BRB No. 08-0646

E.L (Widow of J.L.) Claimant-Petitioner v. UNIVERSAL MARITIME SERVICE COMPANY and MIDLAND INSURANCE COMPANY c/o NEW YORK STATE LIQUIDATION BUREAU Employer/Carrier-Respondents	)	DATE ISSUED: 04/16/2009 DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Jorden N. Pedersen, Jr. (Baker, Pedersen & Robbins), Hoboken, New Jersey, for claimant.

Kevin W. Dorr (Foley, Smit, O'Boyle & Weisman), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Survivor's Benefits (2007-LHC-0840) of Administrative Law Judge Adele Higgins Odegard 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 which 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) was employed as a longshoreman from 1949 until his retirement in 1979. Employer conceded that decedent was exposed to asbestos during the course of his employment. Decedent died on June 12, 2003, of esophageal cancer.[1] Claimant filed a claim for death benefits, asserting that decedent's fatal cancer was caused by his occupational exposure to asbestos.

The administrative law judge found claimant entitled to the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was work-related based upon employer's concessions that claimant established a *prima facie* case. The administrative law judge found that employer rebutted the Section 20(a) presumption through the opinion of Dr. Karetzky that decedent's asbestos exposure was not a factor in the development of his esophageal cancer. EX 1. In weighing the evidence as a whole, the administrative law judge rejected the opinion of Dr. Nahmias that decedent's cancer was related to his asbestos exposure because it was based on an incorrect assumption regarding decedent's smoking history and because the medical literature he cited did not definitively establish a statistical association between asbestos exposure and esophageal cancer. Thus, the administrative law judge found that claimant did not meet her burden of establishing the work-relatedness of decedent's death, and she denied the claim.

On appeal, claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption and in rejecting Dr. Nahmias's opinion. Employer responds, urging affirmance of the denial of benefits.

Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death." In establishing this causal relationship, claimant is aided by Section 20(a) which 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, e.g., American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000). Once, as here, the Section 20(a) presumption is invoked, the burden shifts to employer to produce

[1] At the time of his death, at age 86, the decedent also suffered from chronic bronchitis and restrictive pulmonary disease with an obstructive component and bilateral calcified and noncalcified pleural plaques consistent with asbestos pleural disease. CX 8. Decedent's *inter vivos* claim was settled in 2003 for $10,000 plus an attorney's fee. 33 U.S.C. §908(i).

substantial evidence that decedent's death was not work-related. *See, e.g., C&C Marine Maintenance Co. v. Bellows,* 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). If the Section 20(a) presumption is rebutted, it drops from the case and claimant bears the burden of establishing the work-relatedness of the decedent's death based on the record as a whole. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

Claimant contends the administrative law judge erred in finding that Dr. Karetzky's opinion rebuts the Section 20(a) presumption. Dr. Karetzky reviewed decedent's medical records as well as the medical literature on the subject of the relationship between carcinoma of the esophagus and asbestos exposure. Dr. Karetzky concluded, based on his review of studies, that decedent's asbestos exposure was not a factor in his development of esophageal cancer. EX 2. In finding that employer rebutted the Section 20(a) presumption, the administrative law judge relied on Dr. Karetzky's "unequivocal statement" that there is no causal connection between decedent's employment and his esophageal cancer. Decision and Order at 13.

We cannot affirm this finding in view of the decision of United States Court of Appeals for the Second Circuit in *Rainey v. Director, OWCP,* 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008), which was decided shortly before the administrative law judge issued her decision in this case. In *Rainey,* the Second Circuit, within whose jurisdiction this case arises, reversed a finding that the Section 20(a) presumption was rebutted based on two medical opinions, the first, stating it was likely that the employee would have developed cancer even if he had never been exposed to asbestos and the second, resting on science which the administrative law judge had found, in weighing the evidence as a whole, was "widely discredited." The court stated that while employer's burden on rebuttal is one of production and not persuasion, employer cannot meet this burden by simply producing any evidence. Rather, employer must produce "substantial evidence," which is "such relevant evidence as a reasonable mind might accept as adequate" to support a finding that the claimant's injury is not related to his workplace exposures. *Rainey,* 517 F.3d at 637, 42 BRBS at 14(CRT), *quoting Richardson v. Perales,* 402 U.S. 389, 401 (1971). As the administrative law judge had found the basis for the second report to be unreliable, the court stated that it could not be used to rebut the Section 20(a) presumption as it was not "substantial evidence."

In this case, in determining the weight to be accorded to the medical opinions based on the record as a whole, the administrative law judge "disregard[ed]" the medical studies on which Dr. Karetzky based his opinion. Decision and Order at 15. She did so because the studies were not in evidence and the doctor's comments did not identify the populations studied or the methodologies used. Decision and Order at 15. Dr. Karetzky stated that his opinion that decedent's esophageal cancer was not related to asbestos

exposure is based on this medical literature. EX 1; EX 2 at 12-13. In view of the decision in *Rainey*, we must vacate the administrative law judge's finding that employer rebutted the Section 20(a) presumption. On remand, the administrative law judge must address whether Dr. Karetzky's opinion constitutes substantial evidence sufficient to rebut the Section 20(a) presumption in light of her findings regarding the medical literature upon which his opinion is based.

Claimant also contends the administrative law judge erred in rejecting the opinion of Dr. Nahmias as support for claimant's claim that decedent's cancer was related to asbestos exposure. Claimant contends that studies cited by Dr. Nahmias establish a statistical association between esophagal cancer and asbestos exposure and that this evidence is sufficient to meet her burden of proof. Claimant also asserts that the administrative law judge erroneously rejected this medical opinion on the basis that Dr. Nahmias provided an incorrect smoking history.

We agree that if, on remand, the administrative law judge again finds that employer has rebutted the Section 20(a) presumption, she also must readdress the evidence as a whole.[2] Specifically, in weighing the evidence, the administrative law judge must reconsider the significance of decedent's smoking history. The administrative law judge stated that both physicians agree that cigarette smoking is a risk factor for esophageal cancer and that decedent never smoked cigarettes. *See* CX 20; CX 23 at 6, 17; EX 2 at 16-18. The administrative law judge also found that decedent smoked cigars for 47 years, although the exact degree of decedent's smoking was not established on the record.[3] Decision and Order at 13-14. In this regard the administrative law judge noted that Dr. Karetzky addressed a more accurate smoking history than Dr. Nahmias, who stated that decedent smoked one cigar a week for 15 years. CX 7. Dr. Karetzky, however,

[2] If the Section 20(a) presumption is not rebutted, decedent's death is work-related as a matter of law. *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3d Cir. 2008). However, we reject claimant's contention that the administrative law judge applied an incorrect burden of proof in weighing the evidence as a whole. If the Section 20(a) presumption is rebutted, claimant bears a burden of both production and persuasion in order to establish the compensability of the claim. *See Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Thus, if a proper rationale is provided, the administrative law judge may reject the medical studies provided by both parties and find that claimant did not meet her burden of proving her claim.

[3] Dr. Karetzky stated he reviewed Dr. Edelman's report as stating that decedent smoked five cigars a day and that he assumed decedent smoked between one and five cigars per day. EX 2 at 16-17, 23. The administrative law judge noted that Dr. Edelman's report was not offered into evidence. Decision and Order at 13 n. 13.

did not conclude that decedent's cancer was the result of his cigar smoking. Although the administrative law judge is entitled to find that Dr. Nahmias had an incorrect smoking history, the significance of decedent's smoking history has not been established as the administrative law judge did not discuss any evidence of a correlation between cigar smoking and esophageal cancer. On remand, therefore, the administrative law judge should reassess the significance of decedent's smoking history and the weight to be accorded to the medical evidence in light thereof.

Accordingly, the administrative law judge's Decision and Order Denying Survivor's Benefits is vacated, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge