BRB No. 14-0022

CAROLYN RUBIDOUX (Widow of LEROY RUBIDOUX) Claimant-Petitioner v. OREGON SHIPBUILDING CORPORATION and GUNDERSON, INCORPORATED and POOLE, McGONIGLE and JENNINGS Employers-Respondents SAIF CORPORATION Carrier-Respondent	)	DATE ISSUED: Sept. 25, 2014 DECISION and ORDER

Appeal of the Decision and Order After Remand and Modification of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

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

Holly O'Dell (SAIF Corp.), Salem, Oregon, for carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order After Remand and Modification (2009-LHC-00472) of Administrative Law Judge Richard M. Clark 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This case is before the Board for a second time.

To recapitulate, decedent worked as a welder constructing and repairing ships for three employers, Oregon Shipbuilding Corporation (Oregon Ship), Poole, McGonigle and Jennings (PMJ), and Gunderson, Incorporated (Gunderson), from the third quarter of 1942 to the third quarter of 1944. EX 1 at 3-4. He died on March 16, 2007; the death certificate lists lymphoma as the cause of death. CX 7. Dr. Kagen opined that the death was related to decedent's occupational exposure to asbestos. CX 12. A medical assessment by Dr. Kagen rendered on August 25, 2006, notes that decedent was exposed to asbestos over the course of his career in subsequent occupations as a laborer, plasterer, insulator, welder and tire repairman. CX 11 at 3, 7, 9-11. Claimant, decedent's widow, filed a claim for death benefits based on the decedent's alleged occupational exposure to asbestos during the course of his covered employment as a welder from 1942 to 1944. 33 U.S.C. §909.

In the first decision, Administrative Law Judge Etchingham found, based upon *Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010), and *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), that the deposition testimony of decedent, and that of David Allen and Larry Rafferty, is insufficient to establish that decedent was exposed to asbestos at any of the shipyards. Accordingly, Judge Etchingham denied the claim for benefits under the Act.

Claimant appealed the denial of benefits, as well as the denial of her motion for a new hearing before a different administrative law judge. The Board affirmed Judge Etchingham's denial of the motion for a new hearing, but vacated the denial of the claim and remanded the case for further consideration. *Rubidoux v. Oregon Shipbuilding Corp.*, BRB No. 11-0510 (Mar. 21, 2012) (unpub.). Specifically, the Board stated that Judge Etchingham applied an incorrect legal standard with respect to Section 20(a) of the Act, 33 U.S.C. §920(a), when he stated that claimant must show exposure that was more than minimal and sufficient to cause the disease. *Id.* Rather, pursuant to *McAllister*, 627 F.3d 1293, 44 BRBS 89(CRT), the Board held that claimant had to produce only "some evidence" of asbestos exposure at a given employer's facility in order to establish working conditions that could have caused decedent's death.[1] *Rubidoux*, slip op. at 4.

[1]The Board, however, rejected claimant's assertion that the opinions of Dr. Rischitelli, that decedent "had a reliable history of (longshore) exposure sufficient to

The Board also directed Judge Etchingham, on remand, to conduct the Section 20(a) analysis separately, in reverse sequential order, for each of the three employers in this case, as directed by *McAllister*. *Id.*

On remand, the case was reassigned to Administrative Law Judge Richard M. Clark (the administrative law judge). While the case was pending before the administrative law judge, claimant filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, as well as a motion to reopen the record for the submission of additional evidence. In his decision, the administrative law judge initially denied claimant's request to reopen the record. After conducting a sequential analysis of potential work place exposure to asbestos under the "some evidence" standard, the administrative law judge found the evidence insufficient to invoke the Section 20(a) presumption against any employer. Thus, the administrative law judge again denied the claim. The administrative law judge also denied claimant's petition for modification.

On appeal, claimant challenges the administrative law judge's finding that she is not entitled to the benefit of the Section 20(a) presumption, and his denials of her motions to reopen the record and for modification. Employer responds, urging affirmance. Claimant has filed a reply brief.

Claimant asserts that the administrative law judge erred by not granting her motion to reopen the record to include the testimony of Dr. Kagan, as well as for clarification on the materials upon which Dr. R. Cohen relied in reaching his conclusion.[2] Claimant

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increase his risk for asbestos related cancers," and of Dr. R. Cohen, that "I suspect he had some asbestos exposure (in longshore employment)," represent "some evidence" sufficient to invoke the Section 20(a) presumption. Specifically, the Board observed that they are not supported by an adequate factual foundation and thus are legally insufficient to constitute "some evidence" of asbestos exposure at any of the employers. *Rubidoux*, slip op. at 6.

[2]Dr. R. Cohen based his deposition testimony on a one-page description of decedent's job duties, which was marked by claimant's counsel as "Exhibit A." Exhibit A to Dr. R. Cohen's deposition in actuality references the job duties of a "William Goodloe," rather than those of the decedent. Claimant's counsel maintained that "[a]lthough a review of the substance of the specific exhibit 'A' presented to and relied upon by Dr. Richard Cohen confirms that it correctly reflects the employment locations and the dates of such employment as alleged by decedent herein, the wrong claimant's name, William Goodloe, appeared on the document in place of the name 'Leroy Rubidoux' and apparently references to Mr. Goodloe's alleged exposures were also mistakenly inserted as pertaining to decedent." CX 18.

contends this evidence was admissible on modification notwithstanding Judge Etchingham's exclusion of this evidence.[3]

In his decision, the administrative law judge stated that claimant, on remand, sought to admit, either in person or by deposition, the testimony of Dr. Kagan and Dr. Kenneth Cohen, as well as the corrected testimony of Dr. Richard Cohen. Following a review of the procedural history of this case and Judge Etchingham's prior findings regarding the exclusion of this evidence, the administrative law judge denied claimant's request to reopen the record. With regard to the opinions of Drs. Kagan and K. Cohen, the administrative law judge found that this testimony was not admitted by Judge Etchingham because of claimant's lack of diligence. As Judge Etchingham had made a legal determination not to admit that testimony, the administrative law judge found claimant's request was "simply an attempt to re-litigate its (*sic*) failure to properly submit such evidence at the initial hearing, which was denied by Judge Etchingham." Decision and Order on Remand at 5. Additionally, the administrative law judge found that there was no mistake that needs clarification with regard to Dr. R. Cohen's testimony because it is clear, from a review of a discovery deposition taken by employer on June 14, 2014, during which claimant's counsel did not ask any questions, that Dr. R. Cohen assumed the document pertained to decedent when he rendered his opinion about asbestos exposure even though the name William Goodloe was on the document. *See* n. 2, *supra*. Furthermore, the administrative law judge separately considered this evidence in terms of claimant's petition for modification, finding it "unavailing even under the modification standard." Decision and Order at 21. The administrative law judge thus declined to reopen the record on remand or pursuant to claimant's motion for Section 22 modification.

In this case, claimant did not appeal Judge Etchingham's evidentiary rulings. Consequently, the administrative law judge did not abuse his discretion in refusing to admit, on remand, the evidence previously excluded by Judge Etchingham. *See Williams*

[3]The administrative law judge noted that Judge Etchingham had excluded Dr. Kagan's deposition because claimant failed to comply with the pre-trial order, and because a "simple reading" of that order would have allowed Dr. Kagan to testify as planned by claimant's securing a date certain for the hearing. He also noted that Judge Etchingham excluded the live testimony of Dr. K. Cohen because he was not on claimant's November 2009 pre-hearing list, he was added to a later witness list contrary to Judge Berlin's November 13, 2009 evidentiary order ("Claimant will take no further discovery without first obtaining an Order permitting such discovery based on a showing of good cause"), and because claimant indicated, in June 2010, that she would adhere to the content of the November 2009 witness list. Claimant did not appeal this aspect of Judge Etchingham's decision.

v. Marine Terminals Corp., 14 BRBS 728 (1981). The administrative law judge also rationally declined to admit this evidence pursuant to claimant's motion for modification because, in essence, the evidence, if credited, is insufficient to warrant a finding that the Section 20(a) presumption is applicable. Under Section 22 of the Act, 33 U.S.C. §922, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see generally Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009). The administrative law judge found that there is "simply insufficient evidence warranting a finding of some evidence of [d]ecedent's exposure to asbestos at any of the named employers." Decision and Order at 22. Specifically, none of the evidence reflects the doctors' personal knowledge of decedent's actual exposure to any asbestos while working at any of the three employers. Moreover, the administrative law judge found that Dr. Kagan's supposition about decedent's use of "asbestos rods" is not borne out by decedent's deposition testimony. *Id.* at 21. Granting modification does not "render justice under the Act" if it is clear that the moving party's submissions would not alter the substantive award. *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002). Claimant has not shown that the administrative law judge abused his discretion in not admitting additional evidence pursuant to Section 22, and thus we affirm the administrative law judge's exclusion of the evidence at issue.

Claimant next contends the administrative law judge erred in finding the Section 20(a) presumption inapplicable. Claimant maintains that decedent's deposition, as corroborated by those of David Allen and Larry Rafferty, establishes the presence of asbestos products and friable asbestos dust to which decedent was exposed during his work for all three employers between 1942 to 1944.

To establish a prima facie case, the claimant must show that the decedent sustained a harm and that conditions existed or an accident occurred at work which could have caused the harm. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In *McAllister*, the Ninth Circuit stated that, in order to invoke the presumption, a claimant must offer "some evidence" of both factors. *McAllister*, 627 F.3d at 1298, 44 BRBS at 91(CRT). The Ninth Circuit also held that proper application of the Section 20(a) presumption in a multi-employer, occupational disease case requires that the presumption be invoked against each employer and if not invoked against a particular employer, that employer may not be held liable. *Id.*, 627 F.3d at 1299, 44 BRBS at 91(CRT).

The administrative law judge extensively reviewed the deposition testimony of

decedent, Mr. Allen and Mr. Rafferty, as well as the medical evidence of record, consisting of the deposition of Dr. R. Cohen, the hearing testimony of Dr. Rischitelli, and the August 25, 2006 report of Dr. Kagan. The administrative law judge found that decedent did not testify to any asbestos exposure with any of the named employers. Addressing first decedent's work in 1944 with Gunderson, the administrative law judge found that decedent's generalized testimony that he performed welding tasks on new construction landing craft ships, which he described as open barges, and that he did not recall seeing any insulation going into these ships for motors or exhaust, CX 3 at 8, is insufficient to constitute "some evidence" of working with, or exposure to, asbestos while at that facility. The administrative law judge next found that the experiences of Mr. Rafferty and decedent, both in the years they worked at Gunderson, and in the circumstances of such work were substantially different. Specifically, the administrative law judge found that decedent worked at Gunderson in 1944, while Mr. Rafferty worked there in 1948, and that the four-year difference in employment, under different conditions of war and peace, made it difficult to "harmonize" Mr. Rafferty's experience with decedent's. Decision and Order at 15; CXs 1, 5. Additionally, the administrative law judge found that Mr. Rafferty testified to different employment tasks than those to which decedent testified.[4] CX 5. Furthermore, the administrative law judge found that even if he were to consider Dr. Kagan's assertion that decedent at some time used asbestos-containing welding rods, there is no indication that these rods were used specifically at Gunderson. The administrative law judge thus concluded that claimant did not produce "some evidence" of decedent's asbestos exposure at Gunderson. He next considered decedent's work for PMJ and Oregon.

The administrative law judge found that at PMJ, decedent stated he worked repairing already existing ships and that he spent about 75 percent of his time working outside rather than inside ships. He recalled that these repairs were primarily made on Russian and foreign fishing and cannery ships. CX 2 at 14-16. Decedent stated that his PMJ employment was the only work where he did some pipe welding, but he denied removing or installing any insulation while performing his welding duties or doing any work on boilers or witnessing any insulation of boilers. *Id.* at 14-16, 18. Decedent stated that PMJ had "helpers" who would clear and remove insulation, and he denied seeing anyone insulating the pipes after they were repaired. *Id.* The administrative law judge also found that neither Mr. Rafferty nor Mr. Allen testified to working at PMJ, and that Dr. Kagan's reference to decedent's exposure to asbestos rods at PMJ is not supported in

[4]Specifically, Mr. Rafferty stated he worked on boilers, handled refractory, removed pipe insulation, and was present during the cleanup of debris. CX 5 at 13-20, 27, 40-42. Decedent testified that he did not recall seeing any insulation being installed at Gunderson and did not mention any involvement in the tasks specified by Mr. Rafferty. CXs 1 at 4, 3 at 7.

any way by decedent's deposition testimony. Decision and Order at 17. Thus, the administrative law judge concluded that claimant did not introduce "some evidence" of asbestos exposure at PMJ.

With respect to decedent's first employer, Oregon Ship, the administrative law judge also found decedent's testimony insufficient to constitute "some evidence" of asbestos exposure. Decedent denied that insulators worked in the same compartments where he worked. CX 1 at 9-10. Decedent stated that the only insulating he saw on the ships was that of "minimum pipes," and that he felt that most of the insulating work, such as the insulating of propulsion boilers, occurred after his welding tasks had been completed. *Id.* at 13. Decedent testified that he welded flats and bulkheads and denied welding pipes or wrapping any pipes with insulation because he stated that was a special type of welding performed by steamfitters. *Id.* at 8-9. Moreover, although decedent testified that pipes were wrapped either in rolls of "flexible material" or in a "mixture, like mud" similar to what he used in his plastering career, he denied using that material on the ships and did not see the packaging or have any knowledge of who manufactured these insulating materials. *Id.* at 10. Furthermore, in describing his general working conditions on the ships at Oregon Ship, decedent stated that everything on the ships was "new" and that the "only dirt" came from "slag," which was comprised of welding debris. *Id.* at 12. Decedent said that the only dusty areas were the ship's double bottoms, a place he worked every "once in a while," although he did not discuss any link between this dust and asbestos and instead referred to this dust as the "slag" created by the welding process. *Id.*

Moreover, the administrative law judge found that while the testimony of Mr. Allen and Mr. Rafferty establishes that they were exposed to asbestos in the course of their work at Oregon Ship, the location and nature of that work were substantively different from the work environment in which decedent stated he worked. Whereas Mr. Allen and Mr. Rafferty described working on the outfitting dock in proximity to insulators, mixing asbestos refractory, using asbestos gloves and blankets, working in and around boilers, and cutting and working with gaskets, CX 4 at 3-4, 10-13: CX 5 at 17-22, 32, 39-40, decedent, who worked on the building ways rather than the outfitting dock, denied having any direct contact with asbestos, handling insulation directly, and using any asbestos-based protection such as gloves or blankets, noting instead that he wore leather gloves and a leather jacket while welding. CX 1 at 5-6, 8, 13. Additionally, while Mr. Allen and Mr. Rafferty each testified to exposure to asbestos dust, decedent attributed his dust exposure to slag. *Compare* CXs 4 at 12-13, 5 at 17 *with* CX 2 at 12. Thus, the administrative law judge concluded that claimant failed to establish that decedent was exposed to asbestos at Oregon Ship.

The administrative law judge is entitled to weigh the evidence and to draw his own inferences and conclusions therefrom. The Board is not empowered to reweigh the

evidence, but must affirm the administrative law judge's weighing of the evidence if it is rational. *See generally Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *King v. Director, OWCP*, 904 F.2d 17, 23 BRBS 85(CRT) (9th Cir. 1990); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In this case, the administrative law judge reviewed the evidence of record pursuant to applicable law, and his finding that claimant did not establish the working conditions element necessary for invocation of the Section 20(a) presumption is supported by substantial evidence. Contrary to claimant's contention, *McAllister* does not dictate the finding that she offered sufficient evidence for invocation of the Section 20(a) presumption. Unlike *McAllister*, there is no statement by decedent, whether in his deposition testimony, or made to a physician, to a co-worker or to claimant, that he was exposed to asbestos during his work for any of these three employers.[5] Additionally, while Mr. Allen and Mr. Rafferty describe the use of asbestos in their work at Oregon Ship and Gunderson, neither witness stated, as had a witness in *McAllister*, that members of "almost all" other crafts were in the vicinity when asbestos materials were being installed.

It is claimant's burden to establish each element of her prima facie case. *See McAllister*, 627 F.3d 1293, 44 BRBS 89(CRT); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). As the administrative law judge's findings that claimant did not produce "some evidence" sufficient to establish the working conditions element and thus, is not entitled to invocation of the Section 20(a) presumption, are rational, supported by substantial evidence and are in accordance with law, they are affirmed. We, therefore, affirm the administrative law judge's denial of death benefits.

[5]Decedent remembered working with asbestos only in subsequent non-covered construction employment with J.C. Peacock, Incorporated, during the period from 1949-1957. Specifically, decedent recalled personally adding raw asbestos to a cement/sand mixture one or two times a month for use in a plastering gun, although his primary work involved being a nozzle-man spraying that mixture onto walls. CX 2 at 275-276, 286-289.

Accordingly, the administrative law judge's Decision and Order After Remand and Modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge