

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 20-0188

THOMAS BENCHLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SERVICE EMPLOYEES	)	
INTERNATIONAL, INCORPORATED c/o	)	DATE ISSUED: 04/19/2021
KBR CLAIMS DEPARTMENT	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE	)	
OF PENNSYLVANIA c/o AIG GLOBAL	)	
CLAIMS	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Larry A. Temin,  
Administrative Appeals Judge, United States Department of Labor.

Scott L. Thaler (Grossman Attorneys at Law), Boca Raton, Florida, for  
Claimant.

James M. Mesnard (Postol Law Firm, P.C.), McLean, Virginia, for  
Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and  
JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Larry A. Temin's Decision and Order Denying Claim (2018-LDA-00952) pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant allegedly developed a pulmonary injury as a result of his work as a truck driver for Employer in Iraq.<sup>1</sup> From July 2004 to July 2010, he drove eighteen-wheelers for Employer which, he alleges, exposed him to noxious fumes and smoke from burn pits. EX 44, Dep. at 12, 14, 18-20.

Claimant thereafter worked in the United States in 2013 as a truck driver but stopped altogether in 2017 because of shortness of breath.<sup>2</sup> HT at 61, 88-93; EX 44, Dep. at 29. Dr. Nassar Al-Zubaidi, who treated Claimant from December 13, 2017 through November 2018, diagnosed moderate persistent asthma without complication, restrictive lung disease, diaphragmatic weakness, and dyspnea on exertion. CX 9. He opined Claimant's asthma-like illness is secondary to exposure to burn pits and it is possible Claimant's exposure in Iraq could have resulted in his diaphragmatic weakness. *Id.* Claimant then treated with Dr. Wilfred VanderRoest who, on March 13, 2019, diagnosed hemidiaphragmatic paralysis, restrictive lung disease, chronic neuromuscular respiratory failure, mild persistent reactive airway disease without complication, silicosis, and occupational lung disease. CX 17. Dr. VanderRoest stated he had "no doubt" Claimant's interstitial disease is due to inhalation of silica "plus or minus inhalation of noxious smoke from burning pits in the Middle East." *Id.*

Claimant also received pulmonary evaluations from Drs. Marc M. Dunn and Frederic Gerr. EXs 42, 54. In his January 11, 2019 report, Dr. Dunn diagnosed dyspnea, restrictive lung disease and diaphragmatic paralysis and opined Claimant's conditions

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<sup>1</sup>Claimant also claimed he developed Bell's palsy due to the conditions of his employment. The administrative law judge denied this claim, and Claimant has not appealed this finding. Thus, it is affirmed. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

<sup>2</sup>Claimant stated he experienced some coughing and wheezing while in Iraq, but no breathing difficulties until after his return to the United States. EX 44, Dep. at 21, 28-29. He stated his condition has progressively worsened. *Id.*, Dep. at 27, 29, 44-45; HT at 54, 59-60.

were not caused or aggravated by his work in Iraq.<sup>3</sup> EX 42. Dr. Gerr issued a May 24, 2019 report, wherein he diagnosed a paralyzed right diaphragm, with dyspnea. EX 54. He opined Claimant's work in Iraq did not cause or aggravate his pulmonary condition as the paralyzed right diaphragm is a neurological condition, not a disease of the lung tissue itself, and the restrictive physiology exhibited on pulmonary function testing is entirely explained by his paralyzed diaphragm and obesity. *Id.*

The administrative law judge found Claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), that his respiratory conditions are related to his work exposures, but Employer rebutted it. He found, based on the record as a whole, Claimant did not establish that his work exposures to dust and burn pits caused, contributed to, accelerated and/or aggravated his respiratory conditions. He thus denied benefits.

On appeal, Claimant challenges the administrative law judge's finding that Employer rebutted the Section 20(a) presumption that his respiratory conditions are work-related. Employer responds, urging affirmance of the administrative law judge's decision.

Where, as here, the Section 20(a) presumption applies to link Claimant's harm with his employment exposures, the burden shifts to Employer to rebut it by producing substantial evidence that the injury was not caused or aggravated by Claimant's working conditions. 33 U.S.C. §920(a); *see, e.g., Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Employer need only "advance evidence to throw factual doubt on the prima facie case." *Id.*, 683 F.3d at 231, 46 BRBS at 28-29(CRT).

The administrative law judge found Employer produced substantial evidence of the absence of a relationship between Claimant's pulmonary illnesses and his work for Employer through the opinions of Drs. Dunn and Gerr, who each opined Claimant's pulmonary conditions were not caused or aggravated by his work in Iraq. He thus concluded Employer rebutted the Section 20(a) presumption. We affirm.

The opinions of Drs. Dunn and Gerr rejecting the diagnoses of Drs. Al-Zubaidi and VanderRoest and stating that Claimant's pulmonary conditions were not caused or aggravated by his work in Iraq constitute substantial evidence to rebut the Section 20(a) presumption. EXs 42; 46, Dep. at 25-26, 48, 50-51; 52; 53; 54 at 7; 57; 59, Dep. at 13-14,

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<sup>3</sup>He attributed Claimant's restrictive lung disease to his obesity and stated Claimant's diaphragmatic dysfunction is either congenital or associated with a variety of lung diseases, none of which he thought could be caused by exposure to burn pits. EX 46, Dep. at 48.

17-18, 20, 38, 57, 58. Contrary to Claimant's contention, both Dr. Gerr and Dr. Dunn reviewed the CT scan of Claimant's chest which "showed scattered interstitial infiltrates of both lung fields,"<sup>4</sup> EXs 42 at 3; 54 at 2, 5. Additionally, they each rejected Dr. VanderRoest's opinion that Claimant has interstitial disease due to his employment exposures.<sup>5</sup> CX 17 at 6.

Moreover, the administrative law judge found Employer offered substantial evidence that neither Claimant's diaphragmatic paralysis nor his restrictive lung dysfunction is related to his work in Iraq. Decision and Order at 46. Dr. Dunn stated diaphragmatic dysfunction usually results from "some kind of injury" to the phrenic nerve and is not related to Claimant's work exposures. EX 46, Dep. at 23-24, 25, 26, 48, 50-51. Dr. Gerr stated Claimant's diaphragmatic paralysis is likely the result of an injury to the nerve. He opined the onset of this condition was sometime between Claimant's motorcycle crash in September 2011 and the x-ray that first showed asymmetry in 2012, and not Claimant's overseas exposures which ended in 2010. EX 59, Dep. at 62-63.

As the opinions of Drs. Dunn and Gerr satisfy Employer's burden to produce substantial evidence that Claimant's pulmonary conditions are not work-related, we affirm the administrative law judge's finding that Employer rebutted the Section 20(a)

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<sup>4</sup>Claimant's references to a chest CT scan dated January 11, 2018, are incorrect as no such test exists in the record. As Employer notes, the purported January 11, 2018 chest CT scan cited by Claimant as the linchpin of Dr. VanderRoest's opinion is, in actuality, the December 18, 2017 chest CT scan which was reprinted on different letterhead with a "DOS" for the reprint of January 11, 2018. CX 9 at 50.

<sup>5</sup>Dr. Gerr directly disagreed with Dr. VanderRoest's diagnosis of silicosis, which he noted was the "only 'interstitial disease' among those in Dr. VanderRoest's assessment." EX 54 at 6. He opined Claimant "does not have silicosis" because "he neither had exposures that are known to cause silicosis, nor does he have radiographic findings that are consistent with silicosis." EX 59, Dep. at 23-25. Dr. Gerr's statement that "I don't think that [Claimant] has disease of the lung tissue itself" further refutes Dr. VanderRoest's diagnosis of "interstitial disease." *Id.*, Dep. at 58. Similarly, Dr. Dunn, in his addendum dated May 23, 2019, stated Dr. VanderRoest's "diagnosis of silicosis is not substantiated." EX 53. While Dr. Dunn diagnosed Claimant with a restrictive lung disease, which he defined as "diseases of the chest wall" or "diseases of interstitium" that "can cause scarring and contraction of the lungs," EX 46, Dep. at 30-31, he agreed Claimant's overseas work had nothing to do with that condition. *Id.*, Dep. at 51. Moreover, Dr. Al-Zubaidi repeatedly stated the December 2017 "CT chest showed no specific parenchymal lung disease," CX 9 at 18, 23, 32, 36, 44; EX 18 at 4, which also belies a diagnosis of interstitial lung disease.

presumption. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). Moreover, we affirm the administrative law judge's finding that Claimant did not prove by a preponderance of the evidence that his pulmonary conditions are due to his work exposures in Iraq as it is unchallenged on appeal. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). Consequently, we affirm the administrative law judge's denial of benefits relating to Claimant's pulmonary condition.

Accordingly, we affirm the administrative law judge's Decision and Order Denying Claim.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge