

VIRGINIA WHITAKER)	
(Widow of ISAAC WHITAKER, JR.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 12/22/2005
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (2004-LHC-0920) of Administrative Law Judge Larry W. Price 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).

Decedent worked in shipbuilding and repair for employer from 1962 until 1995, and he was exposed to airborne asbestos dust fibers. He was diagnosed with lung cancer on October 5, 2001, and he died from the disease on January 16, 2002. JX 1. Claimant, decedent's widow, filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's death was due in part to asbestos exposure. The parties

agreed that decedent did not suffer from asbestosis, and the issue of the work-relatedness of decedent's death included whether a diagnosis of asbestosis is required to establish a causal relationship between asbestos exposure and lung cancer.

The administrative law judge found that claimant established a *prima facie* case, as she established that decedent had lung cancer from which he died and exposure to asbestos at work; therefore, the administrative law judge invoked the Section 20(a), presumption of causation. 33 U.S.C. §920(a). He found that employer rebutted the presumption, as Dr. Wick stated that decedent's lung cancer was caused solely by his significant smoking history. In considering the evidence on the record as a whole, the administrative law judge found that claimant did not meet her burden of establishing that a diagnosis of asbestosis is not required for lung cancer to be asbestos-related. The administrative law judge stated that Dr. Legier, who opined that decedent's cancer and death were related to his asbestos exposure, qualified his opinion that a diagnosis of asbestosis is not required by "stating that the jury was still out" and admitting the issue remains unresolved in the medical community. Therefore, the administrative law judge found that claimant did not establish the work-relatedness of decedent's disease and death by a preponderance of the evidence, and he denied benefits.

Claimant appeals, contending that the opinion of her expert, Dr. Legier, is entitled to greater weight than that of Dr. Wick, because the administrative law judge overlooked significant literature supporting Dr. Legier's opinion that asbestosis need not be present to establish a causal nexus between asbestos exposure and lung cancer. Claimant contends that Dr. Wick's opinion that asbestosis is a prerequisite to asbestos-related lung cancer is not as well-supported in medical literature as Dr. Legier's opinion. Employer responds that the administrative law judge's weighing of the medical opinions is rational and should be affirmed.

Once, as here, the Section 20(a) presumption is invoked and rebutted, it drops from the case. The administrative law judge must weigh the evidence as a whole and claimant bears the burden of establishing by a preponderance of the evidence the work-relatedness of decedent's death. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

The record contains the opinions of two medical experts, one of whom opined that asbestosis need not be present to establish the nexus between asbestos exposure and lung cancer, and one of whom opined that asbestosis must be present to establish that link. CX 2; CX 3 at 12,15-16; EX 11 at 11. In addition, each parties submitted articles from medical journals to support the opinion of its respective expert. CX 9-23; EX 5-10. Dr. Legier opined that evidence of an increased asbestos burden, as demonstrated in this case

by microscopic findings of dozens of asbestos bodies in decedent's lung parenchyma, is sufficient to establish the causal relationship between decedent's asbestos exposure and his lung cancer. CX 3 at 15, 18, 20-21. To the contrary, Dr. Wick stated that although there are "two schools of thought," the majority now is of the opinion that a finding of asbestosis is required to causally link asbestos exposure with lung cancer. He emphasized that simply counting asbestos bodies is an insufficient marker of a person's susceptibility to developing an asbestos-related malignancy. EX 11 at 13-16, 20-21. Dr. Wick testified that decedent's lung cancer and death were caused solely by the inhalation of tobacco smoke. EX 11 at 20-21.

The administrative law judge found that claimant's evidence was not more persuasive than employer's and that, therefore, claimant did not satisfy her burden of establishing the work-relatedness of decedent's death. We affirm this finding as it is within the administrative law judge's discretion to determine the weight to be accorded to the evidence of record. The administrative law judge is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 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). Moreover, that claimant submitted into evidence a greater number of journal articles to support Dr. Legier's opinion does not require the administrative law judge to find Dr. Legier's opinion entitled to greater weight. *See generally Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993). Claimant has not raised any reversible error in the administrative law judge's consideration of the doctors' opinions, and the Board is not empowered to reweigh the evidence.¹ *See Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). Therefore, as it is rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant did not establish that decedent's death from lung cancer was causally related to his asbestos exposure at employer's work-place. Consequently, we affirm the denial of death benefits. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

¹ We reject claimant's contention that the administrative law judge was required to evaluate Dr. Wick's opinion pursuant to the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The admissibility of Dr. Wick's opinion was not at issue, 33 U.S.C. §923(a); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997); 20 C.F.R. §§702.338, 702.339, and the medical literature submitted into evidence by employer provides adequate support for Dr. Wick's opinion. *See generally Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001).

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge