

JO MATHER	)	
(Widow of JOHN MATHER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 06/22/2007
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2005-LHC-01638) of Administrative Law Judge Daniel F. Sutton 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 (the decedent) worked for employer from 1959 until 1996, when he voluntarily retired. In March 2003, decedent was diagnosed with colon cancer, from which he died on August 16, 2004. Claimant filed a claim for disability and death benefits, alleging that decedent's colon cancer and death were casually related to his asbestos exposure with employer.

The administrative law judge found that claimant presented sufficient evidence to invoke the Section 20(a) presumption of causation, 33 U.S.C. §920(a), based on Dr. Cherniack's opinion that decedent's occupational asbestos exposure was a significant contributing factor to his colon cancer and death. The administrative law judge also found that employer rebutted the presumption with the opinion of Dr. Pulde that decedent's colon cancer is fully explained by his non-occupational risk factors of age, family history, smoking, diet and obesity. Despite finding Dr. Cherniack's qualifications impressive and crediting his opinion that asbestos exposure may cause cancer generally, the administrative law judge found that, in this case, Dr. Pulde's opinion is "deserving of greater credence" because it is based on a more thorough consideration and discussion of the decedent's history, risk factors, and medical records. Decision and Order at 11. Accordingly, the administrative law judge found that decedent's cancer and death were not related to asbestos exposure, and he denied claimant's claim.

On appeal, claimant contends that the administrative law judge erred in finding that Dr. Pulde's opinion rebuts the Section 20(a) presumption. Claimant also contends the administrative law judge erred in according greater weight to Dr. Pulde's opinion than to that of Dr. Cherniack, based on his weighing the evidence as a whole. Employer responds, urging affirmance of the administrative law judge's decision.

Upon invocation of the Section 20(a) presumption, the burden shifts to employer to rebut the presumption with substantial evidence that the decedent's injury and death were not caused by conditions of his employment. *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1<sup>st</sup> Cir. 2004); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1<sup>st</sup> Cir. 1998); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). If 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 claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant contends that Dr. Pulde's opinion cannot constitute substantial evidence to rebut the Section 20(a) presumption because it is speculative, hypothetical and based on an incorrect understanding of decedent's asbestos exposure. We reject claimant's contention. First, employer's burden on rebuttal is one of production and not persuasion. *American Grain Trimmers*, 181 F.3d at 817, 33 BRBS at 75(CRT). Dr. Pulde stated that, to a reasonable degree of medical certainty, decedent's exposure to asbestos did not cause or contribute to decedent's colon cancer and death. Tr. at 88. The administrative law judge fully addressed claimant's challenges to the sufficiency of Dr. Pulde's opinion, *see* Decision and Order at 10-11, and claimant has demonstrated no error in this regard. Moreover, the administrative law judge's finding that Dr. Pulde's opinion rebuts the

Section 20(a) presumption is rational, supported by substantial evidence, and in accordance with law, and is therefore affirmed. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT).

Claimant also contends that the administrative law judge erred in crediting Dr. Pulde's opinion over that of Dr. Cherniack, based on the record as a whole. The administrative law judge acknowledged Dr. Cherniack's "impressive credentials" and credited his opinion that, generally, medical research supports a link between an increased incidence of colon cancer and asbestos exposure. Decision and Order at 11. Nonetheless, the administrative law judge stated that, in this case, he was persuaded that Dr. Pulde's opinion is "deserving of greater credence because it is based on a more thorough consideration and discussion of the Decedent's history, risk factors and medical records." Decision and Order at 11. Specifically, with regard to decedent's asbestos exposure, Dr. Pulde explained that the basis for his opinion that it was not contributory to decedent's colon cancer is the absence on x-rays and CT scans of asbestos fibers in decedent's lungs. Dr. Pulde stated that this absence indicates that decedent's "gastrointestinal burden of asbestos fiber" also was low and that therefore asbestos exposure was non-contributory to decedent's colon cancer and death. EX 3 at 14; Tr. at 82-87.

It is well settled that an administrative law judge is entitled to weigh the evidence and to draw rational inferences from it. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962); *see also Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner, and may credit any portion of any opinion according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969); *see also Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As the administrative law judge's determination to give greater weight to Dr. Pulde's opinion is rational, his finding that decedent's colon cancer and death were not causally related to his exposure to asbestos is supported by substantial evidence, and claimant has not raised any error in the administrative law judge's findings, we affirm the administrative law judge's denial of benefits.<sup>1</sup> *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001);

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<sup>1</sup> We reject claimant's contention that the administrative law judge applied an improper standard in rejecting Dr. Cherniack's opinion. The administrative law judge did state that acceptance of his opinion "would create an extra-statutory irrebuttable presumption" that mere exposure to asbestos contributes to the development of colon cancer. Decision and Order at 12. The administrative law judge explained, however, that as claimant bears the burden of establishing a causal relationship by a preponderance of the evidence claimant also needs evidence clarifying any role that other demonstrated risk factors played in the genesis of the disease. *Id.* This "requirement" is merely a restatement of the generally-accepted principle that an administrative law judge should

*Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 89 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999).

Accordingly, we affirm the administrative law judge's Decision and Order Denying Benefits.

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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REGINA C. McGRANERY  
Administrative Appeals Judge

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evaluate a doctor's opinion in light of the other evidence of record. *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4<sup>th</sup> Cir. 1998).