

LORETTA LAMPHERE)	
(Widow of BRADLEY LAMPHERE))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Apr. 9, 2014</u>
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-LHC-02253, 2010-LHC-01362) of Administrative Law Judge Colleen A. Geraghty 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a protracted procedural history. Claimant's husband (decedent) worked for employer as a shipfitter from 1961 until he retired on January 29, 1997. During his employment with employer, decedent was exposed to asbestos, cadmium from welding fumes, and solvents. After being diagnosed with kidney cancer, decedent filed a claim for benefits under the Act. In an April 2007 decision, Administrative Law Judge

Sutton found that decedent's kidney cancer was not related to his work exposures to solvents, cadmium and asbestos, and he, therefore, denied decedent's claim. On decedent's appeal, the Board affirmed the administrative law judge's finding that decedent's kidney cancer was not related to his exposure to solvents, vacated his finding that employer established rebuttal of the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's kidney cancer was related to his exposure to asbestos and cadmium, and remanded the case for further consideration consistent with decision of the United States Court of Appeals for the Second Circuit in *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).¹ *B.L. [Lamphere] v. Electric Boat Corp.*, BRB No. 07-0709 (May 14, 2008).

In a Decision and Order on Remand dated October 9, 2008, Judge Sutton found that employer submitted evidence sufficient to rebut the Section 20(a) presumption. Thus, the administrative law judge again denied decedent's claim for benefits. *See n.1, supra*. On decedent's appeal, the Board affirmed the administrative law judge's conclusion that employer submitted into evidence medical testimony sufficient to rebut the Section 20(a) presumption linking decedent's cancer to his work exposures. Consequently, in light of its prior decision affirming the administrative law judge's findings based on the record as a whole, the Board affirmed the administrative law judge's conclusion that decedent's kidney cancer was not compensable. *B.L. [Lamphere] v. Electric Boat Corp.*, BRB No. 09-0128 (Aug. 31, 2009).

On October 2, 2009, decedent died due to his cancer. Decedent's widow (hereinafter claimant) subsequently filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a mistake in fact in the denial of the disability claim, and a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909. As Judge Sutton had retired, claimant's claims were assigned to Judge Geraghty (the administrative law judge) who, in an Order dated March 20, 2013, consolidated the claims for decision. In her Decision and Order, the administrative law judge found the evidence insufficient to invoke the Section 20(a) presumption that decedent's kidney cancer was causally related to his exposure to solvents. The administrative law judge found the evidence sufficient to invoke the Section 20(a) presumption that decedent's kidney cancer was related to his exposure to asbestos and cadmium and that employer submitted substantial evidence to rebut the presumption. After weighing the evidence as a whole, the administrative law judge concluded that claimant did not meet her burden of proving that decedent's exposure to asbestos and cadmium caused or contributed to

¹ In the interest of judicial efficiency, the Board further held that, if on remand, the administrative law judge found the Section 20(a) presumption rebutted, substantial evidence supported the administrative law judge's findings on the record as a whole that decedent's kidney cancer was not work-related.

decedent's kidney cancer or caused or hastened his death. The administrative law judge therefore denied the claims for benefits under the Act.

On appeal, claimant contends the administrative law judge erred in failing to invoke the Section 20(a) presumption linking decedent's kidney cancer to his work-related exposure to solvents. Claimant also challenges the administrative law judge's finding that the evidence as a whole does not establish that decedent's kidney cancer was related to his exposures to asbestos and cadmium. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Section 22 of the Act provides the only means for changing otherwise final decisions. Modification pursuant to Section 22 is permitted if the petitioning party demonstrates a mistake in a determination of fact, *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), or a change in the claimant's physical or economic condition, *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), at any time prior to one year after the last payment of compensation or the rejection of a claim. 33 U.S.C. §922. The modification petition alleged, *inter alia*, that the denial of the disability claim was based on a mistake in fact concerning the solvents to which decedent had been exposed. In general, Section 9 of the Act provides for death benefits to certain survivors where a work-related injury causes or hastens an employee's death. 33 U.S.C. §909; *see Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

Claimant first challenges the administrative law judge's finding that the evidence she presented is insufficient to invoke the Section 20(a) presumption that decedent's kidney cancer was related to his exposure to work-place solvents. In order to be entitled to the Section 20(a) presumption, claimant must establish a prima facie case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused the harm or hastened death. *See Rainey*, 517 F.3d 632, 42 BRBS 11(CRT); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

In support of the motion for modification, claimant asserted to the administrative law judge that decedent was exposed to solvents containing benzene and trichloroethylene (TCE) while working for employer. Specifically, claimant contended that the newly submitted Material Safety Data Sheets (MSDS) establish that employer used solvents containing benzene and TCE at its facility while decedent worked there. *See CX 21*. Thus, claimant argued that it was more probable than not that decedent was exposed to solvents containing benzene and TCE which could have caused his kidney cancer. *See Cl. Br.* at 11-14. In her decision, the administrative law judge found that:

there is no evidence at all that Decedent was actually exposed to any solvent containing benzene, TCE or any other carcinogen. The only evidence is Decedent's testimony that he was exposed to unnamed solvents and paint cleaners. There is no evidence identifying specific solvents or paint cleaners or their chemical composition. The mere fact that three MSDS listed benzene as a component falls short of establishing that Decedent was **actually exposed** to any one of those three products.

Decision and Order Denying Benefits at 20-21 (emphasis added). The administrative law judge thus concluded that claimant did not establish that decedent actually had been exposed to any solvent that could have caused his kidney cancer. *Id.* at 21.

It is claimant's burden to establish that decedent was actually exposed to the substances alleged to have caused his kidney cancer. *See, e.g., Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). In this case, the administrative law judge addressed at length claimant's evidence, and she rationally concluded that claimant did not establish that decedent was actually exposed to any solvent that could have caused his kidney cancer. On appeal, claimant does not cite to evidence establishing a specific solvent to which decedent was exposed during his employment with employer, nor does claimant challenge the administrative law judge's finding that of the 166 MSMDs submitted into evidence only three referred to the component benzene while sixteen referred to a benzene derivative. *See* Decision and Order Denying Benefits at 17, 21. As the administrative law judge's finding that claimant did not present evidence sufficient to establish that decedent was actually exposed to solvents containing benzene is supported by substantial evidence, we affirm her finding that claimant failed to establish an essential element of her prima facie claim that decedent's kidney cancer was related to workplace exposure to solvents. *Brown*, 22 BRBS 284; *see U.S. Industries*, 455 U.S. 608, 14 BRBS 631.

Claimant next contends the administrative law judge erred in concluding, after weighing the evidence as a whole, that decedent's kidney cancer and death therefrom were unrelated to his work exposure to asbestos and cadmium. Once employer rebuts the Section 20(a) presumption, 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.² *See American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

² The administrative law judge invoked the Section 20(a) presumption with regard to claimant's claim that decedent's kidney cancer was related to his exposures to asbestos and cadmium. *See* Decision and Order Denying Benefits at 20. The administrative law judge's finding that employer rebutted the presumption, *id.* at 22-23, is not challenged on

In her decision, the administrative law judge noted that, as there is no direct evidence of a causal link between decedent's cancer and his exposure to asbestos and cadmium, both parties relied primarily upon expert opinions discussing epidemiologic evidence. Decision and Order Denying Benefits at 23. Specifically, the administrative law judge addressed whether that evidence conclusively establishes a "standard mortality ratio" (SMR) greater than 2.0 for kidney cancer resulting from asbestos or cadmium exposure.³ *Id.* at 23-27. Finding the Sali study for asbestos, which demonstrated an SMR of 1.1 for kidney cancer, to be the more persuasive study since it is the most recent and considered 37 other studies, the administrative law judge nonetheless found the epidemiologic evidence alone is not conclusive because the Sali study stated that a completely negative correlation between asbestos exposure and renal cancer is not justified. *Id.* at 25-26. The administrative law judge then addressed the opinions of Drs. Brautbar, Pulde, Gerardi, Harbison, Daum and McCabe. The administrative law judge credited Dr. Pulde's opinion that asbestos exposure did not contribute to decedent's kidney cancer and death. Dr. Pulde stated that asbestos fibers had not reached decedent's kidneys due to the absence of fibrosis in the kidneys, noting that the pathology report of the diseased kidney indicated the absence of any occupational kidney disease. EX 12. The administrative law judge also noted that Dr. Pulde opined decedent's occupational exposures were not additive risks for the development of kidney cancer given decedent's non-occupational factors. The administrative law judge stated that claimant had not introduced any evidence suggesting a synergistic effect between decedent's occupational exposures and his non-occupational risk factors. Therefore, the administrative law judge concluded that claimant did not establish by a preponderance of the evidence that decedent's kidney cancer was related to his asbestos exposure.

appeal and is, therefore, affirmed. *Scalio v. v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

³ In this regard, the administrative law judge referenced the explanation of the statistical language set forth by the United States Court of Appeals for the Second Circuit in *Maiorana v. U.S. Mineral Products Co.*, 52 F.3d 1124 (2d Cir. 1995). In *Maiorana*, the court stated that an SMR of 1.0 is the expected rate of contracting a disease in a population not influenced by the causal factor under consideration. An SMR of 2.0 means that the disease was as likely as not caused by the agent under investigation. An SMR greater than 2.0 means that the disease was more likely than not caused by the agent under investigation. If the SMR is between 1.0 and 2.0, the fact finder should address the epidemiologic evidence in conjunction with the decedent's clinical evidence and other risk factors in order to determine whether the agent more likely than not caused the disease. *See* Decision and Order at 23-24 (citing *Maiorana*, 52 F.3d at 1128).

With respect to cadmium exposure, the administrative law judge credited Dr. Harbison's opinion that the epidemiologic evidence does not support a link between cadmium exposure and kidney cancer. *See* EX 6 at 15-17; Tr. at 145-147. Specifically, the administrative law judge found that Dr. Harbison reported that the majority of studies addressing the possible link between cadmium exposure and kidney cancer show a statistically insignificant risk or demonstrate an SMR of less than 2.0. Dr. Harbison therefore concluded that exposure to cadmium did not contribute to decedent's cancer and death. Thus, the administrative law judge concluded that claimant did not establish that decedent's exposure to cadmium contributed to or caused his kidney cancer or hastened his death.

We reject claimant's contention that the administrative law judge erred in her evaluation of the medical and epidemiologic evidence. The administrative law judge fully and thoroughly addressed all the relevant evidence. It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw her own inferences and conclusions therefrom. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *see also 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). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The administrative law judge's finding that claimant did not establish that decedent's kidney cancer and death were related to his employment exposures is based on a rational weighing of the evidence and is supported by substantial evidence. We therefore affirm the administrative law judge's denial of disability and death benefits.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge