

BRB No. 02-0522

EUNA CASH)	
(Widow of GEORGE CASH))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING)	DATE ISSUED: <u>APR 7, 2003</u>
AND DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying the Claim for Death Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying the Claim for Death Benefits (00-LHC-1752) of Administrative Law Judge Richard K. Malamphy rendered on a claim 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 rational, supported by substantial evidence, and in accordance with law. *O=Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Decedent worked for employer from 1952 until his retirement in 1977. The

parties stipulated that decedent was exposed to asbestos during the course of his employment. In 1983, Dr. Moore diagnosed decedent with Aprobable pulmonary asbestosis@ based on decedent=s history of exposure, shortness of breath, and interstitial fibrosis on x-ray. EX 3a. Decedent also had significant heart disease. *Id.* On December 22, 1998, decedent was hospitalized after he suffered cardiac arrest and was resuscitated. EX 5. Decedent died on December 31, 1998. On the death certificate, Dr. Hoyt listed cardiac arrest due to coronary artery disease as the immediate cause of death and pulmonary asbestosis under Aother significant conditions.@ EX 3. Thereafter, claimant, decedent=s widow, filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. '909, contending that decedent=s work-related asbestosis hastened his death.

In his Decision and Order, the administrative law judge concluded that decedent did not suffer from asbestosis and that asbestosis did not contribute to decedent=s death, and thus he denied claimant=s claim for death benefits. In so concluding, the administrative law judge credited the opinion of Dr. Ross, based on his superior credentials, that decedent did not have asbestosis that contributed to his death. The administrative law judge rejected the opinions of Drs. Moore and Hoyt that claimant suffered from work-related asbestosis as less well-reasoned than that of Dr. Ross.

On appeal, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Ross, a physician who merely reviewed claimant=s various medical records, over the contrary opinions of claimant=s treating physicians. In this regard, claimant also argues that the clinical evidence of record does not support Dr. Ross=s opinion. Additionally, claimant argues that Dr. Ross is biased, as evidenced by his testimony that he has never diagnosed asbestosis in a case where claimant=s doctor has so concluded. Employer responds, urging affirmance of the denial of death benefits.

Section 20(a) of the Act, 33 U.S.C. '920(a), presumes, in the absence of substantial evidence to the contrary, that the claim for death benefits comes within the provisions of the Act, *i.e.*, that the death was work-related. *See Bell Helicopter Int=l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that the decedent=s employment injury did not cause, contribute to, or hasten his death. *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1997); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991)(*en banc*), *aff=d sub nom. Ins. Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT)(2^d Cir. 1992), *cert. denied*,

507 U.S. 909 (1993); see also *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993). If employer produces substantial evidence severing the connection between the death and the employment, the presumption no longer controls and the issue of causation must be resolved on the whole body of proof, with claimant bearing the burden of persuasion. See *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); see generally *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Initially, we hold that the administrative law judge erred in not according claimant the benefit of the presumption under Section 20(a). The parties stipulated that decedent was exposed to asbestos during the course of his employment, which establishes the working conditions element of claimant=s *prima facie* case. In addition, Dr. Moore diagnosed pulmonary asbestosis and Dr. Hoyt opined that claimant=s asbestosis Acertainly contributed to claimant=s final respiratory insufficiency and demise.@ CX 1. This evidence is sufficient to establish that decedent=s exposure to asbestos could have contributed to his death and thus to establish invocation of the Section 20(a) presumption. See *Marinelli v. American Stevedoring, Ltd.*, 32 BRBS 112 (2000), *aff=d*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); see also *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982).

Moreover, although not discussed by the administrative law judge, Dr. Ross=s opinion is sufficient to rebut the Section 20(a) presumption. Dr. Ross opined that decedent did not have asbestosis, and that even if he did, it would not have contributed to his death. Tr. at 28-29, 31; see also EX 2. Thus, employer has produced substantial evidence that decedent=s death was not caused or contributed to by work-related asbestosis. See, e.g., *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

¹We note that neither the administrative law judge below nor claimant on appeal addresses this case in terms of Section 20(a). Nonetheless, because the issue involved is the work-relatedness of decedent=s death, the case must be analyzed in light of the Section 20(a) presumption. See *Peterson*, 25 BRBS at 77-78. Given the evidence of record, however, the administrative law judge=s failure, in this instance, to apply Section 20(a) is harmless error. See *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999).

We turn, then, to claimant=s contention that the administrative law judge, upon weighing the evidence as a whole, erred in crediting the opinion of Dr. Ross over the opinions of Dr. Moore and Dr. Hoyt. Dr. Ross is Board-certified in internal medicine with a subspecialty in pulmonary disease. He reviewed decedent=s medical records and opined that decedent did not have asbestosis and that if he did, it did not contribute to his death. Dr. Moore diagnosed asbestosis, but did not offer an opinion as to whether it contributed to decedent=s death. EXS 3a, 5. Dr. Hoyt stated that asbestosis contributed to decedent=s death. CX 1. Contrary to claimant=s contention, Dr. Ross is not bound to accept the prior readings of the x-rays; he independently reviewed decedent=s x-rays and stated that the 1998 x-rays did not show bilateral interstitial markings indicative of asbestosis. He based his overall opinion that decedent did not have asbestosis on his readings of decedent=s x-rays which he stated showed asymmetric interstitial densities, the intermittent nature of the rales heard by decedent=s physicians which were consistent with heart disease, and the lack of a restrictive component to decedent=s pulmonary function studies. Tr. at 20, 24-26, 38, 41, 44, 48-49, 53. Thus, we reject claimant=s contention that Dr. Ross=s opinion is not supported by the clinical evidence of record.

Moreover, we affirm the administrative law judge=s weighing of the evidence, and thus the denial of benefits. The administrative law judge was entitled to give greater weight to the opinion of Dr. Ross based on his superior credentials, see *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999), and he rationally found Dr. Ross=s opinion to be better reasoned than the other opinions of record. See generally *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). We reject claimant=s

²Dr. Moore practices in the respiratory care department of Riverside Hospital, but the parties stipulated that he is not Board-certified. See EX 3a; JX 1. Dr. Hoyt=s credentials are not in the record. CX 1.

³The administrative law judge erred in stating that Dr. Moore=s diagnosis of asbestosis was based solely on decedent=s history of exposure. Dr. Moore also based the diagnosis on 1983 and 1993 x-rays interpreted as showing pulmonary fibrosis. EX 3a. Dr. Moore, however, did not provide an opinion as to whether asbestosis contributed to decedent=s death. Dr. Hoyt apparently based his diagnosis of asbestosis on Dr. Moore=s opinion. See EX 4.

contention that Dr. Ross=s opinion should not have been credited because he rarely diagnoses asbestosis in contested cases. See Tr. at 33. This fact does not establish the invalidity of his opinion nor does it establish bias. As the Board is not entitled to re-weigh the evidence, see *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982), and as substantial evidence supports the administrative law judge=s finding that decedent=s death was not due in part to work-related asbestosis, we affirm the denial of death benefits.

Accordingly, the administrative law judge=s Decision and Order Denying the Claim for Death Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge