

HATTIE B. DEARMAN)
(Widow of D.A. DEARMAN))
)
 Claimant-Petitioner)

v.)

INGALLS SHIPBUILDING,)
INCORPORATED)

DATE ISSUED: Jan. 9, 2002

and)

AMERICAN MUTUAL LIABILITY)
INSURANCE COMPANY, in liquidation,)
by and through, THE MISSISSIPPI)
INSURANCE GUARANTY)
ASSOCIATION)

Employer/Carrier-)
Respondents)

DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of David W. DiNardi,
Administrative Law Judge, United States Department of Labor.

Scott O. Nelson (Maples & Lomax, P.A.), Pascagoula, Mississippi, for
claimant.

Donald P. Moore (Franke, Rainey & Salloum, P.L.L.C.), Gulfport, Mississippi,
for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (95-LHC-0319) of
Administrative Law Judge David W. DiNardi 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant’s spouse (decedent) worked from 1952 to 1963 as a welder for employer where he was exposed to asbestos dust and fibers. Decedent died on May 31, 1995 due to bronchogenic carcinoma. Prior to his death, claimant and decedent filed third-party suits against manufacturers and distributors of asbestos products. While decedent received some money from these suits prior to his death, claimant did not receive any money from these suits after his death. Claimant sought benefits under the Act. 33 U.S.C. §909.

In his Decision and Order, the administrative law judge found that the evidence was sufficient to establish invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that decedent’s harm, *i.e.*, lung cancer, was causally related to his work environment, but that employer offered evidence sufficient to rebut the presumption. Therefore, the administrative law judge weighed the evidence as a whole and found that Dr. Jones’s opinion, that decedent’s lung cancer was not caused, even in part, by asbestos, is entitled to determinative weight. Accordingly, the administrative law judge found that claimant is not entitled to benefits under the Act. Alternatively, the administrative law judge found that claimant did not comply with Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1), as employer only learned of the third-party settlements through discovery shortly before the hearing. Therefore, the administrative law judge found that claimant would not be entitled to benefits as she failed to obtain employer’s approval of the third-party settlements, which were for an amount less than that to which she would be entitled under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that the decedent did not suffer from a work-related injury, and raises Section 23, 33 U.S.C. §923, contending that decedent’s statements regarding his exposure to asbestos establish that decedent did sustain a work-related injury. Claimant also contends that she did not accept any funds from a third-party claim and did not authorize anyone to act on her behalf to accept third-party settlements without employer’s approval. Therefore, claimant contends, she has not forfeited her entitlement to benefits under the Act. Lastly, claimant contends that she is entitled to an additional assessment pursuant to Section 14(e), 33 U.S.C. §914(e), because employer did not timely controvert the claim. Employer responds, urging affirmance of the administrative law judge’s decision.

Initially, claimant contends that the administrative law judge erred in finding that the decedent did not suffer from a work-related illness. 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. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the death to the employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to the employment. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Gooden*, 135 F.3d 1066, 32 BRBS 59 (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. *See Prewitt*, 194 F.3d 684, 33 BRBS 187 (CRT); *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).

For the reasons stated in *Sistrunk v. Ingalls Shipbuilding, Inc.*, __ BRBS __, BRB No. 01-298 (Nov. 26, 2001), we reject claimant's contention that decedent's declarations, that he was exposed to asbestos and suffering from an asbestos-related disease, conclusively establish that he suffered from a work-related injury pursuant to Section 23(a).¹ Section 23(a) aids a claimant in establishing her *prima facie* case. Once the Section 20(a) presumption is invoked and rebutted by substantial evidence, then the administrative law judge must determine the weight to be accorded to the decedent's declarations about the cause of his harm, along with the other relevant evidence of record. *Sistrunk*, slip op. at 4.

In the instant case, the administrative law judge properly found the Section 20(a) presumption was invoked based on the opinions of Drs. Segarra and Kradin that decedent's lung cancer was due, at least in part, to his occupational asbestos exposure. *See Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). However, the administrative law judge also found rebuttal of the Section 20(a) presumption based on Dr. Jones's opinion that there is no

¹Section 23(a) provides in relevant part, "Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury." 33 U.S.C. §923(a).

diagnosis of asbestosis and no basis for attributing the cancer in part to asbestos exposure. We affirm this finding as it is based on substantial evidence of record. *See Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington University*, 30 BRBS 233 (1997); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). Therefore, the issue of whether decedent's death was related to his work was properly addressed on the record as a whole requiring claimant to prove her claim by a preponderance of the evidence. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

In denying claimant's claim for death benefits based on the record in its entirety, the administrative law judge found that decedent's death was not caused or contributed to by his exposure to asbestos at employer's facility, but was caused by lung cancer which was due solely to decedent's extensive cigarette smoking history.² Decision and Order at 16. Specifically, the administrative law judge gave greatest weight to the opinion of Dr. Jones, finding it to be "well-reasoned and well-documented" and noted that Dr. Jones is a pre-eminent pulmonary specialist. In addition, the administrative law judge credited Dr. Jones's reasons for rejecting claimant's medical evidence and incorporated those reasons into his decision.³ Dr. Jones noted that there was no radiographic evidence of asbestosis, and that the record included a CT scan which showed no diffuse interstitial lung disease. Claimant has raised no error in the administrative law judge's reliance on Dr. Jones's opinion. As the administrative law judge reviewed all of the evidence of record, and rationally accorded greatest weight to Dr. Jones's opinion, we affirm the administrative law judge's finding that decedent's cancer was not work-related, and thus affirm the denial of benefits.⁴ *See*

²Although the administrative law judge stated that "decedent's asbestosis and lung cancer do not constitute a work-related injury," it is clear from reviewing the decision as a whole that the administrative law judge found that decedent did not suffer from asbestosis or any asbestos-related disease. *See* Decision and Order at 16.

³In discussing the medical evidence provided for review, Dr. Jones stated that Dr. Kuebler, who reported x-ray findings on June 6, 1992 compatible with pulmonary asbestosis, made no mention of the multifocal and nodular character of abnormalities shown on later films. In addition he noted that Dr. Conner's report includes "the preposterous statement" that the diffusing capacity test 'is severely decreased and measures a negative figure,' which result is possible only through laboratory error, and that Dr. Hillman also concluded that the same "erroneous" result indicated a severe reduction of lung function. *See* Emp. Ex. 5. Dr. Jones also reviewed the x-rays and CT scan taken of decedent and concluded that they show no radiographic evidence of asbestos. *See* Emp. Ex. 5.

⁴As we affirm the administrative law judge's denial of benefits based on the finding

generally 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); *Coffey*, 34 BRBS 85.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

that the evidence does not establish that the decedent suffered from a work-related harm, we need not address claimant's contentions regarding the administrative law judge's findings under Section 33(g) and Section 14(e).