BRB No. 11-0533

HELEN W. KOCHER (Widow of GORDON L. KOCHER) Claimant-Petitioner v. BETHLEHEM STEEL CORPORATION Self-Insured Employer-Respondent	)	DATE ISSUED: 04/18/2012 DECISION and ORDER

Appeal of the Decision and Order Denying Claim and the Order Denying Claimant's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Lloyd F. LeRoy (Brayton Purcell LLP), Novato, California, for claimant.

Bill Parrish, San Francisco, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim and the Order Denying Claimant's Motion for Reconsideration (2010-LHC-00283) of Administrative Law Judge Gerald M. Etchingham 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).

Claimant's husband, the decedent, worked for employer from 1942 to 1944, and the parties stipulated that, during this employment, he had sufficient exposure to asbestos such that it could cause asbestosis. Decedent died on January 3, 2007, after undergoing coronary bypass and aortic valve replacement surgery on December 13, 2006. It is uncontested that the immediate cause of decedent's death was heart failure resulting from

complications arising as a result of decedent's surgery, specifically, the failure of a suture in one of decedent's coronary bypass grafts. *See* Decision and Order at 10, 12-13, 15; Cl. Petition for Review and Brief at 2; Tr. at 28. A subsequent autopsy, performed by Dr. Salyer, revealed Grade 3 asbestosis as well as other pulmonary and cardiovascular conditions. CX 13. Claimant filed a claim for death benefits under the Act, alleging that decedent's work-related asbestosis contributed to the development of his cardiac condition and hastened the need for cardiac surgery which ultimately failed, leading to his death. 33 U.S.C. §909.

In his decision, the administrative law judge found, pursuant to the parties' stipulations, that claimant is entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that decedent's death was causally related to his work-related asbestos exposure. The administrative law judge found, however, that employer rebutted the presumption. The administrative law judge then weighed the evidence as a whole and concluded that claimant did not establish a causal relationship between decedent's death and his employment. Consequently, the administrative law judge denied the claim for death benefits. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's findings that employer successfully rebutted the Section 20(a) presumption and that claimant failed to establish by a preponderance of the evidence that decedent's asbestosis contributed to his death. Claimant also alleges that she was denied due process of law because her motion for a new hearing before a different administrative law judge was denied. Employer responds, urging affirmance of the administrative law judge's decisions.

We first address claimant's procedural contentions. The hearing in this case was conducted on September 10, 2010, by Administrative Law Judge Etchingham. On December 22, 2010, this administrative law judge issued a notice that he was transferring to another agency and that the case would be assigned to Administrative Law Judge Clark. The parties were afforded the opportunity to request a *de novo* hearing or to accept a decision by Judge Clark on the existing record. Claimant's counsel requested a *de novo* hearing. Judge Etchingham, however, issued his decision on the merits on December 30, 2010, prior to his leaving the Office of Administrative Law Judges (OALJ). Claimant then requested that Judge Etchingham's decision be held in abeyance and that a *de novo* hearing be ordered on the basis that Judge Etchingham lacked jurisdiction to issue a decision in this case. In an Order dated January 5, 2011, Administrative Law Judge Gee denied this request, stating that Judge Etchingham retained jurisdiction over the case as of the date he issued his decision. Claimant then sought reconsideration of both Judge Etchingham's Decision and Order and Judge Gee's Order denying claimant's request for a new hearing. Judge Etchingham, who was

detailed from his new agency back to the OALJ, issued an Order denying claimant's motion on March 17, 2011.

We reject claimant's contention that she was denied due process of law because her motion for a *de novo* hearing was denied. The administrative law judge who conducted the hearing decided the case, in accordance with the Administrative Procedure Act, 5 U.S.C. §554(d). Therefore, a hearing before a new administrative law judge was not necessary and the denial of the motion for a new hearing is affirmed. *See generally Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091, 13 BRBS 843 (5th Cir. 1981). Claimant's contention that she was prejudiced by the delay in the issuance of the administrative law judge's decision, and by the administrative law judge's return to the OALJ whereupon he addressed claimant's motion for reconsideration, is similarly unavailing.[1] The hearing record in this case closed on November 15, 2010, and the administrative law judge's Decision and Order was issued on December 30, 2010. Claimant asserts that she was prejudiced because the time pressure associated with the administrative law judge's imminent departure from the OALJ allegedly led him to engage in an insufficiently thorough consideration of the case and because the administrative law judge allegedly failed to remember critical facts. Claimant's contentions, however, are belied by the thoroughness of the administrative law judge's consideration of this case. The administrative law judge's 23-page Decision and Order includes a comprehensive summary of the evidence and a full analysis of the issues presented by the parties. Similarly, the administrative law judge's Order on Reconsideration fully addressed the issues raised by claimant in her motion. As claimant has failed to demonstrate that she was prejudiced, we reject her contention that the administrative law judge's decisions should be vacated and a new hearing ordered. *See Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981); *V.M. [Morgan] v. Cascade General, Inc.*, 42 BRBS 48 (2008), *aff'd*, 388 F.App'x 695 (9th Cir. 2010); *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981).

Claimant next challenges the administrative law judge's finding that decedent's death was not causally related to his employment. Once, as here, claimant establishes her *prima facie* case, the Section 20(a) presumption applies to relate the employee's death to his employment. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010). The burden then shifts to employer to rebut the presumption by producing substantial evidence that the employee's death was not caused, contributed to

[1]While the Act states that decisions shall be issued within 20 days after the close of the record, 33 U.S.C. §919(c), claimant acknowledges that this time requirement is not jurisdictional and that a delay in the issuance of a decision requires remand only where the aggrieved party shows prejudice resulting from the delay. *Welding v. Bath Iron Works Corp.*, 13 BRBS 812 (1981); *see also* 20 C.F.R. §702.349.

or hastened by his employment injury. *Id.; Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). If the administrative law judge finds that the Section 20(a) presumption is rebutted, then the administrative law judge must weigh all of the relevant evidence and resolve the causation issue based on the record as a whole, with claimant bearing the burden of persuasion. *See Hawaii Stevedores,* 608 F.3d at 650-651, 44 BRBS at 50(CRT); *see also Director, OWCP v. Greenwich Collieries,* 512 U.S. 257, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found the opinions of Drs. Cayton and Breall sufficient to establish rebuttal of the Section 20(a) presumption. We reject claimant's contention that the administrative law judge erred in finding that employer produced substantial evidence to rebut the Section 20(a) presumption.[2] Employer's burden on rebuttal is one of production only, not one of persuasion. *Hawaii Stevedores,* 608 F.3d at 650-651, 44 BRBS at 50(CRT). An employer satisfies this burden of production when it presents evidence that could satisfy a reasonable factfinder that the employee's injury or death was not causally related to his employment. *Id.*, 608 F.3d at 651, 44 BRBS at 50(CRT); *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55, 44 BRBS 13, 17(CRT) (1st Cir. 2010); *Rainey v. Director, OWCP*, 517 F.3d 632, 637, 42 BRBS 11, 14(CRT) (2d Cir. 2008); *American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). The testimony of a physician given to a reasonable degree of medical certainty that no relationship exists between an injury and an employee's employment is sufficient to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also Duhagon,* 169 F.3d at 618, 33 BRBS at 3(CRT).

[2]Under the Section 20(a) rebuttal section of his decision, the administrative law judge also discussed his concerns about the equivocal nature of the testimony of Dr. Hammar, claimant's medical expert. This analysis, however, is relevant in weighing the evidence on the record as a whole rather than at the rebuttal stage. The issue on rebuttal concerns whether employer met its burden of production, and this burden is not affected by the administrative law judge's findings regarding the persuasiveness of Dr. Hammar's opinion that decedent's asbestosis played a role in his death. *See Hawaii Stevedores,* 608 F.3d at 651, 44 BRBS at 50(CRT). The administrative law judge's error in considering Dr. Hammar's opinion at the rebuttal stage is harmless, however, as the administrative law judge properly found that employer produced substantial evidence to rebut the Section 20(a) presumption. *Id.*, 608 F.3d at 648-649, 651-652, 44 BRBS at 48-49, 51(CRT).

In this case, the administrative law judge properly determined that Dr. Cayton's opinion constitutes substantial evidence sufficient to rebut the Section 20(a) presumption.[3] Decision and Order at 20. Dr. Cayton agreed with Dr. Salyer's finding on autopsy that decedent had Grade 3 asbestosis, but he opined that this asbestosis did not contribute to or hasten decedent's death. *See* Tr. at 232-233, 236, 240, 249. Dr. Cayton testified that there is insufficient evidence of objective measures of respiratory problems to support a conclusion that decedent's death was contributed to by his asbestosis. Tr. at 236. Contrary to claimant's contentions on appeal, Dr. Cayton's opinion was given to a reasonable degree of medical certainty and thus represents substantial evidence that asbestosis did not contribute to or hasten decedent's death.[4] *See Hawaii Stevedores*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 959, 31 BRBS 206, 210(CRT) (9th Cir. 1999); *O'Kelley*, 34 BRBS 39.

Moreover, claimant's reliance on *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT), to support her contention that Dr. Cayton's opinion is legally insufficient to rebut the presumption is unfounded. In *Rainey*, the administrative law judge found that the factual premise underlying a physician's opinion offered as support for rebuttal was false and that the opinion was based on a widely discredited medical theory; nonetheless, she found that the medical opinion rebutted the Section 20(a) presumption. *Rainey*, 517 F.3d at 635-637, 42 BRBS at 12-14(CRT). The court stated that in light of the inadequacies found by the administrative law judge in aspects of the physician's report, the administrative law judge "made clear her view that a reasonable mind would not accept [the report as evidence rebutting a causal relationship]." *Id.*, 517 F.3d at 637, 42 BRBS at 14(CRT). Thus, the *Rainey* court held that where an administrative law judge finds that a medical opinion is based on a false factual premise and depends on discredited medical theories, it necessarily follows that the opinion cannot, as a matter of law, constitute substantial evidence to rebut the Section 20(a) presumption. *Id.*, 517 F.3d at

[3]We reject claimant's contention that the administrative law judge's mischaracterization of Dr. Cayton as decedent's treating physician invalidates his reliance on Dr. Cayton's opinion to rebut the Section 20(a) presumption. On reconsideration, the administrative law judge specifically acknowledged this mischaracterization and provided other valid reasons for finding Dr. Cayton's opinion to be reliable. Order on Reconsideration at 3. Thus, the administrative law judge's error in originally mislabeling Dr. Cayton as one of decedent's treating physicians, Decision and Order at 20, is harmless. *See Hawaii Stevedores*, 608 F.3d at 648-649, 651-652, 44 BRBS at 48-49, 51(CRT).

[4]Dr. Cayton testified that he was "certain within 95 percent that [decedent] did not have asbestosis contribute to his death even one percent." Tr. at 249.

633, 42 BRBS at 11(CRT). As distinguished from *Rainey*, there is no conflict in this case between the administrative law judge's factual findings and the bases for Dr. Cayton's opinion. The administrative law judge specifically addressed the reasoning underlying Dr. Cayton's opinion and found the doctor's explanations for his conclusions to be reasonable. Decision and Order at 15-18, 20. The administrative law judge properly determined that Dr. Cayton's opinion can be accepted as reliable and probative evidence that decedent's asbestosis did not contribute to his death.[5] *See Hawaii Stevedores*, 608 F.3d at 651, 44 BRBS at 50(CRT).

Dr. Cayton's opinion is, in and of itself, sufficient to meet employer's burden to produce substantial evidence sufficient to rebut the Section 20(a) presumption. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 3(CRT); *O'Kelley*, 34 BRBS 39; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Thus, we need not reach claimant's assignment of error to the administrative law judge's finding that, notwithstanding his concerns about certain aspects of Dr. Breall's testimony, Dr. Breall's opinion rebuts the Section 20(a) presumption. *See Hawaii Stevedores*, 608 F.3d at 648-649, 651-652, 44 BRBS at 48-49, 51(CRT). We therefore affirm the administrative law judge's finding that the Section 20(a) presumption is rebutted. *See id.*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

Claimant also challenges the administrative law judge's finding that she did not establish a causal relationship between decedent's death and his asbestosis based on the record as a whole. We reject claimant's assertions of error in this regard. Once the Section 20(a) presumption has been rebutted, claimant bears the burden of establishing by a preponderance of the evidence that decedent's death was causally related to his employment. *See Hawaii Stevedores*, 608 F.3d at 650-651, 44 BRBS at 50(CRT); *see also Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT). In considering the evidence as a whole, the administrative law judge weighed the medical opinions and reports and the testimony of the medical experts, and concluded that claimant failed to carry her burden of persuasion. Decision and Order at 21-23. Specifically, the administrative law judge found the testimony of Dr. Hammer, that decedent's asbestosis played a role in his death, to be unconvincing. *Id.* at 20-21. He further found that while

[5]Claimant avers that Dr. Cayton's opinion is premised on the absence of a clinical, as opposed to a pathologic, diagnosis of asbestosis and that this premise conflicts with clinical findings made by Drs. Powers and Jay which, according to claimant, support a clinical diagnosis of asbestosis. We are not persuaded that, as a matter of law, the foundation for Dr. Cayton's opinion is undermined by the clinical findings by Drs. Powers and Jay such that his opinion could not satisfy a reasonable factfinder of the absence of a causal relationship between decedent's work-related asbestosis and his death. *See Hawaii Stevedores*, 608 F.3d at 651, 44 BRBS at 50(CRT).

the reports of Drs. Salyer, Powers and Jay demonstrate that decedent had Grade 3 asbestosis, these reports do not establish that decedent's asbestosis caused, contributed to or hastened his death by being a factor in his need for cardiac surgery or in the surgical complications which ultimately led to his death. *Id.* at 22-23. The administrative law judge concluded that the opinions of Drs. Cayton and Breall, that decedent's asbestosis played no role in the events leading to his death, were more persuasive than the evidence presented by claimant in support of her position that decedent's asbestosis contributed to his death. *Id.* at 23.

It is well-established that the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See Duhagon*, 169 F.3d at 618, 33 BRBS at 2-3(CRT); *see also Hawaii Stevedores*, 608 F.3d at 648, 44 BRBS at 48(CRT). We reject claimant's contention that the administrative law judge erred in evaluating the evidence of record, as the administrative law judge drew rational inferences from the medical evidence and reasonably concluded that claimant failed to establish by a preponderance of the evidence that decedent's asbestosis contributed to his death.[6] *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). We therefore affirm the administrative law judge's determination that claimant failed to establish that decedent's death was related to his employment as it is supported by substantial evidence. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

[6]Claimant argues on appeal that the findings of the administrative law judge are not supported by various pieces of documentary evidence and testimony. We need not address claimant's arguments in detail as the competing characterization of the record evidence offered by claimant does not provide a basis for overturning the administrative law judge's credibility determinations and evaluations of the evidence which are rational and supported by the record. *See, e.g., Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT).

Accordingly, the administrative law judge's Decision and Order Denying Claim and his Order Denying Claimant's Motion for Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge