

DOROTHY DEAN)	
(widow of EDWARD DEAN))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: <u>Apr. 17, 2014</u>
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Stephen Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison Mahoney, LLP), Boston, Massachusetts, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Modification Denying Benefits (2006-LHC-00806) of Administrative Law Judge Colleen A. Geraghty 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has been before the Board previously. Decedent worked for employer in Groton, Connecticut, as a lead bonder and rigger for approximately 30 years. Former co-workers and his widow (claimant) testified that he was exposed to lead, asbestos, welding fumes, and solvents during the course of his employment. Decedent retired in 2001. He was diagnosed with kidney cancer on August 15, 2004. On October 6, 2004, he

underwent a nephrectomy to remove his cancerous left kidney. On November 12 and 17, 2004, he underwent surgeries to correct two cancerous obstructions in the renal fossa area. He did not recover, and he died on November 23, 2004. The death certificate identified the cause of death as metastatic renal cancer.

Claimant filed a claim for death benefits contending that decedent's exposure to the various injurious stimuli,¹ either individually or in combination, caused his kidney cancer and his death. 33 U.S.C. §909. The first time this case was before the administrative law judge, she found that claimant established a prima facie case causally relating decedent's death to his exposure to asbestos. However, she found that claimant did not establish a prima facie case with regard to decedent's exposure to lead, cadmium, benzene, or other solvents or fumes. Decision and Order at 30. The administrative law judge found that the opinions of Drs. Pulde and Harbison, employer's experts, rebutted the causal connection between kidney cancer and asbestos exposure. *Id.* at 31. In weighing the evidence as a whole, the administrative law judge acknowledged the lack of direct evidence of a causal relationship between kidney cancer and asbestos exposure, as the parties relied on epidemiological studies that were not submitted into evidence. She referred to several epidemiological reference guides to explain the "relative risk" between kidney cancer and asbestos exposure,² and she found the epidemiological evidence inconclusive for a specific causal relationship. The administrative law judge concluded that claimant's experts, Drs. Brautbar and Daum, did not rule out or minimize any non-occupational causes of decedent's kidney cancer.³ Thus, the administrative law judge

¹ Claimant contended decedent was exposed to lead, asbestos, cadmium, and solvents such as trichloroethylene and benzene.

² A "relative risk" is the correlation between exposure to harmful stimuli and a disease. If the relative risk is 1.0, then the exposed individual has the same risk as unexposed individuals, so there is no correlation between the exposure and the disease. If the relative risk is greater than 1.0 but less than 2.0, then the exposed individual is at a greater risk for contracting the disease; the fact-finder should address the epidemiological evidence in conjunction with the clinical evidence and other risk factors in order to determine whether the agent under investigation more likely than not caused the disease. If the relative risk is greater than 2.0, the disease was more likely than not caused by that agent. Decision and Order at 32-33 (citing and quoting *Maiorana v. U.S. Mineral Products Co.*, 52 F.3d 1124, 1128 (2d Cir. 1995)).

³ Smoking, obesity, and hypertension were acknowledged as risk factors for kidney cancer by all experts. *See* Cl. Ex. 20; Emp. Ex. 23; Tr. at 52. Decedent stopped smoking 26 years before he was diagnosed with cancer. Dr. Harbison stated that this probably reduced the risk due to smoking but did not eliminate it. Tr. at 146. Decedent also was obese and had hypertension. *See* Cl. Exs. 11, 20.

found that claimant did not establish that exposure to any carcinogen at employer's facility caused or contributed to decedent's cancer and death, and she denied benefits. *Id.* at 37. Claimant appealed that decision to the Board.

The Board affirmed the administrative law judge's findings that claimant established a prima facie case with regard to only asbestos exposure. However, the Board vacated the administrative law judge's finding that employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption with regard to asbestos, as her findings contradicted portions of the doctors' opinions on which she relied. The Board remanded the case for the administrative law judge to reconsider rebuttal in light of *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008).⁴ *D.D. [Dean] v. Electric Boat Corp.*, BRB No. 08-0103 (Aug. 14, 2008).

On remand, the administrative law judge again denied benefits. She found insufficient scientific and epidemiological evidence to establish a connection between asbestos exposure and kidney cancer, and she found that the opinions of Drs. Pulde and Harbison rebut the Section 20(a) presumption. Decision and Order on Rem. at 4-5. In weighing the evidence, the administrative law judge found that decedent was exposed to substantial amounts of asbestos, as shown by his pleural thickening, but that claimant did not establish a link between asbestos exposure and kidney cancer. Specifically, the administrative law judge relied on the fact that decedent had non-work risk factors for kidney cancer, as well as on the lack of scientific evidence showing a synergistic relationship between the non-work factors and asbestos exposure with respect to the development of kidney cancer. Thus, based on the epidemiological evidence and the absence of asbestos fibers in the kidney area, the administrative law judge found that claimant failed to demonstrate by a preponderance of the evidence that decedent's kidney cancer and death were work-related. *Id.* at 5-7. Claimant appealed this decision; however, before the Board addressed the appeal, she moved for dismissal and remand so she could file a motion for modification with the administrative law judge. The Board granted claimant's motion. *Dean v. Electric Boat Corp.*, BRB No. 09-0752 (Sept. 23, 2009).

On modification, claimant submitted additional evidence in support of her claim that decedent's cancer and death were related to his work exposures to the various substances. The administrative law judge found that claimant established a prima facie

⁴ For the sake of judicial efficiency, the Board further held that, if, on remand, the administrative law judge found the Section 20(a) presumption rebutted, she must weigh the record as a whole and apply the proper preponderance of the evidence standard, as she previously erred in requiring claimant to eliminate the non-occupational causes of kidney cancer in order to establish the work-relatedness of the disease.

case relating decedent's exposures to asbestos, solvents, and lead to his kidney cancer.⁵ Decision and Order on Modif. at 27-28. She found that employer presented substantial evidence rebutting the Section 20(a) presumption with regard to the exposures to asbestos, solvents, and lead. *Id.* at 30-31. On the record as a whole, the administrative law judge denied benefits, as she found that claimant did not meet her burden of showing by a preponderance of the evidence a relationship between decedent's kidney cancer and his work-related exposures. *Id.* at 35, 38.

Claimant appeals the denial of benefits, arguing only that the administrative law judge erred in failing to find a causal relationship between decedent's exposure to lead and his kidney cancer and death. Employer responds, urging affirmance.⁶

Section 22 of the Act provides the only means for re-opening a claim that has been finally adjudicated, as it allows the modification of a prior decision on the grounds that there has been a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; see *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). The party moving for modification, here claimant, has the burden of establishing the mistake or change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant contends the administrative law judge erred in finding, on the record as a whole, that she failed to establish a relationship between decedent's lead exposure and his death due to kidney cancer.⁷ She asserts the evidence establishes either that there is a direct relationship between decedent's lead exposure and his kidney cancer or that decedent's lead exposure caused or aggravated his hypertension which then resulted in

⁵ The administrative law judge found that claimant did not establish a prima facie case with respect to exposure to cadmium. Decision and Order on Modif. at 28.

⁶ To preserve the issue for appeal, if necessary, employer also argues that the administrative law judge erred in permitting the modification to proceed. This contention is without basis in law. See *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003).

⁷ Claimant does not challenge any of the administrative law judge's findings regarding solvents, cadmium, or asbestos. Therefore, we affirm, as unchallenged, the findings that claimant has not established a relationship between decedent's kidney cancer and those work exposures. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

kidney cancer. For the reasons that follow, we reject claimant's contentions, and we affirm the administrative law judge's denial of death benefits.

As it relates to the issue on appeal, the administrative law judge found that decedent had three widely-recognized risk factors for kidney cancer, as he had been a smoker, he was obese, and he had hypertension, and that, as there was no direct evidence of a causal relationship between decedent's lead exposure and his kidney cancer, she had to address the expert opinions, the epidemiological studies, and the clinical evidence of record. *See* n. 2, *supra*. She credited the opinions of Drs. Pulde and Choueiri that decedent's kidney cancer and death were not related to his exposure to lead. Decision and Order on Modif. at 34. She found that the epidemiological studies revealed a low relative risk (1.01) between exposure to lead and the development of kidney cancer, and she stated that Dr. McCabe, claimant's expert, acknowledged this weak association. Thus, the administrative law judge concluded that the epidemiological evidence of a causal link is inconclusive. *Id.* at 35. The administrative law judge next addressed claimant's assertion that decedent's exposure to lead caused or aggravated his hypertension which then led to his kidney cancer and death. She found that: 1) hypertension and obesity are accepted risk factors for kidney cancer; 2) high lead exposure can contribute to hypertension; 3) bone lead levels are a more accurate measure of lead toxicity; and 4) there is no evidence of decedent's bone lead levels. *Id.* The administrative law judge also found:

Even if I accepted Claimant's experts (sic) opinions that blood lead levels were a sufficient link to hypertension, Dr. Choueiri has clearly stated that one would need more than simply elevated blood lead levels for lead to affect hypertension. One would require clinical signs of lead toxicity in order to link high lead exposure to elevated blood pressure/hypertension. Drs. Choueiri and Pulde maintain that in lead toxicity situations one would expect to see clinical evidence such as neurological or nephrological signs, and basophilic stippling leading to anemia and abnormal zinc levels. Drs. Choueiri and Pulde asserted, and Dr. Brautbar [claimant's expert] conceded, that a review of Decedent's medical records reflects that these clinical markers were not present. Consequently, the effort to link Decedent's lead exposure to hypertension and then indirectly to renal cell carcinoma fails.

Id. The administrative law judge also relied on Dr. Choueiri's opinion that lead, if directly deposited into the kidney, could form cancer, as well as his statement that in only ten percent of kidney cancers was the adjacent tissue unremarkable and, in this case, decedent's adjacent tissue was normal, making lead exposure to his kidney "virtually impossible." *Id.* (citing Emp. Ex. 7 at 98). Finally, the administrative law judge concluded:

In light of the weak epidemiologic support for a causal link between exposure to lead and kidney cancer and the absence of clinical markers indicating lead toxicity which is necessary to link lead exposure to hypertension, I conclude that Claimant has failed to establish by a preponderance of the evidence that exposure to lead at Electric Boat caused, contributed to or aggravated Decedent's kidney cancer.

Id. at 35.

As the Section 20(a) presumption has been invoked and rebutted with respect to lead exposure, claimant bears the burden on the record as a whole of establishing a causal connection between decedent's work exposure and his death.⁸ 33 U.S.C. §909; *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Claimant contends the administrative law judge erred in giving great weight to the absence of bone biopsies,⁹ in failing to admit into evidence portions of Dr. McCabe's testimony, and in crediting the opinions of Drs. Choueiri and Harbison. Specifically, claimant argues that the absence of the bone biopsies is not proof that decedent did not have a lead toxicity; that Dr. McCabe, if permitted to testify on the matter, would have stated that consistent high blood lead levels would indicate high bone lead levels which could be evidence of toxicity; and that Drs. Choueiri and Harbison made statements that render their opinions not creditable.

The administrative law judge's decision is supported by substantial evidence, and claimant has not shown that the administrative law judge irrationally weighed the evidence. Drs. Choueiri, Harbison, and Pulde all stated that lead has not definitively been found to be a cause of kidney cancer. Emp. Exs. 22 at 26-27; 23 at 18-19; Tr. 130-131. Dr. McCabe acknowledged there is no conclusive proof that lead is a carcinogen in humans as well as the weak evidence of an association between lead exposure and kidney cancer. Emp. Ex. 24 at 6; Tr. at 77. Drs. Choueiri and Harbison both stated that other symptoms, in addition to high lead levels, needed to be present in order to demonstrate

⁸ To the extent claimant argues that employer did not rebut the Section 20(a) presumption, we reject her arguments. Employer produced substantial evidence that decedent's cancer and death were not related to his exposure to lead. *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008). Claimant's arguments relate to the administrative law judge's weighing of the evidence as a whole.

⁹ The experts agreed that bone lead levels are a better indicator of the body burden of lead and whether there is toxicity than blood lead levels. Blood lead levels, however, are easier to obtain and do not require an invasive biopsy.

that an individual has lead toxicity which could contribute to hypertension. They stated that clinical findings such as neuropathy, a lead line on the gums, stipulated blood cells, iron deficiency, abnormal kidney function, and/or abnormal zinc levels, would be expected of someone with lead toxicity. Emp. Ex. 23 at 19-20; Tr. at 138. Dr. Pulde added that decedent did not have clinical signs of lead intoxication because the medical reports also did not indicate there was abdominal pain, nausea, gout, gingival findings, or lab studies showing anemia, basophilic stippling, or high uric acid. Emp. Ex. 22 at 31-32. Dr. Brautbar, claimant's expert, agreed there were no clinical symptoms of lead toxicity. Cl. Ex. 20 at 109. Thus, the administrative law judge did not rely solely on the absence of bone biopsies to establish lack of lead toxicity. Moreover, Dr. McCabe's excluded testimony does not establish lead toxicity, as substantial evidence supports the administrative law judge's findings that decedent's medical records did not demonstrate the requisite clinical symptoms for lead toxicity. Thus, claimant has failed to establish that the administrative law judge's exclusion of this testimony was prejudicial. See generally *Collins v. Electric Boat Corp.*, 45 BRBS 79 (2011).

Further, claimant has not shown an error with regard to the administrative law judge's decision to credit Dr. Choueiri's opinion. The attempt to discredit Dr. Choueiri by showing that he improperly described the cancerous kidney as "normal" misinterprets his opinion. Contrary to claimant's assertion, Dr. Choueiri stated that the tissue *adjacent to* the cancerous kidney was normal, as no pathologist reported toxins in that tissue. Thus, he concluded there was no accumulation of a toxin that would turn cancerous. Emp. Exs. 7 at 98; 23 at 52-53. Overall, based on the scientific studies and decedent's medical records, Dr. Choueiri unequivocally opined that decedent's work-place exposure to lead did not cause, contribute to, or aggravate his kidney cancer, and/or cause or hasten his death. Emp. Ex. 7.

We reject claimant's contention that the administrative law judge erred in her evaluation of the medical evidence. The administrative law judge thoroughly addressed all the relevant evidence. It is well established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to weigh the evidence and draw her own inferences and conclusions therefrom. See *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); see also *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Moreover, it is impermissible for the Board to reweigh the evidence or to substitute its own views for those of the administrative law judge. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982). The administrative law judge concluded, based on the epidemiological evidence and the opinions of Dr. Pulde and Dr. Choueiri, that claimant did not establish that decedent's kidney cancer and death were related to his employment exposure to lead. This

conclusion is based on a rational weighing of the evidence and is supported by substantial evidence. We therefore affirm the administrative law judge's denial of death benefits.¹⁰

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

¹⁰ The administrative law judge did not rely on Dr. Harbison's testimony to draw her conclusion on the record as a whole. In any event, claimant's challenge to Dr. Harbison's credibility is not persuasive. The "contrary" statements in a textbook to which claimant refers were made in 1998 and involved only Dr. Harbison's summaries, at that time, of certain epidemiological studies, while his testimony given in 2011 explained that other studies demonstrated different results, making the relationship between lead exposure and hypertension inconsistent and inconclusive. Tr. at 107, 130-132, 139-141, 157-158; *see also* Emp. Ex. 9; *Hamilton and Hardy's Industrial Toxicology* (5th ed. 1998).