

BRB No. 12-0091

MARGE SOTELO)
(Widow of JOSEPH SOTELO))
)
 Claimant-Petitioner)
)
 v.)
)
 CRESCENT CITY MARINE WAYS) DATE ISSUED: 10/25/2012
)
 and)
)
 SEABRIGHT INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order Denying Benefits of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Richard C. Wootton (Cox, Wootton, Griffin, Hansen & Poulos, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Denying Benefits (2009-LHC-00387, 00389, 01326, 0327) of Administrative Law Judge Russell D. Pulver 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).

Claimant's husband, the decedent, commenced working as a longshoreman during the 1960s. During the course of his employment, decedent allegedly was exposed to numerous airborne irritants. In 2003, decedent sought treatment for a dry cough and for shortness of breath. Decedent was diagnosed with bronchiectasis, and x-rays revealed the presence of an interstitial lung disease. Decedent last worked in longshore employment on May 18, 2006, when he was employed by employer as a foreman.¹ On September 11, 2006, decedent was hospitalized while on a visit to New York and diagnosed with interstitial lung disease and bronchiectasis. Decedent died on September 13, 2006. Claimant filed claims for death benefits under the Act against employer, and five additional employers for whom decedent had previously worked, averring that decedent's death was causally related to his work exposures to airborne irritants. 33 U.S.C. §909.² In controverting claimant's claim, employer presented a report by an industrial hygienist, Mr. Cohen, which states that the levels of airborne irritant exposure at employer's unloading facility were below the acceptable OSHA limits for an eight-hour workday. Prior to the formal hearing in this case, claimant entered into settlement agreements with the five employers for whom decedent worked prior to May 18, 2006, his last day of employment.

In his Decision and Order, the administrative law judge found claimant entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), that decedent's death was causally related to his employment. 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.

On appeal, claimant challenges the administrative law judge's findings that employer rebutted the Section 20(a) presumption and that claimant failed to establish by a preponderance of the evidence that decedent's death was related to his employment with employer. Employer responds, urging affirmance. Claimant has filed a reply brief.

¹Decedent worked for two different employers on May 15 and 17, 2006. On May 18, 2006, Mr. Ramirez, employer's supervisor whose responsibilities included overseeing longshoremen and foremen, and decedent were employed during the unloading of a barge, a process that took approximately three and one-half hours. Tr. at 42, 52-53, 82-85. Mr. Ramirez testified that since he was aware that decedent was having health problems, he instructed decedent to remain in his vehicle, which was parked 120 feet away from the barge that was being unloaded. *Id.* at 42-46, 65-66, 74.

²Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death." See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

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 with substantial evidence that decedent's death was not caused, contributed to 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 642, 44 BRBS 47(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this case, the administrative law judge found the opinion of Dr. McDonald sufficient to rebut the Section 20(a) presumption. Claimant challenges this finding, asserting that Dr. McDonald's opinion is neither specific nor comprehensive enough to sever the presumed causal relationship between decedent's death and his employment with employer on May 18, 2006. We reject claimant's contention. 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 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) (2^d 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 opinion 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).

The administrative law judge rationally determined that Dr. McDonald's opinion constitutes substantial evidence sufficient to rebut the Section 20(a) presumption. Decision and Order at 39-41. Dr. McDonald, who identified decedent's interstitial lung disease as one of idiopathic pulmonary fibrosis, based on the scarring identified in decedent's lungs, testified that there are no factors which are known to change or accelerate that disease. Tr. at 201-203, 210-211. Dr. McDonald testified that decedent's employment with employer on May 18, 2006, did not contribute to or accelerate decedent's underlying lung condition. *Id.* at 200-201, 206-209, 222-223, 234, 238. As this opinion constitutes substantial evidence that decedent's employment with employer on May 18, 2006, did not contribute to or accelerate his lung disease, and thus did not contribute to or hasten his death, we affirm the administrative law judge's finding that the

Section 20(a) presumption is rebutted.³ See *Hawaii Stevedores*, 608 F.3d at 651, 44 BRBS at 50(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1999); *O’Kelley*, 34 BRBS 39.

Claimant also challenges the administrative law judge’s finding that she did not establish a causal relationship between decedent’s death and his May 18, 2006, work-related exposure to airborne irritants 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). The administrative law judge found that neither Dr. Horn nor Dr. Bagheri testified to a reasonable degree of medical probability that the working conditions experienced by decedent on May 18, 2006 aggravated his interstitial lung disease or his bronchiectasis. Decision and Order at 42. Dr. Horn testified he was unaware of decedent’s employment activities on May 18, 2006, or the details of any possible exposures experienced by decedent on that day; Dr. Horn concluded that he did not know whether decedent’s exposures on that day contributed to his lung disease. *Id.* at 43; JX 69 at 58-59. The administrative law judge found that Dr. Bagheri also was not aware of decedent’s employment exposures on May 18, 2006, and that Dr. Bagheri did not connect decedent’s work with employer to an aggravation of decedent’s lung conditions. Decision and Order at 43; EX 65 at 57, 72-75. The administrative law judge concluded that only Dr. McDonald, who testified that decedent’s employment with employer on May 18, 2006, did not cause or aggravate his lung conditions, specifically offered an opinion regarding decedent’s work with employer on May 18, 2006. Decision and Order at 43.

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). Although Dr. Bagheri supposed that some sort of irritant may have caused decedent’s condition to worsen, the administrative law judge rationally found his testimony too speculative to

³Contrary to claimant’s assertion, Dr. McDonald’s testimony that the cause of decedent’s lung condition is unknown does not render his subsequent opinion, that decedent’s death is unrelated to his employment with employer, insufficient to rebut the presumption since employer is not required to establish another agency of causation in order to rebut the presumption. See *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982)(Kalaris, J., concurring and dissenting), *aff’d mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984).

support a connection between decedent's employment on May 18, 2006 and his fatal lung condition. 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 employment with employer on May 18, 2006, aggravated or contributed to his lung conditions.⁴ 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).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴As Dr. Bagheri's testimony does not establish an affirmative causal connection between decedent's May 18, 2006, employment and his lung conditions, we need not address claimant's contention that the administrative law judge erred in failing to give Dr. Bagheri's opinion "special weight" pursuant to the decision of the United States Court of Appeals for the Ninth Circuit in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999).