

CHARLES SPRALLING)	
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Claimant-Petitioner)	
)	
v.)	
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ELECTRIC BOAT CORPORATION)	DATE ISSUED: 02/16/2011
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

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

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

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-LHC-00781) 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a chipper/grinder from 1973 to 1990. He testified that he worked with asbestos welding blankets for protection from sparks, and that he would occasionally hit a blanket with a grinding wheel, filling the air with asbestos. He also testified that he worked in confined areas next to pipe ladders who covered pipe with asbestos, and that, during the rip-out process, the deck would be covered with asbestos dust, which was cleaned with air hoses. In 2007, claimant

developed lung cancer and underwent a pneumonectomy. Claimant sought permanent total disability benefits and medical benefits under the Act.

In her decision, the administrative law judge found that claimant established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his lung cancer is causally related to his employment, as claimant was exposed to asbestos intermittently in his employment. The administrative law judge also found that employer established rebuttal of the Section 20(a) presumption, as the opinions of Drs. Kimani, Barrett, and Pulde support a finding that workplace exposure to asbestos did not cause or contribute to claimant's lung cancer. In reviewing the evidence as a whole, the administrative law judge relied on Dr. Barrett's interpretation of claimant's chest x-rays and CT scans to conclude they show no bilateral pleural thickening in the lungs and no evidence of abnormalities consistent with asbestosis. In addition, the administrative law judge rejected Dr. Daum's conclusion that claimant's pulmonary function study shows an asbestos-related lung condition; the administrative law judge credited the contrary opinion that claimant's smoking-related emphysema is sufficient to cause the diffusion capacity deficit alone. The administrative law judge concluded that claimant's exposure to asbestos was intermittent and credited the opinions of employer's experts that absent the evidence of asbestosis, claimant's lung cancer could not be attributed to asbestos exposure to any degree. Therefore, the administrative law judge denied the claim for benefits.

On appeal, claimant contends the administrative law judge erred in finding rebuttal of the Section 20(a) presumption based on the opinions of Drs. Pulde, Kimani and Barrett. In addition, claimant contends that the administrative law judge erred in finding that claimant failed to establish that his lung cancer is related to his occupational exposure to asbestos based on a weighing the evidence as a whole. Employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends 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 lung cancer is 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) (2^d 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.

Once, as here, the claimant establishes a *prima facie* case, Section 20(a) applies to relate the disabling injury to the employment, and the employer 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); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001). In order to establish rebuttal, the employer is not required to rule out any possible causal connection between the decedent's employment and his condition, but it must produce "substantial evidence" that the work injury is not due, even in part, to the work exposures. *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT).

In *Rainey*, the employee was exposed to asbestos during the course of his employment. He was diagnosed with lung cancer and chronic obstructive pulmonary disease. The administrative law judge found that the employee established a *prima facie* case relating his lung cancer to his exposure to asbestos. She also found that the employer rebutted the Section 20(a) presumption by presenting the opinions of Drs. Teiger and Pulde who stated that the lung cancer was not due to asbestos exposure but, rather, was caused by the employee's many years of tobacco use. On the record as a whole, the administrative law judge found that the employee did not meet his burden of establishing the work-relatedness of the lung cancer. The Board affirmed this decision.

On appeal, the United States Court of Appeals for the Second Circuit reversed. Dr. Teiger's report stated that he agreed with the conclusions of the decedent's doctors and he opined that the employee most likely would have developed lung cancer even if he had never been exposed to asbestos. The court held this opinion did not amount to a statement that decedent's cancer was unrelated to asbestos exposure in view of the aggravation rule and because the doctor's statement regarding the likelihood of developing cancer in the absence of asbestos exposure did not foreclose a causal relationship. Also insufficient was Dr. Pulde's opinion that the lung cancer was an exclusive consequence of the employee's cigarette smoking because that opinion was based on what the administrative law judge found to be an incorrect assessment of the degree of the employee's asbestos exposure as well as having been based on what she found to be a widely discredited theory in the medical community. *Rainey*, 517 F.3d at 635-637, 42 BRBS at 13-14(CRT). Thus, the *Rainey* court held that an administrative law judge cannot rely on a medical opinion derived from a false factual premise or based on discredited medical theories because such is not "substantial evidence."¹ *Rainey*, 517 F.3d at 633, 42 BRBS at 11(CRT). As neither Dr. Teiger's opinion nor Dr. Pulde's opinion constituted reasonable, reliable and probative evidence stating that the employee's lung cancer was not related to his asbestos exposure, the court held that

¹While the burden is on the employer to produce evidence, it cannot be just "any evidence." To meet its burden, an employer "must introduce 'such relevant evidence as a reasonable mind might accept as adequate' to support a finding that workplace conditions did not cause the accident or injury." *Rainey*, 517 F.3d at 637, 42 BRBS at 14(CRT).

neither opinion constituted substantial evidence rebutting the Section 20(a) presumption, and the cancer was work-related as a matter of law. *Id.*

In this case, the administrative law judge found that employer introduced the reports of three medical experts, Drs. Kimani, Barrett and Pulde. Dr. Kimani, a pulmonary specialist, opined that there is no evidence that claimant suffers from asbestosis or asbestos-related disease, and that, absent such evidence, there is no link between his occupational asbestos exposure and his lung cancer. Emp. Ex. 1. Dr. Barrett, a board-certified radiologist, reviewed claimant's chest x-rays and the CT scans from 2007 and 2008 and concluded that there is no evidence of asbestosis, asbestos-related lung disease or pleural plaques. Emp. Ex. 4. Dr. Pulde, an internist, opined that there is no evidence of asbestosis, asbestos-related lung disease or pleural plaques, and thus, there is no causal link between claimant's lung cancer and his asbestos exposure. Emp. Exs. 6, 8. Employer also submitted medical literature stating that evidence of asbestosis or fibrosis is required in order to link asbestos exposure to lung cancer. Emp. Ex. 10-13. The administrative law judge acknowledged that she had found in a previous case that the theory that asbestos exposure cannot be linked to lung cancer in the absence of asbestosis had been widely discredited in the medical community.² However, after consideration of the articles, studies and other evidence presented in this case, the administrative law judge found that this theory is, in fact, accepted in parts of the medical and scientific community. Decision and Order at 15.

The administrative law judge's finding that the opinions of Drs. Kimani, Barrett and Pulde, that claimant's occupational exposure to asbestos did not play any role whatsoever in the development of his lung cancer, are sufficient to rebut the Section 20(a) presumption is rational, supported by substantial evidence, and in accordance with law. The finding in this case is not contrary to *Rainey*, as the administrative law judge's crediting of these opinions is not inconsistent with other findings of fact she made. Moreover, the administrative law judge is entitled to review the evidence presented to her and to reach a conclusion about the medical literature that differs from a conclusion reached in another case. As the medical opinions of Drs. Kimani, Barrett and Pulde constitute substantial evidence that asbestos did not cause or contribute to claimant's cancer, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *Rainey*, 517 F.3d 632, 42 BRBS 11(CRT).

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. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31

²See *Rainey v. Electric Boat Corp.*, ALJ No. 2003-LHC-02251 (Jan. 23, 2006).

BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). The administrative law judge found that claimant's exposure to asbestos was intermittent with the most direct exposure occurring early in his career. The administrative law judge also found that the persuasive evidence establishes that claimant does not have asbestosis or asbestos-related pleural plaques. In making this finding, the administrative law judge credited the opinion of Dr. Barrett over the contrary opinion of Dr. Daum, based on Dr. Barrett's credentials as a board-certified radiologist and B-reader.³ In addition, the administrative law judge credited Dr. Pulde's opinion that the decreased diffusion capacity revealed in the pulmonary function study taken in October 2007 could be accounted for by claimant's emphysema, due to smoking, over Dr. Daum's contrary opinion that this was caused in part by asbestosis.

We reject claimant's contention that the administrative law judge erred in weighing the evidence as a whole. It is well established that an administrative law judge is entitled to weigh the evidence of record and to draw reasonable inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). The administrative law judge found that, given the objective evidence and the credited opinions of employer's medical experts, claimant did not establish that his lung cancer was caused or contributed to by his asbestos exposure. The administrative law judge did not err in relying on the opinions stating that claimant must have some asbestos-related condition in order for asbestos to have contributed to the development of lung cancer. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Moreover, the administrative law judge's finding that claimant did not establish the existence of such a condition is supported by substantial evidence, and therefore it must be affirmed. *See generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). As the administrative law judge's weighing of the evidence is rational and her finding that claimant did not meet his burden of proving that his asbestos exposure contributed to his lung cancer is supported by substantial evidence, we affirm the denial of benefits. *See generally Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

³The administrative law judge's finding that there is no evidence of bilateral pleural thickening is not contrary to the report of the CT scan taken July 9, 2005, as that report indicates that claimant has pleural thickening in his left upper lobe only. Cl. Ex. 3. Moreover, Dr. Barrett opined that there is no evidence of parenchymal asbestosis in the x-rays and CT scans. Emp. Ex. 4

Accordingly, the administrative law judge's Decision and Order Denying Benefit is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge