BRB No. 03-0859

NANCY RIGGS (Widow of ROBERT P. RIGGS, JR.) Claimant-Respondent v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Petitioner	)))))))))))	DATE ISSUED:Aug. 24, 2004 DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (03-LHCA-2937) of Administrative Law Judge Paul H. Teitler 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 for employer from 1961 through 1966, where his job duties exposed him to airborne asbestos fibers. On January 22, 1999, decedent was diagnosed with lung cancer. Following the decedent's death on March 1, 2001, claimant, decedent's widow, filed a claim pursuant to Sections 8(c) and 9 of the Act, 33 U.S.C.

§§908(c), 909, alleging that decedent's lung cancer and death were causally related to his occupational asbestos exposure.

The parties agreed, and the administrative law judge found, that claimant is entitled to invocation of the Section 20(a) presumption that decedent's lung cancer, and ultimately his death, were due at least in part to his asbestos exposure.[1] Next, the administrative law judge found that employer did not establish rebuttal of the Section 20(a) presumption, and therefore that decedent's lung cancer and death were work-related as a matter of law. Accordingly, the administrative law judge awarded claimant permanent partial disability and death benefits, as well as funeral expenses. 33 U.S.C. §§908(c), 909.

On appeal, employer argues that the administrative law judge erred in finding the opinions of Drs. Churg and Wick insufficient to establish rebuttal of the Section 20(a) presumption. Therefore, employer requests that the Board reverse this finding and remand the case to the administrative law judge to weigh the evidence as a whole. Claimant responds, urging affirmance of the administrative law judge's decision.

Once the Section 20(a) is invoked, as in the instant case, the burden shifts to employer to rebut the presumption with substantial evidence that the decedent's condition was not related to his employment. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If employer rebuts the presumption, it no longer controls and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with the claimant bearing the burden of persuasion. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, employer avers that the administrative law judge erred in concluding that the opinions of Drs. Churg and Wick are insufficient to rebut the Section 20(a) presumption. Dr. Churg, a pathologist, reviewed decedent's medical records, which included an x-ray and seventeen lung tissue slides.[2] Dr. Churg stated that the slides do not show evidence of asbestosis. He stated that he believes that the association

[1] Dr. Legier opined that decedent's lung cancer was caused by occupational exposure to asbestos. Cl. Ex. 4.

[2] Dr. Churg is Board-certified in anatomic pathology and has authored numerous articles and book chapters on occupational diseases. Emp. Ex. 14.

of asbestos exposure and lung cancer is based on the relationship of a specific disease, asbestosis, to lung cancer. As he found no evidence that decedent had asbestosis, he opined that asbestos exposure played no role in causing decedent's lung cancer and that it was due entirely to the decedent's cigarette smoking. Emp. Ex. 9.

Dr. Wick, who is also a pathologist, reviewed the same x-ray and slides as Dr. Churg, as well as six paraffin blocks.[3] Dr. Wick stated that the slides do not show asbestosis, which he opined to be "a prerequisite to a pulmonary carcinoma with asbestos exposure causatively." Emp. Ex.10. Rather, Dr. Wick found two definitive markers of significant tobacco inhalation, and he thereupon concluded, within a reasonable degree of medical certainty, "that asbestos exposure had nothing to do with the etiology of [decedent's] carcinoma, the sole cause of which was either active or passive tobacco smoke inhalation." *Id.*

The administrative law judge gave several reasons for finding that the opinions of Drs. Churg and Wick are insufficient to rebut the Section 20(a) presumption. For the reasons that follow, we cannot affirm the administrative law judge's determination on this issue. First, the administrative law judge found that to "allow the opinions of Dr. Churg and Dr. Wick to rebut the presumption is to preclude its invocation in the first instance." Decision and Order at 6. This rationale is faulty since claimant, in order to invoke the Section 20(a) presumption, need only establish that decedent sustained a harm and that he was exposed at work to something that could have caused his harm. *See Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999). In the instance case, the parties stipulated that the decedent had lung cancer and that he was exposed to asbestos; moreover, no party challenges the administrative law judge's invocation of the Section 20(a) presumption. Thus, the burden shifted to employer to produce substantial evidence that decedent's lung condition was not related to asbestos exposure; as employer's burden is one of production, the relative merits of each party's evidence is not weighed on rebuttal. The fact that the administrative law judge found Dr. Churg's opinion insufficient to prevent the Section 20(a) presumption from being invoked in the first instance does not preclude the opinion from rebutting the Section 20(a) presumption if it is "substantial evidence to the contrary." 33 U.S.C. §920(a); *see Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *see also Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

