

JUDY DOUSIS)	
(Widow of ANDREW DOUSIS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>Jan 30,</u>
)	<u>2003</u>
Self-Insured)	
Employer-Respondent)	

DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Mark W. Oberlatz (Murphy and Beane), New London, Connecticut, for self-insured employer.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order-Denying Benefits (2000-LHC-1271) of Administrative Law Judge Thomas F. Phalen, 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 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).

Decedent (claimant's husband) worked primarily as a truckdriver and forklift operator for employer from 1967 to July 23, 1999, during which time it is undisputed that he was exposed to asbestos. See Jt. Ex. 1; Tr. at 11. In 1999, decedent was diagnosed with an inoperable malignant tumor in his left lung; he

subsequently filed a claim for benefits under the Act pursuant to Section 8(c)(23), 33 U.S.C. §908(c)(23). Decedent died on May 27, 2000, with the death certificate listing lung cancer as the primary cause of death. Clt. Ex. 3. Claimant thereafter filed a claim for death benefits under the Act. See 33 U.S.C. §909.

In his Decision and Order, the administrative law judge found that claimant failed to establish, by a preponderance of the evidence, that decedent experienced employment conditions that could have caused his lung cancer. The administrative law judge therefore concluded that claimant did not establish a *prima facie* case entitling her to the Section 20(a) presumption linking decedent's lung cancer and subsequent death to his employment. Accordingly, the administrative law judge denied claimant's claim for benefits.

On appeal, claimant contends that the administrative law judge erred in determining that her evidence is insufficient to establish her *prima facie* case and in thus denying her invocation of the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision.

In determining whether a decedent's injury or death is work-related, a claimant is aided by the Section 20(a), 33 U.S.C. §920(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 working conditions existed, at work which could have caused or aggravated that harm. See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). It is claimant's burden to establish each element of her *prima facie* case by affirmative proof. See *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). In presenting her case, however, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused the decedent's harm; rather, claimant must show that working conditions existed which could have caused the decedent's harm. See generally *U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631. Should claimant establish her entitlement to invocation of the Section 20(a) presumption, the burden shifts to employer to present substantial evidence that the decedent's employment did not cause or contribute to the

¹ If the decedent's work exposures played a causative role in the development of the condition leading to his death, such that it hastened death, then the death is work-related. See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993).

decedent's disability and death. See *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); *Swinton v. J. Frank Kelley, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert. denied, 429 U.S. 820 (1976); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the administrative law judge must weigh all of the evidence contained in the record and resolve the causation issue based on the record as a whole. *Id.*; see also *Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43 (CRT); *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990).

In the instant case, claimant contends that the administrative law judge erred in denying her the benefit of the Section 20(a) presumption since, she asserts, she has established that decedent sustained multiple harms, specifically lung cancer and subsequently death, and that decedent's work at employer's facility exposed him to asbestos which could have caused or aggravated those conditions. We agree. In denying claimant's claim, the administrative law judge held claimant to an improper standard when he required claimant to submit sufficient documentation to establish by a preponderance of the evidence that the conditions decedent experienced while working for employer caused his lung cancer and subsequent death. See Decision and Order at 14. Contrary to the administrative law judge's conclusion, however, claimant is not required to prove that the level of asbestos exposure experienced by decedent during his period of employment with employer was sufficient, in fact, to cause or aggravate his lung cancer and death in order to invoke the presumption. See generally *Brown v. I.T.T./Continental Baking Co.*, 912 F.2d 289, 24 BRBS 75(CRT)(D.C. Cir. 1990); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990).

In the case at bar, decedent's uncontroverted deposition testimony that he was exposed to asbestos while working at employer's facility,

see Clt. Ex. 7, together with employer's concession that such exposure to asbestos did in fact occur, see Jt. Ex. 1; Tr. at 11, is sufficient to establish the existence of working conditions which could have caused or aggravated decedent's lung cancer and contributed to his ultimate demise. Moreover, two of the physicians of record, Drs. DeGraff and Cherniak, opined that decedent's asbestos exposure was a factor

² It is undisputed that decedent was diagnosed in 1999 with lung cancer, specifically described as interstitial fibrosis, and that decedent subsequently died as a result of this condition on May 27, 2000. See Clt's Exs. 3, 6. Thus, claimant has established the existence of multiple harms in the instant case.

³ Decedent additionally testified that his forklift duties involved the hauling and disposal of unnamed chemicals. See Clt. Ex. 7 at 7, 12.

in the development of decedent's lung cancer and his subsequent death, see Clt's Exs. 2 at 2; 8; 9 at 37-42; 10 at 5-7, 13, while a third, Dr. Agrawal, opined that decedent's lung cancer may be related to his asbestos exposure. See Clt. Ex. 1. As the record thus contains substantial evidence that decedent was exposed to asbestos which could have potentially caused his lung cancer and subsequent death, claimant has established the existence of working conditions which could have caused or aggravated decedent's lung cancer and death. See *Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985). We, therefore, reverse the administrative law judge's finding that claimant has failed to establish the working conditions element of her *prima facie* case, and hold that invocation of the Section 20(a) presumption has been established as a matter of law; accordingly, we remand the case for the administrative law judge to consider whether employer has rebutted the presumption. See *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Swinton*, 554 F.2d 1075, 4 BRBS 466; *O'Kelley*, 34 BRBS 39. Should the administrative law judge determine that the presumption is not rebutted, or that, although rebutted, claimant has established a causal connection between decedent's lung cancer and death and his employment with employer based on the record as a whole, see *Devine*, 23 BRBS 279, the administrative must then address any remaining issues.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in the amount of \$2,336, representing 10.5 hours of attorney services at a rate of \$220.95 per hour, and one-quarter hour of para-legal work at a rate of \$64 per hour. Employer has not responded to this fee request. Having reviewed counsel's fee petition, we find the requested fee to be reasonably commensurate with the necessary work performed. See *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). We accordingly award counsel a fee of \$2,336, payable directly to counsel by employer, contingent upon claimant obtaining an award of benefits on remand. 33 U.S.C. §928; 20 C.F.R. §§802.203, 802.409; see generally *Devine*, 23 BRBS 279.

⁴ Although, as the administrative law judge found, each of these physicians conceded that it is difficult to determine decedent's actual level of asbestos exposure, they all concluded that this exposure was a factor in the development of decedent's lung cancer.

Accordingly, the administrative law judge's determination that claimant is not entitled to invocation of the Section 20(a) presumption is reversed, and the case is remanded for further consideration consistent with this opinion. Claimant's counsel is awarded an attorney's fee of \$2,336 for work performed before the Board, contingent upon claimant's obtaining an award on remand.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to reverse the administrative law judge's determination that claimant is not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, and to consequently remand the case at bar for further consideration. Moreover, I agree that a review of claimant's counsel's fee petition indicates that the 10.5 hours of legal services and one-quarter hour of para-legal services spent preparing this case for appeal to the Board are reasonable and necessary. I respectfully dissent, however, from my colleagues' decision to award claimant's counsel his requested rate of \$220.95 per hour. This requested hourly rate is excessive and not commensurate with the rate the Board has previously awarded in the geographic area in similarly complex cases. Therefore, I would reduce the hourly rate to \$200, and thus award claimant's counsel a fee in the amount of \$2,116, contingent upon claimant's obtaining an award of benefits on remand. See generally *McKnight v. Carolina Shipping Co.*, 32 BRBS 251, *aff'g on recon. en banc* 32 BRBS 165 (1998); *Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998) (Decision and Order on Reconsideration).

ROY P. SMITH
Administrative Appeals Judge