

BRB No. 91-2177A

NAN PARKS (Widow of HERMAN)	
W. PARKS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED:
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins), Newport News, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (90-LHC-2556) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).
seq. (the Act).¹ 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).

Claimant's husband (decedent) worked for employer from 1942 to 1945 as a handyman and joiner, and from 1961 to 1979 as a joiner. During the course of his employment he was exposed to asbestos. He also had a 60 pack year history of cigarette smoking. Decedent was diagnosed with emphysema in 1965, chronic bronchitis in 1975 and moderately severe chronic obstructive pulmonary disease in 1979. He retired in 1979 due to chronic lung disease. In March 1988 he was diagnosed with lung cancer, which proved fatal on December 5, 1989. On April 20, 1990, claimant filed a claim for death benefits under the Act. *See* 33 U.S.C. §909.

The parties disputed the cause of death, which employer attributed solely to cigarette smoking. Claimant averred that death was due, at least in part, to occupational exposure to asbestos. The administrative law judge found that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was due, at least in part, to asbestos exposure and that employer produced substantial evidence to rebut the presumption. Accordingly, the administrative law judge addressed the cause of decedent's death based on the record evidence as a whole.

He found that all three medical experts of record are well-qualified and that their opinions appear rationally based in fact. In this regard, claimant proffered the opinion of Dr. Roggli that decedent had asbestosis and that his death was due, at least in part, to occupational exposure to asbestos. Employer proffered the medical opinions of Drs. Craighead and Ross. They opined that there was no evidence of asbestosis and that decedent's death due to lung cancer is not attributable in any way to his asbestos exposure. The administrative law judge found that, based on the evidence of record, it is not possible to find either parties' experts more qualified or credible. Accordingly, he determined that the evidence regarding the cause of death is in equipoise. The administrative law judge found, therefore, that the true doubt rule is applicable to resolve the evidentiary conflict, and he concluded that decedent's lung cancer was related to asbestos exposure during the course of his employment with employer. Claimant was awarded death benefits, and employer was found entitled to Section 8(f) relief from continuing compensation liability. 33 U.S.C. §908(f). On appeal, employer contends that the administrative law judge erred by applying the true doubt rule to find that decedent's lung cancer and death were caused by work-related asbestos exposure. Claimant responds, urging affirmance.

Employer challenges the administrative law judge's application of the true doubt rule. The true doubt rule requires that claimant be afforded the benefit of the doubt when there is conflicting but equally probative evidence for and against the existence of a particular fact, or when the evidence for and against entitlement to benefits is in equipoise. *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Thompson v. Northwest Eviro Services, Inc.*, 26 BRBS 53 (1992). Employer contends that the Administrative Procedure Act (APA) does not permit application of the true doubt rule to cases arising under the Act. See 5 U.S.C. §554 *et seq.*

Section 19(d) of the Act, 33 U.S.C. §919(d), provides that hearings shall be conducted in accordance with the APA. As supporting authority for its contention that the APA does not allow the administrative law judge to rely on the true doubt rule, employer cites *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993). In *Maher Terminals*, the United States Court of Appeals for the Third Circuit held that Section 7(c) of the APA, 5 U.S.C. §556(d), which requires that claimant bear the burden of proof, prohibits application of the true doubt rule to cases arising under the Act. *Id.*, 992 F.2d at 1284, 27 BRBS at 11-12 (CRT). No other circuit court has explicitly addressed the validity of the true doubt rule in view of this provision in a case arising under the Act. However, in cases arising under Title IV of the Federal Coal Mine Health and Safety Act, 30 U.S.C. §901 *et seq.*, (the Black Lung Act), which incorporates Section 19(d) of the Act, see *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-126-127, the United States Court of Appeals are divided on whether application of the true doubt rule is prohibited by the APA. Compare *Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) with *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), and *Freeman United Coal Mining Co. v. Director, OWCP*, 988 F.2d 706, 17 BLR 2-195 (7th Cir. 1993).

In *Grizzle*, a case arising under the Black Lung Act recently decided by the United States Court of Appeals for the Fourth Circuit, in which circuit the instant case arises, the court stated that the circuit has "embraced" the true doubt rule. *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127. Although *Grizzle* is not controlling herein, as the case arose under the Black Lung Act, it is clear that within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, application of the true doubt rule in appropriate circumstances is not violative of the APA. See generally *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104, 108-109 (1993). Moreover, other circuit courts have noted the applicability of the true doubt rule to cases arising under the Act. See, e.g., *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT) (5th Cir. 1990); *Parson's Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980); *Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1st Cir. 1978); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). Accordingly, we hold that the APA does not prohibit the administrative law judge in the instant case from applying the true doubt rule to resolve the issue regarding the cause of decedent's lung cancer and death.

Employer next challenges the administrative law judge's finding that the evidence regarding causation is in equipoise, and his consequent reliance on the true doubt rule. Employer contends that the weight of the evidence establishes that decedent's lung cancer is not work-related. Additionally, employer contends that the administrative law judge's Decision and Order does not comply with the APA because the administrative law judge did not address evidence which employer argues establishes that decedent did not have asbestosis and that his lung cancer therefore is not related to asbestos exposure.

In discussing the issue of the cause of the lung cancer, based on the evidence of record as a whole, the administrative law judge found that the disagreement in the experts' opinions appeared to be due to medical questions regarding the appropriate criteria to be used in diagnosing asbestosis and the etiology of lung cancer in asbestos-exposed cigarette smokers. He also noted Dr. Ross's admission that his criterion of requiring clinical evidence to support a diagnosis of asbestosis is not universally shared. He next found that Drs. Roggli and Craighead are well-qualified and experienced pulmonary pathologists, that Dr. Ross has substantial experience and qualifications in pulmonary diseases, and that each expert's opinion appears rationally based in fact. He concluded that, based on the evidence of record, he could not find one expert's opinion more qualified or credible, which therefore rendered the evidence regarding the relationship of decedent's lung cancer to his asbestos exposure at work in equipoise. The administrative law judge therefore applied the true doubt rule to find that claimant, based on the record as a whole, established that decedent's lung cancer was related to occupational exposure to asbestos.

The *curricula vitae* of Drs. Ross, Craighead and Roggli are substantial evidence from which the administrative law judge could rationally find that Dr. Ross has substantial experience and qualifications in pulmonary diseases and that Drs. Roggli and Craighead are well-qualified and experienced pulmonary pathologists. *See* CX 10; EX 15, 19. Employer also submitted journal articles co-authored by Dr. Craighead and claimant submitted a journal article and chapter from a medical book written by Dr. Roggli that demonstrate additional sub-specialization in the histological diagnosis of asbestosis. *See* CX 5, 6; EX 16, 17. Accordingly, we affirm the administrative law judge's finding that he could not conclude that one expert is more qualified than another. *See generally John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Employer also challenges the administrative law judge's finding that he could not conclude that one opinion regarding the etiology of decedent's lung cancer is more credible than another. Employer specifically relies on the absence in this case of restrictive lung disease and diffuse interstitial pulmonary fibrosis as negative evidence that decedent's lung cancer was not related to asbestos exposure. Employer also contends that the administrative law judge's failure to address this evidence violated the requirements of Section 557(c)(3)(A) of the APA.

Initially, we note that the evidence of record does not contain any clinical, physiological or radiological indication of asbestosis. Nonetheless, the record includes the medical reports and opinions of Drs. Craighead and Roggli, who separately conducted a histological examination of lung tissue extracted at the autopsy of decedent. *See* CX 2. They each found peribronchiolar interstitial fibrosis and an elevated asbestos body content. CX 1; EX 14, 18. Dr. Roggli attributed the fibrosis to asbestos exposure. CX 1 at 8. He therefore opined that decedent's lung cancer is related, at least in part, to his employment history of asbestos exposure. *Id.* Dr. Craighead stated that decedent's peribronchiolar fibrosis "may well be the result of Mr. Parks' prolonged use of cigarettes, a recognized cause of peribronchiolar fibrosis." EX 18 at 2. He therefore concluded that decedent did not have asbestosis and that his death was not work-related. Neither doctor's report states the basis for his differing opinion regarding the nature of decedent's fibrosis, and neither Dr. Roggli nor Dr. Craighead was deposed.²

Based on this record, the administrative law judge could rationally conclude that no physician's opinion is more credible than another. In addition to agreeing that decedent's lung tissue contained asbestos bodies and focal fibrosis in the respiratory bronchioles, the medical publications in the record by Drs. Roggli and Craighead are consistent regarding the definition of asbestosis, its progression in the lungs, and the means by which pulmonary fibrosis due to asbestos exposure can be distinguished from other types of fibrosis, such as that caused by cigarette smoking. Drs. Roggli and Craighead have defined asbestosis as pulmonary fibrosis consequent to the accumulation of asbestos bodies in the lungs. CX 6 at 54; EX 16 at 557. They agree that asbestosis may be diagnosed histologically at the earliest stage of its evolutionary development when the fibrosis is focalized in the walls of the respiratory bronchioles and the lungs have accumulated asbestos bodies. CX 6 at 53-55, EX 16 at 559. Dr. Craighead stated in one of his journal articles that these histologic findings are adequate to establish a diagnosis of early stage asbestosis even if the disease process has not been shown to result in functional or radiologic alterations. EX 16 at 559. Characteristics of asbestosis such as diffuse interstitial fibrosis are present at a more advanced stage of the disease. CX 6 at 39-41; EX 16 at 559, 570. Accordingly, in Dr. Craighead's stated opinion, histologic assessment of the lungs may be pivotal in establishing a diagnosis. EX 16 at 557; *see also* EX 18 at 1453. Additionally, their medical publications also agree that fibrosis in the respiratory bronchioles consistent with asbestos exposure is characterized by thickening of the bronchiolar wall due to the accumulation of collagen. CX 6 at 39; EX 16 at 559. None of the medical reports of record, however, states the basis for the opposite conclusions regarding the etiology of decedent's focalized peribronchiolar fibrosis.

Finally, in a report containing his response to Dr. Roggli's diagnosis of asbestosis and his conclusion that decedent's lung cancer was caused in part due to asbestos exposure, Dr. Craighead stated that while the number of asbestos bodies found in decedent's lung tissue established occupational exposure, the total number is less than 37,500 AB/gm found in the majority of asbestos cases reported by Dr. Roggli in his book chapter on asbestosis.³ *See* CX 6, V.L. Roggli: *Pathology of Human Asbestosis: A Critical Review*, in *ADVANCES IN PATHOLOGY* 31, 50 (Fenoglio, C.M., ed., Yearbook Pub., Inc., 1988). Dr. Craighead also responded that asbestos exposure increases the likelihood that a cigarette smoker will develop lung cancer only when

asbestosis is demonstrated by radiologic means. Dr. Roggli's publication additionally reported, however, that five percent of the cases in his study had an asbestos body tissue count less than 1700 AB/gm. *Id.* Moreover, a special medical committee report published by the American Medical Association, of which Dr. Craighead was the chairman, states that the relationship between the number of asbestos bodies in the lungs with the development of lung cancer is not resolved. EX 16 at 588. A second article co-authored by Dr. Craighead and published in *The New England Journal of Medicine* states that heavy users of cigarettes who are occupationally exposed to asbestos have an 80 to 90 fold greater predisposition to lung cancer in comparison to non-smokers who are not regularly exposed to asbestos. EX 17 at 1451. The article also states that the incidence of lung tumors is increased in asbestos workers in comparison to non-asbestos workers, even though asbestos workers may not exhibit radiologic evidence of asbestosis.⁴ EX 17 at 1451.

In sum, we hold that there is evidence from which the administrative law judge could rationally find, based on his consideration of the record as a whole, that the opinions of Drs. Craighead and Ross are not entitled to greater weight than that of Dr. Roggli. Specifically, the medical publications of record reveal that the absence of restrictive lung disease and diffuse interstitial fibrosis in this case does not establish that decedent did not have work-related asbestosis, since Dr. Roggli diagnosed early stage asbestosis, whose indications are evident only through histologic examination. We, therefore, reject employer's argument that the administrative law judge violated the APA because he failed to analyze the absence of clinical or radiological evidence of restrictive lung disease or diffuse interstitial fibrosis. Furthermore, given their writings on the subject, neither Dr. Roggli nor Dr. Craighead states the basis for his opinion regarding the etiology of decedent's peribronchiolar fibrosis, and the parties did not depose either of these physicians who, the record indicates, examined the most probative evidence of asbestosis in this case. Although Dr. Ross was deposed, he did not examine decedent's lung tissue, but instead relied on Dr. Craighead's histologic findings. Since the administrative law judge rationally determined that, based on evidence of record, the evidence regarding the cause of decedent's lung cancer is in equipoise, we must therefore affirm his reliance on the true doubt rule. *See Avondale Shipyards*, 914 F.2d at 90-91, 24 BRBS at 48-49 (CRT); *Thompson*, 26 BRBS at 57. Accordingly, we affirm the administrative law judge's conclusion that decedent's lung cancer was caused by his employment-related exposure to asbestos, and the resulting award of death benefits.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge