

BRB No. 01-298

FLORA SISTRUNK	)	
(Widow of B.J. SISTRUNK)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	DATE ISSUED: <u>Nov. 26, 2001</u>
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Scott O. Nelson (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Donald P. Moore (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (1993-LHC-6767) of Administrative Law Judge Lee J. Romero, Jr., 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 as a welder/burner beginning in the 1940's and continued until his retirement in the 1980's. Cl. Ex. 33; Emp. Ex. 13-92. Employer stipulated that asbestos products were present at its facility during the time decedent worked

there. Decision and Order at 2. In 1985, decedent was examined by Dr. Lorino, his treating physician, and diagnosed with asbestos-related lung disease. Cl. Ex. 3. Decedent died on January 13, 1995, due to respiratory failure caused by cancer of the lung with diabetes mellitus listed as a contributing factor. Cl. Ex. 26. On March 13, 1995, claimant, decedent's widow, filed a claim for benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, and employer timely filed a notice of controversion. Cl. Ex. 30.

The administrative law judge determined that claimant established a *prima facie* case, invoking the Section 20(a), 33 U.S.C. §920(a), presumption, by showing that decedent's death was due to a tumor in his lungs and that asbestos was present at employer's facility during decedent's employment. Decision and Order at 13. The administrative law judge further found that employer rebutted the presumption by presenting substantial evidence that decedent's employment did not cause, aggravate or contribute to his death. Specifically, the administrative law judge found that employer produced medical reports showing that decedent's death was not attributable to an asbestos-related disease. *Id.* at 14. Therefore, he found that the Section 20(a) presumption drops from the case, and the case must be decided on the record as a whole with claimant bearing the burden of proof. After reviewing a multitude of medical records, the administrative law judge credited the opinions of Drs. Cagle and Jones over those opinions proffered by claimant. He found that the pathology report from the hospital and the well-reasoned opinions of those two doctors led to the conclusion that decedent's tumor was the result of his history of smoking cigarettes and was not asbestos-related. *Id.* at 17-18. The administrative law judge also noted that claimant had not presented any evidence specifically stating that decedent was exposed to asbestos while working for employer. *Id.* at 15. Accordingly, he denied benefits. *Id.* at 19. Claimant appeals this decision, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding that claimant did not establish by a preponderance of the evidence that decedent suffered from a work-related disease. She argues that the administrative law judge denied benefits based on his erroneous finding there was no evidence of exposure to asbestos. Employer responds, arguing that substantial evidence supports the administrative law judge's decision.

In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5<sup>th</sup> Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the death to the employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related

to the employment. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5<sup>th</sup> Cir. 2000); *American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *See Prewitt*, 194 F.3d 684, 33 BRBS 187(CRT); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that claimant established both a harm, lung cancer, and working conditions, the presence of asbestos at employer's facility, and he properly invoked the Section 20(a) presumption. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). The administrative law judge then found that employer presented substantial evidence to rebut the presumption in that it proffered the medical reports of Drs. Cagle and Jones showing that claimant's lung cancer was not asbestosis or an asbestos-related disease and that it was caused by decedent's history of smoking cigarettes. The finding that the Section 20(a) presumption is rebutted is also supported by substantial evidence of record and is affirmed. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Therefore, the issue of whether decedent's death was related to his work was properly addressed on the record as a whole requiring claimant to prove her claim by a preponderance of the evidence. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

In support of her contention that the administrative law judge erred in weighing the evidence as a whole, claimant relies on Section 23(a) of the Act which provides in relevant part:

Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

33 U.S.C. §923(a). Thus, claimant asserts that decedent's statements conclusively establish he suffered from a work-related injury. We disagree. Pursuant to Section 23(a) of the Act, the declarations made by decedent regarding his injury, *see* Emp. Ex. 13, which appear to be corroborated by other evidence of record, *see* Cl. Exs. 2, 17; Emp. Ex. 5, are sufficient to establish that decedent sustained a harm. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990)

(Dolder, J., concurring in result only). Contrary to claimant's contention, Section 23(a) does not render those declarations conclusive proof of a work-related injury. Rather, Section 23(a) assists claimant in establishing an element of a *prima facie* case. *Id.* In this case, the administrative law judge invoked the Section 20(a) presumption, but found it rebutted; thereafter, the administrative law judge was not required to credit decedent's statements in his review of the record as a whole. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).

In denying claimant's claim for death benefits based on the record in its entirety, the administrative law judge found that decedent's death was not caused, contributed to, or aggravated by his exposure to asbestos at employer's facility, but was caused by carcinoma, cancer, related to his history of cigarette smoking.<sup>1</sup> Decision and Order at 17-18. Specifically, the administrative law judge reviewed all the medical evidence and credited the opinions of Drs. Cagle and Jones because they were more consistent with the hospital x-ray, CT and biopsy reports. Cl. Exs. 9-17; Emp. Exs. 5, 7. The x-ray reports consistently revealed an abnormality in the right upper lung and relative normalcy in the remaining lobes. The right upper lobe biopsy revealed the abnormal tissue to be "poorly differentiated carcinoma with undifferentiated large cell carcinoma." It was fibrotic and focally necrotic lung tissue and contained multiple ferruginous bodies. Cl. Ex. 17. The report explained that the ferruginous bodies were not of the asbestos type, but that occasional bodies showed morphologic characteristics of asbestos bodies. *Id.* Dr. Cagle reviewed decedent's records and slides, and on June 20, 2000, he opined that within reasonable medical probability decedent's lung cancer was caused by smoking cigarettes and not due to asbestos exposure. He stated that in the absence of asbestosis, lung cancer cannot be attributable to exposure to asbestos and that there was no lung parenchyma available for the evaluation of the presence or absence of asbestosis. Thus, his diagnosis was poorly differentiated carcinoma with extensive necrosis. Emp. Ex. 7.

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<sup>1</sup>Any error in the administrative law judge's statement that claimant did not present evidence to show that decedent "sustained asbestos exposure" at employer's facility is harmless because the basis for the denial of benefits was not the lack of exposure but, rather, the administrative law judge's crediting of substantial evidence establishing that decedent's death was not work-related.

Dr. Jones also reviewed decedent's records and x-rays. On July 30, 2000, he reported that the biopsy established lung cancer and that the radiographic studies showed evidence of pleural plaques; however, he located no evidence of asbestosis or other diffuse interstitial lung disease. Because he found there was no tissue available for determination of the presence or absence of asbestosis, such a determination could only be made from the x-rays, and then only if the x-rays showed lung scarring. In this case, Dr. Jones found there was no evidence of lung scarring and, therefore, no evidence of asbestosis. Emp. Ex. 5. This interpretation is supported by the hospital findings. Cl. Ex. 17. Dr. Jones, like Dr. Cagle, related decedent's lung cancer solely to his cigarette smoking.<sup>2</sup> Emp. Ex. 5.

The administrative law judge credited the opinions of Drs. Cagle and Jones, and he found that decedent's disease was not asbestos-related and, therefore, was not work-related. Decision and Order at 17-18; *Hice v. Director, OWCP*, 48 F.Supp. 2d 501 (D.Md. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 89 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999). It is within the administrative law judge's discretion to credit and weigh the evidence. *Calbeck*, 306 F.2d 693; *Donovan*, 300 F.2d 741; *Hughes*, 289 F.2d 403; *Heyde*, 306 F.Supp. 1321. As his finding is rational and is supported by substantial evidence of record, we affirm the denial of benefits. *Coffey*, 34 BRBS 85; *Duhagon*, 31 BRBS 98.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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<sup>2</sup>Dr. Jones stated that any asbestos-related lung disease present in 1985 would still be present in the 1995 studies. As such disease was absent from the 1995 studies, he concluded that Dr. Lorino must have misinterpreted the 1985 x-rays. Emp. Ex. 5.

NANCY S. DOLDER  
Administrative Appeals Judge