In addition, the administrative law judge stated that employer cannot rebut the Section 20(a) presumption with evidence of the absence of asbestosis, because the presumption does not in any way rely upon the existence of asbestosis; rather, it

[3] Dr. Wick is Board-certified in anatomic and clinical pathology. Emp. Ex. 13.

presumes that decedent's lung cancer was due at least in part to his exposure to asbestos while working for employer. Decision and Order at 6. However, while both Drs. Churg and Wick stated that decedent did not have asbestosis, they went on to opine that, as a result, decedent's lung cancer was not due to asbestos exposure.[4] Thus, if the opinions of Drs. Churg and Wick are otherwise "substantial evidence to the contrary" they rebut the presumed causal connection between decedent's lung cancer and his asbestos exposure. *See generally Harford,* 137 F.3d 673, 32 BRBS 45(CRT).

Next, the administrative law judge found the opinions of Drs. Churg and Wick to be insufficient to rebut the Section 20(a) presumption because they "are of a generic, non-specific nature and are largely unexplained," and because offering alternate theories of the epidemiological basis for decedent's lung cancer cannot rebut the presumption. Decision and Order at 6-7. These bases for rejecting employer's evidence cannot be affirmed. As we have stated, employer's burden on rebuttal is one of production only, not one of persuasion. *See Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *American Grain Trimmers,* 181 F.3d at 816, 33 BRBS at 75(CRT). In the instant case, both Dr. Churg and Dr. Wick stated that they reviewed claimant's medical records, which included an x-ray and pathological slides, and each respectively set forth the basis for his medical opinion that a diagnosis of asbestosis could not be made in this case. Emp. Exs. 9, 10. Thus, the administrative law judge's finding that these opinions are generic, non-specific and largely unexplained is not supported by the record. *See generally Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). Moreover, contrary to the administrative law judge's statement, these physicians did not merely suggest another causative agent, *see, e.g., Sinclair v. United Food & Commercial Workers,* 23 BRBS 148 (1989), but both specifically attributed decedent's lung cancer solely to tobacco smoke inhalation. *See Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

Lastly, the administrative law judge rejected the opinions of Drs. Churg and Wick because he found that "although Employer submitted a significant amount of medical and scientific literature in support of its position. . . .the record contains no in-depth analysis of this literature." Decision and Order at 7. There is no requirement that employer produce such an analysis in order to meet its burden of production. As the administrative law judge found, both parties submitted into evidence numerous articles and reports supportive of their respective positions on the issue of causation. Specifically, employer submitted into evidence eight exhibits in support of the opinions of Drs. Churg and Wick, Emp. Exs. 16-23, while claimant submitted twenty exhibits into the record. Cl. Exs. 8-27. This documentation is more relevant to the ultimate persuasiveness of the medical opinions, and the fact that the literature presents conflicting views cannot preclude a

[4] Both physicians found evidence of asbestos exposure on the specimens they examined. Emp. Exs. 9, 10.

finding of rebuttal where employer meets its burden of production. *See Leone*, 19 BRBS 100. Accordingly, as employer produced medical opinions given to a reasonable degree of medical certainty that decedent's lung cancer was not due to asbestos exposure but was due solely to tobacco inhalation, employer has satisfied its burden of production. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). As the opinions of Drs. Churg and Wick constitute substantial evidence that decedent's lung cancer was not caused or contributed to by his asbestos exposure, we reverse the administrative law judge's finding that Section 20(a) was not rebutted. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT).

On remand, the administrative law judge must weigh all the relevant evidence, without the benefit of the Section 20(a) presumption, and determine if claimant has met her burden of establishing that decedent's lung cancer was work-related. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge is entitled to weigh the evidence and to determine which medical opinions are more persuasive, and his findings must be affirmed if supported by substantial evidence. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT)(5th Cir. 2002). In so doing, the administrative law judge should evaluate the competing literature and medical opinions based thereon and determine which is most persuasive and thus entitled to greater weight. *See, e.g., Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1988), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table); *see also Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT).

Accordingly, we reverse the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. This 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge