that asbestos cannot cause lung cancer unless asbestosis is present, and that even if he accepted employer's position that asbestosis is a necessary precursor to asbestos-related lung cancer, employer failed to produce sufficient evidence that decedent did not have asbestosis. Decision and Order at 9. Specifically, the administrative law judge found that all six of the physicians who addressed this subject agreed that decedent had asbestos bodies in his lungs, with Drs. Maddox, Legier and Abraham noting that the asbestos burden was particularly high, while Drs. Churg, Hutchins, and Cagle never specifically opined that decedent did not have asbestosis, but merely noted that the tissue samples available for their respective reviews were insufficient to make such a diagnosis. *Id.* at 9-10.² The administrative law judge concluded that while negative evidence could be probative, it must be specific and comprehensive, citing *Swinton*, 554 F.2d 1075, 4 BRBS 466, and that a report silent about the presence of asbestosis is inadequate for rebuttal, citing *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). Thus, the administrative law judge determined that the medical evidence in this case is inadequate to establish whether or not decedent had asbestosis prior to developing lung cancer, and is therefore effectively silent on the issue. He consequently concluded that employer has not offered sufficient evidence to rebut the presumption. Thus, pursuant to the operation of Section 20(a), the administrative law judge concluded that claimant is deemed to have proven causation and is consequently entitled to death benefits. Decision and Order at 10.

We affirm the administrative law judge's finding that employer did not establish rebuttal in this case. Dr. Hutchins, a professor of pathology at Johns Hopkins University, opined that non-small cell carcinoma of the lung was the cause of decedent's death, that biopsy slides revealed the presence of asbestos bodies

Collieries does not change in any way the employer's burden to come forward with substantial evidence that no relationship exists between an injury and an employee's work once the Section 20(a) presumption is invoked. See *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18, 21 n.3 (1995).

² Drs. Maddox and Legier also agreed that decedent's tissue samples were insufficient to establish whether or not the decedent had asbestosis at the time of his death.

and pleural plaques, but that the lung tissue included in the transbronchial biopsy did not permit a definitive diagnosis on the presence or absence of asbestosis. EX 2. Similarly, Dr. Cagle, Director of Pulmonary Pathology at Baylor College of Medicine, also examined decedent's biopsy slides and reported that, despite the presence of asbestos bodies indicating an occupational level of exposure to asbestos, the biopsy material presented for his review was insufficient to determine whether decedent had asbestosis. EX 3. Lastly, Dr. Churg reported on

April 1, 2001, that "[i]n the present case the pathology materials are totally unsuited for assessing the presence of asbestosis, and one is forced to rely on the radiographic finding." EX 1. As to those findings, Dr. Churg stated that "[i]nterpreting from Dr. Hutchins' report, the plain films appear to show no evidence of asbestosis. However, the CT scan may show changes of asbestosis, since interstitial markings are described. It is impossible for me to make any further judgment about this, . . ." Dr. Churg concluded that "[i]f it were clear that there was no radiographic evidence of asbestosis, I would attribute [decedent's] lung cancer only to cigarette smoking. . . . If there were definite radiographic evidence of asbestosis, I would attribute [decedent's] lung cancer to both asbestosis and cigarette smoking." CX 1. Thus, as found by the administrative law judge, none of the three physicians relied upon by employer in support of its contentions on appeal was able to state that decedent did not have asbestosis; moreover, none of these physicians opined that decedent's undisputed work-related asbestos exposure did not aggravate, contribute to, or combine with his lung cancer. Accordingly, as the medical evidence relied upon by employer does not sever the presumed causal connection between decedent's death and his employment with employer, we affirm the administrative law judge's determination that the Section 20(a) presumption was not rebutted, and his consequent award of death benefits to claimant.³ See *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Jones*, 35 BRBS 37.

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

SO ORDERED.

ROY P. SMITH

³We need not address employer's argument that the administrative law judge erred in relying on the opinions of Dr. Legier, Maddox and Abraham, who correlate an increased risk of lung cancer with exposure to asbestos, CXs 16, 17, 18, as these opinions are not dispositive of the issue on rebuttal.

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge