BRB No. 09-0141

J.J.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 08/31/2009
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Stephen C. Embry (Embry and Neusner), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Awarding Benefits (2007-LHC-1082) of Administrative Law Judge Daniel F. Sutton 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).

Claimant alleged that in the course of his employment with employer, which most recently ran from March 1981 until his retirement on August 24, 2001, he was exposed to pulmonary toxins, including asbestos, grinding dust, and welding and paint fumes, which contributed to his chronic obstructive pulmonary disease (COPD) and a resulting pulmonary impairment. Claimant stated that he began to have some symptoms of shortness of breath two or three years prior to his retirement but that he never reported

any breathing problems to employer or lost any time due to this condition. He additionally stated that he first sought treatment for his lung condition from Dr. Kamireddy a few months prior to his retirement.

On July 5, 2001, Dr. Kamireddy opined that claimant had mild COPD. In November 2003, claimant began seeing Dr. Radu who ultimately stated that claimant had evidence of severe obstructive lung disease, *i.e.*, emphysema and asbestos-related pleural plaques, which she opined may be the result of combined lung irritants including asbestos, welding fumes and cigarette smoke. Upon a review of claimant's records, Dr. DeGraff opined, on May 29, 2006, that exposure to asbestos and to irritant dusts and fumes while working for employer significantly contributed to claimant's impaired lung function. Claimant thereafter filed a claim for a 50 percent permanent lung impairment pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23).

In his decision, the administrative law judge initially found that claimant invoked, but that employer rebutted, the Section 20(a) presumption with regard to claimant's pleural plaques and COPD. 33 U.S.C. §920(a). The administrative law judge then found, based on the record as a whole, that claimant established that his pleural plaques are causally related to his exposure to fumes and irritants while working for employer but that he did not establish that his COPD and resulting partial respiratory impairment arose out of his employment with employer. The administrative law judge thus concluded that claimant is not entitled to any disability benefits since he found that any such disability is attributable exclusively to his non-work-related COPD. The administrative law judge, however, concluded that claimant is entitled to medical benefits for his asbestos-related pleural plaques pursuant to 33 U.S.C. §907.

On appeal, claimant challenges the administrative law judge's denial of disability benefits. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant initially argues that the administrative law judge erred by not admitting into evidence a Health Hazard Study done by the National Institution of Occupational Safety and Health (NIOSH). Claimant maintains that the administrative law judge's statement that the NIOSH report is inadmissible under the "learned treatise exception to the hearsay rule" is erroneous since claimant did not offer this evidence pursuant to that exception. Claimant instead argues that he sought admission of the NIOSH study based on its existence as a government document under either Rule 803(a) and/or Rule 803(6)(8) of the Federal Rules of Evidence.

We reject claimant's assertions that the administrative law judge erred in refusing to consider NIOSH report in this case. The administrative law judge initially admitted

the NIOSH report into the record.[1] Nonetheless, in his decision, the administrative law judge found the report is inadmissible, as there is no testimony that the report is reliable under the "learned treatise" exception to the hearing rule. Decision and Order at 13, n.7. Any error in the administrative law judge's failure to give the parties notice that he was changing his ruling is harmless in this case, as the administrative law judge also discussed the report in terms of the deposition testimony of both of employer's experts, Drs. Teiger and Pulde, Decision and Order at 13, 15, and found the report is not probative in this case. Decision and Order at 13, n. 7. This finding is within his discretion. In particular, the administrative law judge observed that Dr. Pulde dismissed the NIOSH report "as poorly designed and irrelevant to the claimant because it looked at painters and welders who had asthma which the claimant does not have."[2] Decision and Order at 15. Additionally, Dr. Pulde found that the NIOSH report "has significant methodological flaws."[3] EX 5, Dep. at 38-39. Moreover, we note that the NIOSH report, which states that "workers were reporting health problems" that they attributed to the inhalation of paint and other toxic fumes, is not necessarily inconsistent with the underlying premise of the opinions of Drs. Teiger and Pulde. These physicians opined that claimant's COPD is related entirely to his smoking and not to his work due, in part, to claimant's absence of a history of symptoms contemporaneous with his occupational exposure to irritants. We, therefore, reject claimant's contention that the administrative law judge erred in rejecting

[1] The administrative law judge reconvened the original September 11, 2007, formal hearing on October 15, 2007, because "claimant has offered as an exhibit, by letter dated September 22, 2007, a document which is entitled 'HETA, 96-0253-2683, entitled General Dynamics, Electric Boat Division.'" HT dated October 15, 2007, at 6. Employer's counsel did not object and the administrative law judge admitted this exhibit into evidence as "Claimant's Exhibit 8." *Id.*

[2] Specifically, Dr. Pulde stated that the NIOSH report was not relevant to the instant case because: 1) "it didn't evaluate electricians" such as claimant but instead "studied painters and welders and individuals exposed to painting and welding;" and 2) "more importantly, it evaluated these individuals for reversible air flow limitation, asthma," and claimant "did not have asthma," but rather "fixed air flow limitation, COPD due to tobacco." EX 5, Dep. at 37-38.

[3] Dr. Pulde stated that the NIOSH report's methodology is suspect in that it was a highly subjective test. In this regard, Dr. Pulde was troubled by the fact that individuals "volunteered" for the study because "we often see [that] people who have symptoms or disease will volunteer whereas people who don't won't volunteer." EX 5, Dep. at 38. Moreover, Dr. Pulde observed that the volunteers' tobacco use was never objectively validated which "would underestimate the effect of tobacco and overestimate the potential effect of their exposure in the workplace." *Id.* at 39-40.

the NIOSH report in this case. *See generally 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); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Claimant next argues that the administrative law judge applied an incorrect standard in finding that employer established rebuttal of Section 20(a), which provides claimant with a presumption that his COPD and pulmonary disability are related to his employment. Claimant avers that employer's evidence is insufficient to meet the rebuttal standard espoused by the 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), since it does not establish that the work exposures were not a contributing factor and/or that they did not play any role in aggravating claimant's respiratory symptoms. Claimant further contends that the administrative law judge did not adequately address whether claimant's work exposure to toxic pollutants aggravated his pre-existing COPD.

Where, as here, the claimant establishes a *prima facie* case, the Section 20(a) applies to relate the disabling injury to the employment. Employer then can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT). When aggravation of a pre-existing condition is claimed, the employer must produce substantial evidence that work events neither directly caused the injury nor aggravated the pre-existing condition. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If a work-related injury contributes to, combines with, or aggravates a pre-existing condition, the entire resultant condition is compensable. *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc), cert. denied*, 528 U.S. 1187 (2000); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

In *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT), the claimant sought to establish that the decedent's lung cancer was due to his work-related exposure to asbestos. The administrative law judge found that the employer had rebutted the Section 20(a) presumption based on the opinions of Drs. Teiger and Pulde. However, the court held that their opinions did not constitute substantial evidence rebutting the presumption. Rather, the court held that Dr. Teiger's opinion more closely supported the opinion of the claimant's expert and did not foreclose the likelihood that the cancer was work-related, so the opinion could not rebut the Section 20(a) presumption. *Rainey*, 517 F.3d at 635-636, 42 BRBS at 13(CRT). Additionally, the court stated that the administrative law judge specifically found that Dr. Pulde's statement that the decedent's asbestos exposure was indirect and clinically insignificant contradicted her finding that the testimony regarding the decedent's exposure to asbestos was credible and undisputed. The court noted that the

administrative law judge also had rejected Dr. Pulde's theory that lung cancer is due to the scarring caused by asbestosis and not just the exposure to asbestos. As the administrative law judge had discounted aspects of Dr. Pulde's report because of its "inadequacies," the court stated that a reasonable mind would not accept the report as substantial evidence rebutting a causal relationship. *Id.,* 517 F.3d at 636-637, 42 BRBS at 14(CRT). Thus, the *Rainey* court held that where the premise for a medical opinion is false or depends on discredited theories, the opinion cannot, as a matter of law, constitute substantial evidence in rebuttal of the Section 20(a) presumption.[4] *Id.*, 517 F.3d at 633, 42 BRBS at 13-14(CRT). Absent rebuttal evidence, the court reversed the decision and remanded the case for an award of benefits. *Id.*, 517 F.3d at 637, 42 BRBS at 14(CRT).

In this case, the administrative law judge addressed employer's rebuttal evidence in light of *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT), finding that the opinions expressed by Drs. Teiger and Pulde do not have the same evidentiary flaws that precluded rebuttal in *Rainey*. We affirm the administrative law judge's finding that the opinions of Drs. Teiger and Pulde constitute substantial evidence of rebuttal of the Section 20(a) presumption in this case.

Dr. Teiger stated that occupational factors "played no role in the development of [claimant's] obstructive pulmonary condition," which he diagnosed as pulmonary emphysema due to his tobacco use over many years. EX 7, Dep. at 15. Dr. Teiger explained that claimant's examination demonstrated that he has no evidence of asbestos-related lung disease since: 1) an examination of claimant's lungs revealed no evidence of rales; 2) claimant's x-rays showed no evidence of parenchymal lung disease; and 3) claimant's pulmonary function testing is consistent with airways obstruction and not restriction. Additionally, Dr. Teiger stated that there is a lack of a causal connection between claimant's inhalation of paint and chemical irritants and his COPD because it is his experience that "those irritants produce an early and immediate [symptomatic] response which in my history taking of [claimant] did not occur." EX 7, Dep. at 46.

Dr. Pulde conceded that claimant was exposed to asbestos in the course of his work for employer since he has "evidence of asbestos-related pleural plaques." EX 2. This is consistent with the administrative law judge's crediting of claimant's uncontradicted testimony that he was exposed to asbestos in the course of his employment aboard submarines for employer. Dr. Pulde, however, opined that claimant's work-related pleural plaques "are nonfunctional and do not result in any pulmonary impairment." EX 2. Dr. Pulde premised this conclusion on the results of

[4] "[A]n employer cannot satisfy its burden of production simply by submitting any 'evidence' whatsoever." *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT).

claimant's pulmonary function tests between August 15, 2000, and June 20, 2006, which demonstrate a pattern of impairment very commonly linked with tobacco-related emphysema, and "inconsistent with a diagnosis of asbestosis or interstitial lung disease secondary to exposure to asbestos." EX 5, Dep. at 15-16.

Dr. Pulde also stated that there is no causal link between claimant's exposures to other irritants at work and his COPD because, as the administrative law judge observed, "most of his exposures were indirect, self-limited, and they occurred prior to 1965," Decision and Order at 22, and moreover, because claimant had no documented episodes of work-related pulmonary symptoms. While the administrative law judge did not make a specific finding as to the nature and extent of claimant's exposure to asbestos, or to other irritants while working for employer, he did address the physicians' understanding of that exposure, and concluded that Drs. Pulde and Teiger each had an accurate picture of the claimant's work and exposures to asbestos and other lung irritants. Decision and Order at 22-23. Thus, in contrast to *Rainey*, the administrative law judge did not reject an underlying premise of the physicians' opinions.

Moreover, the administrative law judge found that the record in this case contains no persuasive expert testimony to establish that the science behind the reports of Drs. Teiger and Pulde is unsound. The administrative law judge extensively outlined the medical literature submitted in this case, *i.e.*, Decision and Order at 17-20 referencing The American Thoracic Society Statement (ATS) and The Harber Study, and discussed the opinions of Drs. Teiger and Pulde in terms of that literature, Decision and Order at 12-13, 15-17, 23. Specifically, the administrative law judge found that Dr. Teiger's difficulty in accepting as "entirely correct" the ATS Statement that asbestos has been associated with a contribution to COPD was reasonable given that the ATS Statement states that "[t]he role of asbestos as a cause of airway obstruction has been controversial." EX 6. Moreover, it states that the association between asbestos exposure and COPD "might arise in one or more of several ways" including some that are less than definitive in establishing that asbestos exposure contributes to development of COPD. *Id.* Similarly, the administrative law judge found that there is nothing in either the ATS Statement or the Harber study to directly contradict Dr. Pulde's beliefs that studies have found asbestos-related obstructive disease only in the presence of asbestosis. Furthermore, the administrative law judge found that the record contains no evidence to refute the opinions of Drs. Teiger and Pulde that COPD cannot be attributable to occupational exposure to other irritating dust and fumes in the absence of any evidence that these exposures were of sufficient intensity to have precipitated any contemporaneous symptoms. Decision and Order at 23. The administrative law judge thus concluded that "this record, which unlike *Rainey* contains no persuasive expert testimony that [employer's] experts relied on discredited science, does not support a finding that the opinions of Drs. Teiger and Pulde are so far outside the mainstream of

current scientific and medical thinking that they are insufficient to rebut the Section 20(a) presumption." Decision and Order at 23.

