

HAZEL BAKER	)	
(Widow of DELBERT T. BAKER)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 01/11/2005
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Ralph A. Romano, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2003-LHC-00976) of Administrative Law Judge Ralph A. Romano 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 for employer from September 29, 1952 until November 14, 1952, November 1, 1954 until October 14, 1955, and January 18, 1960 until he retired in January 1995, during which time his employment duties exposed him to airborne asbestos dust and fibers. On January 22, 1999, decedent was diagnosed with lung cancer.

Following the decedent's death on June 14, 2000, claimant, decedent's widow, filed a claim pursuant to Section 9 of the Act, 33 U.S.C. §909, alleging that decedent's lung cancer and death were causally related to his occupational asbestos exposure.<sup>1</sup>

The parties agreed, and the administrative law judge found, that claimant is entitled to invocation of the Section 20(a) presumption that decedent's lung cancer, and ultimately his death, were due at least in part to his asbestos exposure.<sup>2</sup> Next, the administrative law judge found that employer did not establish rebuttal of the Section 20(a) presumption, and he accordingly awarded claimant death benefits, as well as funeral expenses. 33 U.S.C. §909.

On appeal, employer argues that the administrative law judge erred in finding the opinions of Drs. Churg, Wick, and Weiss insufficient to establish rebuttal of the Section 20(a) presumption. Therefore, employer requests that the Board reverse this finding and remand the case to the administrative law judge to weigh the evidence as a whole. Claimant responds, urging affirmance of the administrative law judge's decision.

Once, as in the instant case, claimant establishes a *prima facie* case, Section 20(a), 33 U.S.C. §920(a), applies to relate decedent's death to his employment, and employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to his employment. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5<sup>th</sup> Cir. 1999). If employer rebuts the presumption, it no longer controls and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

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<sup>1</sup> Decedent's death certificate states that the immediate cause of death was "metastatic lung cancer." CX 1.

<sup>2</sup> Dr. Legier opined that decedent's lung carcinoma was caused by occupational exposure to asbestos. CX 4.

In the instant case, employer avers that the administrative law judge erred in concluding that the opinions of Drs. Churg, Wick, and Weiss are insufficient to rebut the Section 20(a) presumption. We agree and, for the reasons that follow, we reverse the administrative law judge's finding on this issue and remand the case for further consideration.

Dr. Churg, an anatomic pathologist, reviewed decedent's clinical and pathology records, which included lung tissue slides.<sup>3</sup> EX 23 at 6-8. Pursuant to this review, Dr. Churg found no histologic evidence of asbestosis, and he therefore concluded that decedent did not have any asbestos-related disease. EX 5. Additionally, Dr. Churg diagnosed decedent's lung malignancy as a "high grade carcinoid tumor" that is not related to either smoking or asbestos exposure. *Id.*; see EX 23 at 19-20, 33. As carcinoid tumors are idiopathic, Dr. Churg concluded that the malignancy that resulted in the decedent's demise has no known association with shipyard or any other type of employment. EX 5.

Dr. Wick, who is also a pathologist, conducted a pathological examination of the decedent's autopsy specimens, which included 23 slides and 16 paraffin blocks, and concluded that the pathologic findings did not support a diagnosis of asbestosis which, in his opinion, is a necessary prerequisite to link asbestos exposure to carcinoma of the lung.<sup>4</sup> EXS 8, 19. Rather, Dr. Wick reported that his examination revealed, *inter alia*, centrilobular emphysema and anthracosis, and he thereupon concluded, to a reasonable degree of medical certainty, "that the sole cause of [decedent's] lung cancer was tobacco smoke inhalation." EX 8.

Dr. Weiss, a pathologist, also reviewed the decedent's medical records and, based upon decedent's autopsy results which did not reveal the presence of asbestosis, concluded that "asbestos did not cause [decedent's] death." EX 1.

The administrative law judge gave several reasons for finding that the opinions of Drs. Churg, Wick, and Weiss are insufficient to rebut the Section 20(a) presumption. Initially, the administrative law judge stated that employer cannot rebut the Section 20(a) presumption with evidence of the absence of asbestosis, because the presumption does not in any way rely upon the existence of asbestosis; rather, it presumes that decedent's lung cancer was due at least in part to his exposure to asbestos while working for employer. Decision and Order at 7. However, while Drs. Churg, Wick, and Weiss stated

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<sup>3</sup> Dr. Churg is Board-certified in anatomic pathology and has authored numerous articles and book chapters on occupational diseases. EXS 20, 23.

<sup>4</sup> Dr. Wick is Board-certified in anatomic and clinical pathology. EX 19 .

that decedent did not have asbestosis, they went on to opine that, as a result, decedent's lung cancer and consequent death was not due to asbestos exposure.<sup>5</sup> Thus, if the opinions of Drs. Churg, Wick, and Weiss are otherwise "substantial evidence to the contrary" they rebut the presumed causal connection between decedent's lung cancer and his asbestos exposure. *See generally Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1<sup>st</sup> Cir. 1998).

Next, the administrative law judge found that to "allow the opinions of Drs. Weiss, Churg and Wick to rebut the presumption is to preclude its invocation in the first instance." Decision and Order at 7. This rationale is faulty since claimant, in order to invoke the Section 20(a) presumption, need only establish that decedent sustained a harm and that he was exposed at work to something that could have caused his harm. *See Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1<sup>st</sup> Cir. 1999). In the instant case, the parties stipulated that the decedent had lung cancer and that he was exposed to asbestos; moreover, no party challenges the administrative law judge's invocation of the Section 20(a) presumption. Thus, the burden shifted to employer to produce substantial evidence that decedent's lung condition was not related to asbestos exposure; as employer's burden is one of production, the relative merits of each party's evidence is not weighed on rebuttal. *See Moore*, 126 F.3d at 262, 31 BRBS at 123(CRT); *see also Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *Harford*, 137 F.3d 673, 32 BRBS 45(CRT).

Lastly, after specifically finding the opinions espoused by Drs. Weiss, Churg, and Wick to be reasonable given the vast amount of medical literature supporting their position, the administrative law judge found Dr. Churg's diagnosis of a carcinoid tumor to be highly conclusory and self-serving. Decision and Order at 8. Specifically, the administrative law judge found that Dr. Churg, while diagnosing the decedent's tumor as a "carcinoid tumor," did not address the cause of that condition; the administrative law judge thereafter acknowledged, however, that a physician need not do so in order to rebut the presumption. *See O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). However, while not offering an opinion as to the cause of the decedent's fatal tumor, Dr. Churg did unequivocally testify that that tumor was not asbestos-related because "carinoid tumors are simply not associated with asbestos exposure." EX 23 at 19. *See Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986). As we have stated, employer's burden on rebuttal is one of production only, not one of persuasion. *See Conoco*, 194 F.3d 684, 33 BRBS 187(CRT); *American Grain Trimmers*, 181 F.3d at 816, 33 BRBS at 75(CRT). In the instant case, Dr. Churg's opinion satisfies this burden. Additionally, Dr. Wick did not merely suggest another causative agent, *see, e.g., Sinclair v. United Food &*

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<sup>5</sup> Dr. Churg found evidence of asbestos exposure on the specimens that he examined. EX 23 at 8-9, 36.

*Commercial Workers*, 23 BRBS 148 (1989), but specifically attributed decedent's lung cancer to tobacco smoke inhalation. See *Leone*, 19 BRBS 100. Lastly, Dr. Weiss unequivocally opined that asbestos did not cause decedent's death. Thus, as employer has produced medical opinions given to a reasonable degree of medical certainty that decedent's lung cancer was not due to asbestos exposure but was due solely to tobacco inhalation, and that decedent's death was not asbestos-related, employer has satisfied its burden of production. See *O'Kelley*, 34 BRBS 39. We accordingly reverse the administrative law judge's finding that the invoked Section 20(a) presumption was not rebutted. *Harford*, 137 F.3d 673, 32 BRBS 45(CRT).

On remand, the administrative law judge must weigh all the relevant evidence, without the benefit of the Section 20(a) presumption, and determine if claimant has met her burden of establishing that decedent's lung cancer was work-related. See *Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The administrative law judge is entitled to weigh the evidence and to determine which medical opinions are more persuasive, and his findings must be affirmed if supported by substantial evidence. See *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5<sup>th</sup> Cir. 2002). In so doing, the administrative law judge should evaluate the competing literature and medical opinions based thereon and determine which is most persuasive and thus entitled to greater weight.<sup>6</sup> See, e.g., *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1988), *aff'd mem.*, 202 F.3d 259 (4<sup>th</sup> Cir. 1999) (table); see also *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT).

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<sup>6</sup> In this case, employer submitted twenty-five exhibits in support of its position, while claimant submitted thirty-six exhibits into the record.

Accordingly, we reverse the administrative law judge's finding that employer did not rebut the Section 20(a) presumption. This case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge