



BRB No. 14-0414

BONNIE WOOD)	
(Widow of WILLARD L. WOOD))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: <u>Aug. 12, 2015</u>
HUNTINGTON INGALLS INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jennifer W. Stevens (Patten, Wornom, Hatten & Diamonstein), Newport News, Virginia, for claimant.

Jonathan Walker (Mason, Mason, Walker & Hendrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2014-LHC-00025) of Administrative Law Judge Paul C. Johnson, Jr., 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 rational, supported by substantial evidence, and 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’s husband (decedent) worked for employer for seven years, during

which time he was exposed to airborne asbestos fibers.¹ JX 1. Decedent died on October 9, 2010. The death certificate states decedent died from sepsis due to a urinary tract infection due to urinary retention; other significant conditions contributing to death were MRSA bacterium and dementia. EX 1. Claimant filed a claim under the Act, alleging that decedent had work-related asbestosis that hastened his death.²

The administrative law judge found that the preponderance of the evidence establishes that decedent suffered from asbestosis. Therefore, as employer stipulated to working conditions that could have caused asbestosis, and as Dr. Bluemink, the autopsy prosector, opined that decedent died of bronchopneumonia and that asbestosis diminished the likelihood of a favorable response to treatment for the bronchopneumonia, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was causally related to his work-related asbestos exposure. Decision and Order at 4, 8; CX 4. Finding that employer's evidence did not rebut the Section 20(a) presumption, the administrative law judge found the death work-related as a matter of law and awarded claimant death benefits.³ 33 U.S.C. §909. Employer appeals the award of death benefits, contending the administrative law judge erred in finding decedent had asbestosis and that the Section 20(a) presumption was not rebutted. Claimant responds, urging affirmance.

Section 9 of the Act, 33 U.S.C. §909, provides for death benefits to certain survivors "if the injury causes death." In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a prima facie case, i.e., the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4th Cir. 2007); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In addressing the scope of Section 9 where

¹ Decedent was employed by employer as a helper, handyman, clerk, and material checker from September 14, 1953 – November 22, 1955, and March 30, 1959 – May 8, 1964. JX 1.

² The parties stipulated that employer was claimant's last maritime employer under the Act; claimant was exposed to asbestos-containing products in the course of his employment; and the claim falls within the coverage of the Act. JX 1.

³ Pursuant to employer's motion for reconsideration, the administrative law judge amended his order to correct a calculation error in the compensation rate.

the immediate cause of death is not work-related, the Board has applied the maxim that “to hasten death is to cause it,” as this principle is consistent with the aggravation rule. See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *Woodside v. Bethlehem Steel Corp.*, 14 BRBS 601 (1982) (Ramsey, C.J., dissenting); see also *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992).

In this case, the administrative law judge weighed the relevant evidence in finding that decedent had asbestosis. Specifically, the administrative law judge considered a 1998 medical report of Dr. Scutero, diagnosing asbestosis based on an x-ray; the autopsy report of Dr. Bluemink stating that decedent had asbestosis and died from bronchopneumonia; and the pathology reports of Drs. Churg and Roggli, stating that decedent did not have asbestosis. CXs 4, 6 at 38-39; EXs 2, 3. The administrative law judge found that Drs. Bluemink, Churg, and Roggli are equally qualified as board-certified pathologists. Nonetheless, the administrative law judge credited Dr. Bluemink’s opinion because it was “based on his personal examination of decedent’s remains as well as an analysis of the tissue samples conducted contemporaneously with the examination.”⁴ Decision and Order at 8. Accordingly, the administrative law judge found that decedent suffered from asbestosis.

The administrative law judge is entitled to weigh the evidence and to draw his own inferences from it; the administrative law judge has the discretion to determine which of conflicting opinions is entitled to determinative weight and the Board is not empowered to reweigh the evidence.⁵ See *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock*

⁴ The administrative law judge rationally found Dr. Scutero’s report supportive of Dr. Bluemink’s opinion. CX 6 at 38; see *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). However, contrary to the administrative law judge’s implication, Dr. Bluemink did not state he had personally reviewed Dr. Scutero’s x-ray or report. Dr. Bluemink merely stated his awareness of an x-ray diagnosis of asbestosis. CX 4. Dr. Churg indicated in his report that he was aware, through Dr. Bluemink’s report, of decedent’s prior diagnosis of asbestosis and restrictive pulmonary function abnormality. EX 2. Dr. Roggli’s report is silent on this matter, as the administrative law judge correctly notes. EX 3.

⁵ Thus, we reject employer’s assertion that the administrative law judge was obligated to assign greater weight to the pathology findings of Drs. Roggli and Churg than to those of Dr. Bluemink based on the former physicians’ allegedly superior qualifications.

Co. v. Director, OWCP [Hess], 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). The administrative law judge’s decision to credit Dr. Bluemink’s opinion is rational and within the administrative law judge’s discretion. *Id.* Dr. Bluemink provided a detailed autopsy report. CX 4. He stated that he applied a special stain to the removed lung sections to determine the presence of ferruginous or asbestos bodies, and that this resulted in a finding of “23 ferruginous bodies per five sections of lung sampled.” *Id.* From this, he concluded that decedent had asbestosis.⁶ *Id.* Substantial evidence of record thus supports the administrative law judge’s finding that decedent had asbestosis, and we affirm this finding. *Richardson*, 39 BRBS 74.

Employer stipulated to working conditions that exposed decedent to airborne asbestos fibers and dust. JX 1. Dr. Bluemink opined that bronchopneumonia was the proximate cause of death and that “asbestosis diminished the likelihood of a favorable response to treatment of the bronchopneumonia.”⁷ CX 4. Based on this evidence, the administrative law judge rationally determined that claimant established her prima facie case, i.e., a work-related injury that could have hastened her husband’s death. We affirm the administrative law judge’s finding that the Section 20(a) presumption applies in this case, as it is rational, supported by substantial evidence and in accordance with law. *Cline v. Huntington Ingalls, Inc.*, 48 BRBS 5 (2013); *Richardson*, 39 BRBS 74.

⁶ Dr. Bluemink’s specific finding is:

4. Asbestosis
 - A. Peribronchiolar and interstitial fibrosis
 - B. Pleural plaques
 - C. Asbestos (ferruginous) bodies

CX 4.

⁷ We reject employer’s contention that decedent’s 2004 “normal” pulmonary function study undermines Dr. Bluemink’s opinion. Emp. Br. at 8. Although the normal pulmonary function study may suggest that, in 2004, asbestosis did not significantly affect decedent’s lung function, it does not address whether, six years later, asbestosis combined with, aggravated, or accelerated the bronchopneumonia demonstrated on autopsy, or hastened death. Similarly, the fact that the hospital notes do not reference a diagnosis of asbestosis is not significant in this case, as the case turns on autopsy evidence. Moreover, decedent’s intake notes state he had “left lobe pneumonia” for which he was given antibiotics on October 3, 2010, six days before his death. CXs 2; 6 at 6.

Once, as here, the claimant establishes a prima facie case, Section 20(a) applies to relate the decedent's death to his employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to his employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). While the employer's burden on rebuttal is one of production only, and not persuasion, it cannot meet this burden by simply producing "any evidence." Rather, it 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 death is not related to his workplace exposures. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); see also *Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2^d Cir. 2008); *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); *Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). 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. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, employer relied on three reports in support of its contention that it rebutted the Section 20(a) presumption: decedent's death certificate and the pathology reports of Drs. Roggli and Churg. Dr. Winfrey signed the death certificate, stating that decedent died of sepsis as a consequence of a urinary tract infection. CX 2. Dr. Roggli noted that the death certificate "indicates urinary tract infection with sepsis as a cause of death," and he opined that "there is no histologic evidence that asbestos[is] caused or contributed to [decedent's] death." EX 3. Dr. Churg diagnosed interstitial fibrosis, "arguably" related to asbestos exposure. However, he opined that "the amount of fibrosis is minimal and would not be expected to significantly affect lung function." Dr. Churg stated that "there is nothing in this case to support a diagnosis of asbestosis," and he summarily concluded that "[t]his patient died of sepsis." EX 2 at 1.

With respect to decedent's death certificate, the administrative law judge determined that "no conclusions" could be drawn from it regarding a connection between decedent's death and work exposure to asbestos. Specifically, he found that Dr. Winfrey was not aware of decedent's prior diagnosis of asbestosis and was unable to obtain a history and conduct testing due to decedent's deteriorating condition. The administrative law judge therefore found Dr. Winfrey's opinion was not substantial countervailing evidence.⁸ Similarly, the administrative law judge found the opinions of Drs. Churg and

⁸ Despite its contention on appeal regarding Dr. Winfrey's opinion, employer conceded in its brief before the administrative law judge that "the question of whether asbestos exposure caused the Decedent's death turns exclusively upon the pathology, and

Roggli were not substantial countervailing evidence because they failed to diagnose asbestosis, a condition which the administrative law judge found decedent had. Moreover, the administrative law judge found Dr. Churg's opinion insufficient to rebut the Section 20(a) presumption because he did not address whether decedent's asbestos-related fibrosis combined with, aggravated, or accelerated the bronchopneumonia demonstrated on the autopsy slides.⁹ Thus, the administrative law judge found employer did not rebut the Section 20(a) presumption. Decision and Order at 9.

Employer challenges the administrative law judge's finding, contending he applied an incorrect standard in evaluating the opinions of Drs. Winfrey, Roggli and Churg. Citing *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), cert. denied, 540 U.S. 1056 (2003), employer contends the administrative law judge improperly required employer to "rule out" any causal connection between decedent's death and work exposure rather than to offer "substantial evidence" of the absence of a causal connection. In addressing an employer's burden on rebuttal in *Charpentier*, the United States Court of Appeals for the Fifth Circuit stated that an employer need not produce evidence: that is "specific and comprehensive;" that "rul[es] out" the employment as a possible cause of the injury; or that "unequivocally or affirmatively states" that the claimant's injury or death is not related to his employment, in order to establish rebuttal of the Section 20(a) presumption.¹⁰ *Charpentier*, 332 F.3d at 290, 37 BRBS at 39(CRT). Rather, the court held that an employer must "affirmatively rebut" the presumption with "*substantial evidence* to the contrary," which the court defined as a minimal standard that is "more than a modicum" but is less demanding than the ordinary civil requirement that a party prove a fact by the preponderance of the evidence. *Id.*, 332 F.3d at 287, 290, 37 BRBS at 37, 39(CRT) (emphasis in original); see also *Ceres Gulf*,

histological examination of the Decedent's lung tissue. Emp. Br. at 2 (June 27, 2014). Employer additionally stated that "it is well accepted that pathology trumps a clinical diagnosis," and that Dr. Winfrey's opinion is "entitled to considerably less weight, because it is a clinical determination on the part of the Decedent's treating physician as opposed to a decision based upon the direct evidence of histology...." *Id.* at 2, 4 n.3.

⁹ The administrative law judge additionally observed that Dr. Churg "appears simply to have accepted the notations on the death certificate as correct, without discussing whether his own analysis showed the presence of sepsis, and without commenting on Dr. Bluemink's finding that the infection appeared to be limited to the prostate." Decision and Order at 7.

¹⁰ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit; however, *Charpentier* is consistent with the applicable law in the Fourth Circuit. See *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT).

Inc. v. Director, OWCP [Plaisance], 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012) (an employer must produce evidence that “throws factual doubt” on a claimant’s prima facie case).

We reject employer’s assertion of error. The administrative law judge specifically stated it was employer’s burden to “produce substantial countervailing evidence [to] rebut the presumption that [decedent’s] death was caused, at least in part, by his employment.” Decision and Order at 8. Further, the administrative law judge assessed the evidence in light of whether it in fact constituted “substantial countervailing evidence.” *Id.* at 8-9. Thus, the administrative law judge applied the correct legal standard. *Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT). Moreover, the administrative law judge rationally found that neither the death certificate nor the opinions of Drs. Churg and Roggli constitute “substantial evidence” to rebut the Section 20(a) presumption. The administrative law judge rationally found, on the facts of this case, that the absence of evidence of asbestosis on the death certificate and in the hospital records “is not evidence of absence” of a connection between decedent’s asbestosis and death. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 43 BRBS 67(CRT) (4th Cir. 2009) (evidence that does not address aggravation cannot constitute substantial evidence to the contrary); Decision and Order at 9; *see n. 6, supra*. Moreover, the administrative law judge rationally rejected the opinions of Drs. Churg and Roggli as they are premised on an absence of asbestosis, which is contrary to the administrative law judge’s finding that the decedent had this condition. *Rainey*, 517 F.3d at 636-637, 42 BRBS at 14(CRT) (where the premise for a medical opinion is false or unsound, the administrative law judge may find that the opinion does not constitute substantial evidence in rebuttal of the Section 20(a) presumption); *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT). Therefore, we affirm the administrative law judge’s finding that the death certificate and the opinions of Drs. Roggli and Churg do not rebut the Section 20(a) presumption. *Id.*; *see also Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 44 BRBS 13(CRT) (1st Cir. 2010); *C&C Marine Maintenance Co. v. Bellows*, 538 F.3d 293, 42 BRBS 37(CRT) (3^d Cir. 2008); *Shorette*, 109 F.3d 53, 31 BRBS 19(CRT). As employer did not rebut the Section 20(a) presumption, the administrative law judge properly found that, as a matter of law, decedent’s death was work-related. *Holiday*, 591 F.3d 219, 43 BRBS 67(CRT). Consequently, we affirm the administrative law judge’s award of death benefits to claimant. 33 U.S.C. §909.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge