

HELEN STEELE	)	
(Widow of CHARLES STEELE)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: <u>APR 14, 2005</u>
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Peter D. Quay (Murphy and Beane), New London, Connecticut, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-1392) of Administrative Law Judge Janice K. Bullard 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 as a shipfitter for employer from 1959 to 1982, and it is undisputed that during this employment he was exposed to asbestos, welding fumes, and other irritants. The decedent also had a lengthy history of cigarette smoking. The decedent developed chronic obstructive pulmonary disease, emphysema, and a nodule in his lung, which some doctors suspected was lung cancer. In his last days, the decedent was admitted to the hospital with pneumonia; he died on February 4, 2002. The death certificate stated that he died from respiratory failure due to lung cancer, with

secondary causes listed as chronic obstructive pulmonary disease and cardiovascular attack. Claimant filed a claim for benefits under the Act, contending that decedent was permanently partially disabled prior to his death and died due to a work-related pulmonary condition. 33 U.S.C. §§908(c)(23), 909.

In her decision, the administrative law judge initially invoked the Section 20(a) presumption, 33 U.S.C. §920(a), that the decedent's death was due at least in part to his occupational exposure to asbestos and fumes, but found that employer submitted evidence which established rebuttal of the presumption. Consequently, the administrative law judge weighed the evidence as a whole and found that claimant failed to prove that decedent died as a result of asbestos-induced lung cancer, or "by any other asbestos induced disease." Decision and Order at 15.

On appeal, claimant contends that the administrative law judge erred in failing to address whether the decedent's chronic obstructive pulmonary disease was work-related and whether it hastened his death. In addition, claimant contends that the administrative law judge erred in finding that the evidence is sufficient to rebut the presumption that decedent suffered from work-related asbestosis and lung cancer. Finally, claimant contends that the administrative law judge erred in concluding, based on her weighing of the evidence as a whole, that decedent's death was not due to work-related asbestosis and/or lung cancer.

In order to invoke the Section 20(a) presumption, claimant must show that decedent sustained a harm and that either an accident occurred or working conditions existed which could have caused the harm. 33 U.S.C. §920(a); *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2001), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2<sup>d</sup> Cir. 2001); *see also U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once, as here, the Section 20(a) presumption is invoked, employer bears the burden of producing substantial evidence that decedent's injury and death were not caused or hastened by his employment injury. *See, e.g., 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). If employer produces substantial evidence, the presumption falls from the case and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of decedent's condition and death. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997).

The administrative law judge focused her rebuttal analysis on whether decedent had either asbestos-related lung cancer or asbestosis that contributed to his death. We affirm the administrative law judge's finding that the opinions of Dr. Tieger and Dr. Kern are sufficient to establish rebuttal of the Section 20(a) presumption that the decedent suffered from work-related asbestosis and/or lung cancer that contributed to his death. The administrative law judge found that Dr. Tieger disagreed with Dr. Daum's finding of lung cancer. Dr. Tieger concluded that the decedent's death was a direct result of progressive chronic obstructive pulmonary disease. EX 6. More specifically, Dr. Tieger opined that decedent did not die due to lung cancer, and that asbestos played no role in the development of lung cancer if he even had it. *Id.* Dr. Tieger also stated that decedent did not suffer from asbestosis. *Id.* In addition, Dr. Kern opined that asbestos exposure did not contribute to the development of lung cancer, if there was any. EX 7. Therefore, as employer produced substantial evidence that asbestosis and/or lung cancer did not contribute to decedent's death, we affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted in this regard. *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1998), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999).

Moreover, the administrative law judge weighed the conflicting evidence of record and found that the opinion of Dr. Daum is entitled to less weight than the contrary opinions of Drs. Tieger and Kern.<sup>1</sup> The administrative law judge rationally found that Dr. Daum's interpretation of an x-ray as showing asbestosis is not supported by other interpretations of the x-ray. EX 7; EX 6 at 15. The administrative law judge also found more persuasive the opinions of Drs. Tieger, Kern and Deutsch that any opinion as to the nature of the lung nodule would be speculative given that a biopsy was not performed and decedent also suffered from colon and prostate cancer. In addition, the administrative law judge observed that Dr. Bundy, while finding evidence of asbestos exposure, did not diagnose asbestosis or lung cancer. The administrative law judge gave no weight to Dr. Kamireddy's opinion that asbestos exposure contributed to decedent's death, as she found the opinion conclusory. The administrative law judge is entitled to determine the relative weight to be accorded to the physicians' opinions, and the Board is not empowered to re-weigh the evidence. Thus, as it is rational and supported by substantial evidence, we affirm the administrative law judge's determination that, based on the record as a whole, the decedent's death was not due to work-related lung cancer or

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<sup>1</sup> Dr. Daum stated that decedent had asbestosis and died due to lung cancer and other lung diseases. She stated that decedent's occupational exposure to asbestos was a significant contributive factor in the development of decedent's fatal lung cancer. CX 1.

asbestosis.<sup>2</sup> *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

However, as claimant correctly contends, the administrative law judge did not address whether decedent's work-related exposure to welding fumes and other irritants contributed to such respiratory impairments as chronic obstructive pulmonary disease and emphysema and whether they caused or hastened decedent's death. *See generally Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993) ("to hasten death is to cause it"). Claimant consistently raised a theory of recovery based on decedent's exposure at work to deleterious substances other than asbestos. *See, e.g.*, Tr. at 14; Cl. Post-hearing brief. Although the administrative law judge seemingly found the Section 20(a) presumption invoked based on welding fume exposure as well as asbestos exposure, she did not further address this issue. Therefore, we must remand the case for full consideration of whether decedent's respiratory condition and death were due, at least in part, to these work-related exposures. If the administrative law judge finds on remand that the Section 20(a) presumption is rebutted, she must then consider whether a causal relationship between decedent's respiratory disability and death is established based on the record as a whole. If the administrative law judge finds that decedent had a work-related respiratory impairment, she must determine the extent of that impairment in accordance with Sections 2(10) and 8(c)(23) of the Act, 33 U.S.C. §§902(10), 908(c)(23), and address any remaining issues related to the disability and death benefits claims.

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<sup>2</sup> As the administrative law judge's finding that decedent did not have work-related lung cancer or asbestosis is supported by substantial evidence, it is axiomatic that these conditions did not cause a permanent partial disability prior to decedent's death.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, but the denial of benefits is vacated and the case is remanded for further consideration consistent with this opinion.

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