The administrative law judge addressed the opinions of Drs. Teiger and Pulde in terms of *Rainey*, and found them sufficient to rebut the Section 20(a) presumption because they are not based on incorrect assumptions or discredited theories. This finding is rational and supported by substantial evidence. Consequently, the administrative law judge's finding that the opinions of Drs. Teiger and Pulde that claimant's work exposures for employer did not play any role whatsoever in his COPD, are sufficient to rebut the Section 20(a) presumption is rational, supported by substantial evidence, and in accordance with law. Thus, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption with regard to claimant's COPD. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT).

Claimant further argues that in addressing the evidence on causation as a whole, the administrative law judge did not give sufficient consideration to the fact that Dr. Radu has been treating claimant for many years. Citing *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997), claimant avers that the administrative law judge should have accorded greatest weight to Dr. Radu's opinion on causation over the contrary opinion of Dr. Teiger, and thus, concluded that claimant's COPD is related to his work exposures with employer.

The opinions of treating physicians are not accorded automatic deference; while the courts have recognized that a treating physician's opinion may be entitled to special weight if it is not contradicted, *see, e.g., Amos v. Director, OWCP*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999); *Pietrunti*, 119 F.3d 1035, 31 BRBS 84(CRT), the administrative law judge is entitled to weigh conflicting medical opinions and determine which view is most persuasive. *See Mendoza v. Marine Pers. Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). In this case, the administrative law judge found that the opinion proffered by Dr. Radu was not as thorough as the opinions of Dr. DeGraff and Dr. Teiger.[5] Decision and Order at 24. He thus permissibly accorded diminished weight to that opinion. *See generally Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v.*

[5] Dr. Radu opined that claimant had evidence of severe obstructive lung disease which may be the result of combined lung irritants including asbestos, welding fumes and smoke. CX 2. Dr. DeGraff similarly opined that claimant's exposure to asbestos and to irritant dusts and fumes while working for employer significantly contributed to claimant's impaired lung function. CX 1.

Director, OWCP, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). As the administrative law judge's decision to accord greatest weight to the opinion of Dr. Teiger because it is better supported by the objective evidence and more consistent with the diagnostic criteria set forth in the ATS Statement,[6] Decision and Order at 24, is rational, the administrative law judge's conclusion that claimant did not establish that his COPD and resulting partial disability arose out of his occupational exposures with employer is affirmed. Accordingly, we affirm the administrative law judge's denial of disability benefits related to claimant's COPD.[7]

Claimant lastly argues that the administrative law judge's finding that claimant's pleural plaque condition may be progressive and requires ongoing medical care and treatment necessitates a finding that claimant is entitled to a *de minimis* award under *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). It is undisputed that claimant is seeking benefits under Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). *See* 33 U.S.C. §§902(10), 910(d)(2), (i). HT at 11. A nominal award, however, is based on Section 8(h) of the Act, 33 U.S.C. §908(h), *see Rambo*, 521 U.S. at 138-141, 31 BRBS at 61-62(CRT), and Section 8(h) is not applicable to an award pursuant to Section 8(c)(23), because such an award is based solely on the degree of claimant's permanent physical impairment. 33 U.S.C. §902(10); *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989). We, therefore, reject claimant's assertion that he is entitled to a *de minimis* award of benefits in this case.[8]

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[6] The administrative law judge also found that Dr. Teiger's opinion that claimant's occupational exposures to grinding dust, welding fumes and paint vapors did not contribute to his COPD, is further supported by Dr. Pulde's opinion.

[7] We reject claimant's contention that, in *Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007), the Second Circuit stated that "all doubts" should be resolved in claimant's favor. The court properly recognized that the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), requires the proponent of a rule to bear the ultimate burden of persuasion. In that case, as employer was the proponent of its entitlement to a credit, it bore the burden of establishing the allocation of the settlement. Consequently, in this case claimant bears the burden of persuasion to demonstrate that his COPD is related to his work for employer. *Id.*

[8] Moreover, since claimant can file a new claim if and when he has a permanent impairment due to his pleural plaques, 33 U.S.C. §913(b)(2), there is no need for a *de minimis* award to extend the statute of limitations under Sections 13 and 22 of the Act. 33 U.S.C. §§913(b)(2), 922.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge