

BRB Nos. 10-0200, 11-0178
and 11-0202

ALANE JOY LEE)
(Widow of THOMAS E. LEE))
)
 Claimant-Petitioner)
)
 v.)
)
 BATH IRON WORKS CORPORATION) DATE ISSUED: 08/26/2011
)
 and)
)
 ONEBEACON INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeals of the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Modification of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Alane Joy Lee, Lindstrom, Minnesota, *pro se*.

Richard F. van Antwerp and Cara L. Biddings (Robinson, Kriger & McCallum, P.A.), Portland, Maine, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits dated October 28, 2009 and the Decision and Order Denying Motion for Modification dated October 22, 2010 (2005-LHC-01625 and 2005-LHC-01626) 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). In an appeal by a claimant without representation by

counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine whether they are rational, supported by substantial evidence, and are in accordance with law; if they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a lengthy procedural history which is briefly summarized here. Claimant and her deceased husband, Thomas E. Lee (decedent), were both employed by employer from 1978 to February 1981. Claimant, who has been without legal representation at all times, sought death benefits under the Act as the widow of decedent and additionally sought compensation under the Act for her own disability. Specifically, claimant alleged that decedent's death from pancreatic cancer on June 14, 1982, resulted from radio frequency (RF) radiation and lead exposure sustained in the course of his employment as an electrician with employer when a megatron firing device, also referred to as a radar unit, malfunctioned.¹ Claimant additionally filed claims for disability benefits for her mental illness, which she asserted is causally related to decedent's work-related injury and death, and for her respiratory problems, which she alleged arose out of her employment with employer. A subsequent claim for lead intoxication, which claimant allegedly sustained through her contact with decedent and his clothing, was consolidated with her previous claims.²

In the initial proceedings in this case, Administrative Law Judge Larry Price granted employer's motion for summary decision and denied the claims for death and disability benefits on the grounds that the claims were untimely filed. On appeal, the Board vacated the denial of the claims and remanded the case for further consideration of whether the claims were timely filed. *Lee v. Bath Iron Works Corp.*, BRB Nos. 06-0147, 06-0509 (Feb. 28, 2007) (unpub.); Order on Motion for Reconsideration (Jul. 30, 2007) (unpub.).

¹Claimant alleges that the radar unit was located onboard the U.S.S. *Sims*, a Navy vessel which was overhauled at employer's shipyard, and that the incident involving the malfunction of the radar unit occurred in June 1979.

²Various pleadings filed by claimant with the Board contain references to a claim for a head injury, with resulting brain trauma, allegedly sustained in the course of claimant's employment with employer. The administrative law judge's decisions do not address a head injury claim and employer, in its response brief, states that the head injury alleged by claimant is not at issue in these proceedings. As the administrative law judge made no findings regarding a head injury, the Board has nothing to review in this regard.

On remand, the case was reassigned to Administrative Law Judge Daniel F. Sutton (the administrative law judge) on claimant's request for a change in hearing venue, and a formal hearing was held. In a Decision and Order on Remand Denying Benefits issued on October 30, 2008 (2008 Decision and Order), the administrative law judge found, with respect to the death benefits claim, that claimant was not entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a).³ The administrative law judge further found that assuming, *arguendo*, the presumption was invoked, employer established rebuttal and that the evidence, considered as a whole, establishes that there was no causal relationship between decedent's death due to pancreatic cancer and his work for employer. With respect to claimant's claim for disability benefits for her respiratory conditions, the administrative law judge found that claimant did not establish the working conditions element of her *prima facie* case. The administrative law judge further found that assuming, *arguendo*, the Section 20(a) presumption was invoked, it was rebutted and that the evidence, considered as a whole, establishes that there is no relationship between claimant's respiratory conditions and her work for employer. The administrative law judge also found that claimant is not entitled to disability benefits for her mental illness since the Act does not provide compensation for a spouse who suffers emotional harm as the result of the work-related illness or death of an employee.⁴ Accordingly, the administrative law judge denied the claims for death and disability benefits. Claimant's motions for reconsideration were denied by orders dated December 9, 2008 and January 7, 2009.

After appealing these decisions to the Board, BRB No. 09-0348, claimant filed a request for modification; by Order dated March 26, 2009, the Board dismissed claimant's appeal and remanded the case for modification proceedings pursuant to Section 22 of the Act, 33 U.S.C. §922.⁵ In a Decision and Order Denying Benefits issued on October 28,

³As employer did not assert on remand that the claims were untimely, the administrative law judge deemed the timeliness defense to have been waived. *See* Decision and Order on Remand Denying Benefits at 3-4, 8.

⁴The administrative law judge additionally reiterated in this regard that decedent's pancreatic cancer and death were found to be unrelated to his employment with employer.

⁵On remand, the administrative law judge granted claimant's request to consolidate her new claim for lead intoxication with her previous claims that had been remanded for modification proceedings. Claimant proffered new evidence in support of her modification request and additionally requested the issuance of numerous subpoenas, including a request for the production and DNA testing of decedent's autopsy slides to investigate the possibility that decedent had been exposed to lead and RF radiation. Employer filed an objection to claimant's proposed modification exhibits and request for

2009 (2009 Decision and Order), the administrative law judge found that employer was entitled to summary decision on both claimant's request for modification of the 2008 Decision and Order and her new lead intoxication claim. With respect to the original death and disability claims, the administrative law judge found that claimant presented no argument or evidence that could establish that there was a mistake in a determination of fact made in the 2008 Decision and Order, in which the administrative law judge found no causal relationship between decedent's death and claimant's disabling conditions and their employment with employer. With respect to claimant's new claim for lead intoxication, the administrative law judge determined that as claimant's alleged exposure to lead occurred as a result of her contact with decedent's person and his clothing, and not in the course of any activity related to her own employment with employer, her claim would fail as a matter of law as she did not sustain an injury arising out of and in the course of her employment. Accordingly, the administrative law judge granted employer's motion for summary decision and denied claimant's cross-motion for summary decision. In addition, claimant's motions for subpoenas and additional discovery, petition for modification, and new claim for lead intoxication were denied by the administrative law judge.

Claimant appealed this decision to the Board, BRB No. 10-0200, but subsequently filed a new petition for modification. In an order dated March 19, 2010, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for modification proceedings.⁶ In a Decision and Order Denying Motion for Modification issued on October 22, 2010 (2010 Decision and Order), the administrative law judge denied claimant's requests to reopen the record and for the issuance of subpoenas. He also denied claimant's motion for modification, having determined that claimant did not offer or identify any relevant or probative evidence that had not been considered in the 2009 Decision and Order nor did she identify any mistake in the administrative law judge's prior determinations of fact regarding the death and disability claims.

subpoenas and also filed a motion for summary decision with respect to both claimant's request for modification of the 2008 Decision and Order and her new lead intoxication claim. Thereafter, claimant filed an opposition to employer's motion for summary decision and additionally filed a cross-motion for summary decision.

⁶On remand, claimant filed a motion to reopen the record for consideration of new evidence, and additionally requested the issuance of several subpoenas, including a subpoena to compel the testing of decedent's autopsy slides. Employer filed objections to claimant's motions and requested dismissal of claimant's modification request.

Claimant appealed this denial of modification to the Board, and additionally requested that her prior appeal, BRB No. 10-0200, be reinstated. By order dated December 30, 2010, the Board reinstated claimant's previous appeal, BRB No. 10-0200, acknowledged claimant's appeal of the 2010 Decision and Order, BRB Nos. 11-0178 (representing the death claim) and 11-0202 (representing the disability claim), and consolidated these appeals for purposes of decision. On appeal, claimant contends that the administrative law judge erred in finding that she is not entitled to death benefits for decedent's death due to pancreatic cancer and to disability benefits related to her mental illness, respiratory conditions, and lead intoxication. Claimant also asserts that the administrative law judge erred in denying her requests to reopen the record and issue subpoenas so that claimant might obtain further evidence in support of her claims and in denying her motion to compel the testing of decedent's autopsy slides to ascertain whether decedent was exposed to lead and/or RF radiation.⁷ Employer responds, urging affirmance of the administrative law judge's decisions.

Discovery Issues

We first address claimant's contention that the administrative law judge deprived her of the opportunity to conduct necessary discovery during the modification proceedings. In his 2009 Decision and Order, the administrative law judge specifically listed each subpoena requested by claimant and set forth the facts claimant sought to establish through each of them. 2009 Decision and Order at 16-21. The administrative law judge denied the requested subpoenas, having determined that the testimony and records claimant sought to obtain would not provide relevant or probative information with respect to establishing the requisite causal relationships between decedent's death and his employment and claimant's medical conditions and her own work for employer. *Id.* at 23. In this regard, the administrative law judge stated that decedent's autopsy slides are available to claimant for testing, but that claimant lacks the funds to have such testing performed. The administrative law judge concluded that the Act does not confer on him the authority to order that the slides be tested without expense to claimant. *Id.* In his subsequent 2010 Decision and Order, the administrative law judge fully addressed claimant's new discovery motions, determined that the information claimant sought would not assist her in demonstrating the causal relationships necessary to prevail in her

⁷In addition to presenting arguments on appeal, claimant has submitted several pieces of new evidence to the Board. As these documents were not part of the record before the administrative law judge, they cannot be considered by the Board. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.301(b).

claims, and reiterated that he lacked the authority to order the testing of decedent's autopsy slides without charge to claimant.⁸ 2010 Decision and Order at 9-10.

Our review of the administrative law judge's discovery rulings reflects that claimant's due process rights were fully protected in this case. *See Stark v. Washington Star Co.*, 833 F.2d 1025, 20 BRBS 40(CRT) (D.C. Cir. 1987); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). As the administrative law judge rationally determined that the testimony and records sought by claimant via subpoena would not provide relevant and material evidence, he did not abuse his discretion in declining to reopen the record or to issue the requested subpoenas. *See id.*; 20 C.F.R. §702.338. Moreover, as correctly found by the administrative law judge, the Act provides no basis for ordering the testing of decedent's autopsy slides without claimant bearing the initial expense of such testing.

Lead Intoxication Claim

We next consider the administrative law judge's denial, in his 2009 Decision and Order, of claimant's claim for lead intoxication. For a claim to be compensable under the Act, the injury must arise out of and in the course of employment. 33 U.S.C. §902(2). An injury occurs in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. *See, e.g., Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010). As correctly found by the administrative law judge, claimant's claim alleged that she was harmed by secondary exposure to lead through contact with decedent's person and clothing, and not while in the course of any activity related to her own employment with employer. 2009 Decision and Order at 24-25. Thus, as any possible harm to claimant caused by her secondary exposure to lead was not due to her own employment with employer, we affirm the administrative law judge's conclusion that claimant's lead intoxication claim is not cognizable under the Act.

⁸Moreover, as set forth in the administrative law judge's discussion of the discovery-related issues raised during the 2008 hearing in this case, the administrative law judge provided claimant at that stage of the proceedings with every reasonable opportunity to obtain evidence in support of her claims. *See* 2009 Decision and Order at 5-6; 2010 Decision and Order at 4-5; *see also* 2008 Decision and Order at 3-5.

Modification

Section 22 of the Act permits the modification of a final award if the party seeking modification demonstrates either a change in claimant's physical or economic condition or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). In requesting modification, claimant sought to demonstrate that the administrative law judge made mistaken findings of fact in his 2008 Decision and Order regarding the issue of whether decedent's death and claimant's medical conditions were causally related to their employment with employer. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes her *prima facie* case. To establish a *prima facie* case, the claimant must show the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. See *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004). Once the Section 20(a) presumption is invoked, employer bears the burden of producing substantial evidence that the injury/death is not related to the employment. See *id.* If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. See *id.*; see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

Claim for Death Benefits

In his initial decision, the administrative law judge found that claimant did not establish that decedent was exposed to substances at work which could have caused his death due to pancreatic cancer.⁹ See 2008 Decision and Order at 34-35. In this regard, the administrative law judge determined that the scientific evidence submitted by claimant does not indicate that exposure to RF radiation or lead causes or contributes to pancreatic cancer. *Id.* at 27, 34-35. Thus, as claimant did not establish that any exposure to RF radiation and/or lead that decedent might possibly have experienced could conceivably have caused or contributed to his fatal pancreatic cancer, the administrative law judge properly found that claimant failed to establish an essential element of her

⁹Although the administrative law judge did not credit claimant's account of a radar malfunction onboard the U.S.S. *Sims* in 1979, he found that decedent may have been in close proximity to an incident onboard the U.S.S. *Conyngnam* in the summer of 1980 when a radar unit on that vessel overheated, causing the lead shielding to melt. See 2008 Decision and Order at 12-19, 23-24, 34.

claim for death benefits.¹⁰ See *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The administrative law judge alternatively found that if the Section 20(a) presumption was invoked, it was rebutted by Dr. Holland's report. See 2008 Decision and Order at 28, 35-36. Dr. Holland, a Board-certified medical toxicologist, opined that decedent's pancreatic cancer was unrelated to any exposure to RF radiation or lead that he may potentially have experienced in the course of his employment with employer. EXs 1, 2. In a detailed report, with references to epidemiologic studies and other medical literature, Dr. Holland explained that there is no credible scientific evidence that radiation or lead exposure are risk factors for the development of pancreatic carcinoma. *Id.* The administrative law judge properly determined that Dr. Holland's opinion is legally sufficient to rebut the Section 20(a) presumption. 2008 Decision and Order at 28, 35-36; see *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). As claimant introduced no evidence to counter Dr. Holland's opinion, the administrative law judge properly concluded that the evidence, considered as a whole, does not establish that decedent's death was causally related to his employment. *Id.*; see 33 U.S.C. §909.

In considering claimant's motion for modification, the administrative law judge found that claimant did not establish that a mistake of fact was made in his initial determination that no causal relationship existed between decedent's death and his employment with employer. In making this determination, the administrative law judge thoroughly reviewed the arguments and additional evidence presented by claimant in support of her modification request, see 2009 Decision and Order at 9-10, 12-16, 20-24; 2010 Decision and Order at 10-12, and he rationally found that claimant did not present any evidence which, even if fully credited, could establish that decedent was exposed at work to any substances that could have caused or contributed to his pancreatic cancer and resulting death. See 2009 Decision and Order at 23; 2010 Decision and Order at 11. We therefore affirm the administrative law judge's denial of modification, and uphold the administrative law judge's denial of the claim for death benefits. *Sprague v. Director, OWCP*, 688 F.2d 862, 15 BRBS 11(CRT) (1st Cir. 1982); *Manente v. Sea-Land Service, Inc.*, 39 BRBS 1 (2004).

¹⁰The administrative law judge rationally stated in this regard that in establishing that the employee's working conditions could have caused the harm, claimant's theory of causation must be supported by more than her own speculation. 2008 Decision and Order at 35; see *Champion v. S & M Traylor Bros.*, 690 F.2d 285, 15 BRBS 33(CRT) (D.C. Cir. 1982); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

Claim for Disability Benefits

In addressing the claim made by claimant for disability benefits for her respiratory conditions, the administrative law judge found, in his 2008 Decision and Order, that claimant established the harm element of her *prima facie* case but that she presented no evidence that she was exposed to asbestos or any potentially harmful levels of dust or other irritants while in the course of her employment with employer that could have caused, contributed to or aggravated her respiratory conditions.¹¹ See 2008 Decision and Order at 9, 28-32, 36. As the administrative law judge rationally found that claimant did not offer evidence of exposure to potentially harmful substances, he properly found that she did not establish a *prima facie* case that her respiratory conditions are related to her work for employer. See *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989). The administrative law judge found that assuming, *arguendo*, the Section 20(a) presumption was invoked, it was rebutted by Dr. Mette's opinion and that Dr. Mette's opinion outweighed any evidence suggestive of a causal relationship between claimant's respiratory conditions and her employment with employer. 2008 Decision and Order at 32-33, 36. Dr. Mette, a Board-certified internal medicine and pulmonary disease specialist, who reviewed claimant's medical records, attributed any respiratory conditions claimant may have to her own smoking history and secondhand exposure to cigarette smoke, and not to any possible workplace exposure to asbestos, fumes or airborne particulates.¹² EXs 3, 5. As Dr. Mette's opinion is sufficient to rebut the Section 20(a) presumption, and as claimant presented no countervailing evidence, the administrative law judge properly concluded that claimant did not prove that her respiratory conditions are causally related to her employment. See *Harford*, 137 F.3d 673, 32 BRBS 45(CRT); see also *Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT).

¹¹In her testimony regarding her working conditions with employer, claimant stated that until March 1980, she worked in a shipping office that was not dusty. Hearing Tr. at 191, 194, 196. In March 1980, she was transferred to a receiving office which she described as dusty. *Id.* at 194-195, 230-233. In response to her concerns about dusty conditions, employer's safety office conducted dust and fiber testing in her office on January 23, 1981, which indicated that no fibers were present and that dust levels were within allowable limits. *Id.* at 233-235; EX 7. Additionally, on January 12, 1981, claimant underwent a chest x-ray, which was interpreted as normal. EXs 7, 8.

¹²Dr. Mette noted the absence of any documentation that claimant was exposed to asbestos, fumes or airborne particulates during her employment with employer and additionally cited employer's January 23, 1981 dust and fiber survey which found no fibers or dust above the allowable level. EXs 3, 7.

Claimant also sought disability benefits for her mental illness, asserting that decedent's cancer and death contributed to such illness. As the administrative law judge correctly found, the Act provides benefits only for injuries that arise out of and in the course of employment and does not provide compensation for a spouse who is emotionally harmed by the illness or death of an employee.¹³ 2008 Decision and Order at 36; 33 U.S.C. §902(2); *see Stark v. Lockheed Shipbuilding & Constr. Co.*, 5 BRBS 186 (1976); *see generally Phillips*, 44 BRBS 1. The administrative law judge therefore properly concluded that claimant is not entitled to benefits under the Act for her mental illness.

In denying modification, the administrative law judge found that claimant offered no argument or evidence that could establish that there was any mistake of fact in the administrative law judge's previous determination that she failed to establish that her respiratory condition is causally related to her employment with employer.¹⁴ *See* 2009 Decision and Order at 23; 2010 Decision and Order at 11. As claimant presented no evidence establishing that claimant's respiratory conditions are related to her employment, we affirm the administrative law judge's finding that claimant failed to establish grounds for modification; the administrative law judge's prior denial of claimant's claim for disability benefits therefore is upheld. *Manente*, 39 BRBS 1.

In sum, the administrative law judge's findings that claimant did not establish that decedent's death or her own medical conditions are compensable under the Act are rational, supported by substantial evidence, and in accordance with law. Therefore, we affirm the administrative law judge's grant of summary decision for employer and the denial of claimant's initial and modification claims for death and disability compensation. *See generally R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd mem. sub nom. Villaverde v. Director, OWCP*, 335 F.App'x 79 (2^d Cir. 2009).

¹³As noted by the administrative law judge, claimant stated at the hearing that she was not alleging that her mental illness was related to the conditions of her own employment with employer but, rather, that her mental illness claim was based on the stressful conditions of decedent's employment with employer and his illness and death. *See* 2008 Decision and Order at 2 n.2; Hearing Tr. at 444, 474-475.

¹⁴The administrative law judge's finding, in his 2008 Decision and Order, that claimant's mental illness-related claim for disability benefits is not cognizable under the Act is a legal determination and, as such, is not subject to Section 22 modification. *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985).

Accordingly, the administrative law judge's Decision and Order Denying Benefits dated October 28, 2009 and Decision and Order Denying Motion for Modification dated October 22, 2010 are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge