

BRB No. 05-0394

SHIRLEY HARRIS)	
(widow of ELDRIDGE HARRIS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: 11/30/2005
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (2003-LHC-2920) of Administrative Law Judge Daniel A. Sarno, 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked in shipbuilding and ship repair for employer from 1957 until 1993, and he was exposed to airborne asbestos dust fibers. He was diagnosed with lung cancer on December 4, 2000, and he died from the disease on March 25, 2002. ALJ Ex. 1. Claimant filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909.

The parties disputed only two issues: 1) whether decedent suffered from asbestosis; and 2) whether a diagnosis of asbestosis is required in order to establish a causal relationship between asbestos exposure and lung cancer.

The administrative law judge found that claimant established a *prima facie* case, as she established decedent's harm, lung cancer and death, and conditions at decedent's work that could have caused the harm, exposure to asbestos; therefore, he invoked the Section 20(a), 33 U.S.C. §920(a), presumption. He then found that employer rebutted the presumption, as two doctors stated that decedent's lung cancer was caused solely by his significant smoking history. Decision and Order at 10. In considering the evidence on the record as a whole, the administrative law judge found that both sides presented qualified medical experts with conflicting opinions. Based on the opinions of Drs. Legier, Wick and Churg, he found that decedent did not suffer from asbestosis. *Id.* at 10-12. The administrative law judge then found that the evidence was in equipoise regarding whether a diagnosis of asbestosis is required to establish a causal relationship between asbestos exposure and lung cancer. Thus, he determined that claimant did not establish the work-relatedness of decedent's disease and death by a preponderance of the evidence, and he denied benefits. Decision and Order at 12.

Claimant challenges the administrative law judge's weighing of the evidence, arguing that the opinion of her expert, Dr. Maddox, is entitled to greater weight because the administrative law judge overlooked significant literature supporting Dr. Maddox's opinion that asbestosis need not be present to establish a causal nexus between asbestos exposure and lung cancer. Additionally, claimant argues that the administrative law judge failed to give proper weight to Dr. Maddox's opinion, as Dr. Maddox had more detailed information than employer's experts pertaining to the location of the asbestos fibers in decedent's lungs and the extent of decedent's smoking history. Employer argues that the administrative law judge's weighing of the medical opinions is rational and affirmable. We reject claimant's contentions, and we conclude the administrative law judge acted within his discretion in weighing the evidence on the record as a whole. Therefore, we affirm the denial of death benefits.

In this case, the administrative law judge found that claimant invoked Section 20(a) presumption of causation and that employer produced substantial evidence to rebut the presumption. Thus, 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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

The record contains the opinions of four medical experts,¹ two of whom, Drs. Legier and Maddox, subscribe to the opinion that asbestosis need not be present to establish the nexus between asbestos exposure and lung cancer, and two of whom, Drs. Churg and Wick, subscribe to the opinion that asbestosis must be present to establish that link. Cl. Exs. 2-3, 24 at 41-42; Emp. Exs. 3, 5, 7, 11-12, 26 at 18, 20, 23, 28. Dr. Maddox opined that evidence of an increased asbestos burden, as demonstrated here by microscopic findings of dozens of asbestos bodies in decedent's lung parenchyma, is sufficient to establish the causal relationship between decedent's asbestos exposure and his lung cancer and that there need not be an actual diagnosis of asbestosis. Cl. Exs. 3, 24 at 25-27, 41-42. Dr. Legier agreed that decedent's cancerous tumors were related to asbestos exposure as evidenced by the increased asbestos burden in decedent's lungs. Cl. Ex. 2. To the contrary, Dr. Wick stated that although there are "two schools of thought," the majority are of the opinion that a finding of asbestosis is required to causally link asbestos exposure with lung cancer. He rejected the criteria employed to support Dr. Maddox's opinion as not being peer-reviewed, well-recognized criteria, and he emphasized that merely counting asbestos bodies is an insufficient marker of a person's "susceptibility to developing an asbestos-related malignancy." Emp. Ex. 26 at 16-18, 20, 28. Dr. Wick thus concluded that decedent's lung cancer was caused solely by his extensive use of tobacco. Emp. Ex. 12. Similarly, in the absence of a finding of asbestosis, Dr. Churg determined that decedent's asbestos exposure played no role in decedent's cancer and that decedent's disease and death were caused solely by his cigarette smoking. Emp. Ex. 11. In addition to the experts' opinions, both parties submitted numerous reports and studies to support the positions of their respective medical experts. Cl. Exs. 11-22; Emp. Exs. 17-25.

After reviewing the evidence, the administrative law judge acknowledged:

The testimony and medical literature submitted by the parties indicate that the medical community has clearly not settled the issue of whether something less than a clinical or histological diagnosis of asbestosis is acceptable to attribute a lung cancer to asbestos exposure. The experts in this case, all of whom are well-respected and seasoned pathologists with extensive experience in diagnosing diseases of the lung, agreed that reasonable physicians could disagree over this issue.

¹Dr. Legier conducted the autopsy. Drs. Maddox, Churg and Wick reviewed the autopsy materials. Cl. Exs. 2-3; Emp. Exs. 11-12.

Decision and Order at 11. While the administrative law judge stated that he is “unable to determine whether the bulk of the literature truly does support Employer’s position[,]” he found that the evidence submitted by claimant “does not rise above that submitted by Employer.” That is, the administrative law judge found that the evidence is in equipoise. Decision and Order at 11-12. As claimant bears the burden of persuasion, the administrative law judge concluded that claimant did not satisfy her burden of establishing the work-relatedness of decedent’s death. *Id.*

We reject claimant’s arguments that the administrative law judge did not consider all the evidence and that he should have given greater weight to the opinion of Dr. Maddox. It is within the administrative law judge’s discretion to determine the weight to be accorded to the evidence of record, including medical evidence. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). With regard to the issue of whether decedent suffered from asbestosis, the administrative law judge determined that Dr. Maddox’s opinion was outweighed by the opinions of three other doctors who found no asbestosis present. Decision and Order at 11. Contrary to claimant’s contention, he fully discussed all of Dr. Maddox’s opinion. *Id.* at 4-6. The administrative law judge also gave a rational reason for giving less weight to Dr. Maddox’s opinion. He stated that each doctor’s use of the CAP-NIOSH criteria, which is widely recognized in the field of pathology, gave him a basis on which to compare the autopsy and consultation reports. Because Dr. Maddox found asbestosis using those criteria when the other doctors did not, the administrative law judge stated that this diminished Dr. Maddox’s opinion overall, even if only slightly. Decision and Order at 12. As the administrative law judge is entitled to weigh the evidence of record, we reject claimant’s argument that his reasons for giving less weight to Dr. Maddox’s opinion are erroneous and warrant reversal of the denial of benefits.

With regard to the issue of whether there is a causal connection between decedent’s work-related exposure to asbestos and his terminal lung cancer, the administrative law judge’s rational determination that the opposing evidence warrants equal weight defeats claimant’s claim. *Greenwich Collieries*, 512 U.S. at 281, 28 BRBS at 48(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (Decision on Recon.). The administrative law judge found there are two conflicting positions in the medical community and that the medical evidence and literature supporting the doctors’ opinions in this case are equally balanced. Contrary to claimant’s contention, the administrative law judge was not required to find Dr. Maddox’s opinion better supported by the medical literature. Based

on his reasonable determination that each medical expert is highly qualified and experienced, and has literature to support his opinion, the administrative law judge rationally concluded that the evidence was in equipoise and, therefore, that claimant did not meet her burden of persuasion on the issue of the work-relatedness of decedent's death. *Santoro*, 30 BRBS at 175. Thus, we affirm as rational and supported by substantial evidence the administrative law judge's finding that claimant did not establish by a preponderance of the evidence that decedent's lung cancer and death were work-related. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

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

JUDITH S. BOGGS
Administrative Appeals Judge