

PAULINE FLETCHER)
(Widow of MILTON FLETCHER))
))
Claimant-Petitioner)
))
v.)
))
KAISER ALUMINUM & CHEMICAL)
CORPORATION (Successor to)
Permanente Metals Corporation))
))
and)
))
FIREMAN'S FUND INSURANCE)
COMPANIES)
))
Employer/Carrier-)
Respondents)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits, Order Denying Motion to Reopen the Record, and Order Denying Motion for Reconsideration of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

Victoria Edises (Kazan, McClain, Edises & Simon), Oakland, California, for claimant.

B. James Finnegan and Kay H. Grant (Finnegan & Marks), San Francisco, California, for employer/carrier.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits, Order Denying Motion to Reopen the Record, and Order Denying Motion for Reconsideration (89-LHC-2231) of Administrative Law Judge Steven E. Halpern 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Decedent worked at employer's shipyard for various periods during World War II and

possibly thereafter. In 1986, decedent began treating with Dr. Nakomoto for complaints of dyspnea on exertion, a dry cough and sputum production. Upon chest x-ray, Dr. Nakomoto noted that decedent had significant pulmonary fibrosis. Decedent died on September 2, 1986, and the death certificate stated that cardiac arrest and congestive heart failure were the immediate causes of death with pulmonary fibrosis as an underlying cause. A widow's claim was filed on February 18, 1987, seeking death benefits and alleging that decedent was exposed to asbestos in the course of his employment with employer as a ship inspector. Claimant also sought disability benefits on behalf of her deceased husband.

The parties stipulated that decedent's lung problems contributed to his death, Tr. at 8, 9, and one of the issues presented for resolution was the cause of the lung problems. In his Decision and Order the administrative law judge found that claimant produced insufficient evidence to establish invocation of the presumption contained in Section 20(a) of the Act, 33 U.S.C. §920(a), that decedent's lung condition was work-related. The administrative law judge credited the January 17, 1983 history taken by decedent's treating physician, Dr. Romeo, to find that decedent never worked on board ships as a safety inspector in the course of his employment with employer.¹ The administrative law judge rejected the testimony of claimant that decedent was exposed to asbestos in the course of his work as a safety inspector on liberty ships. The administrative law judge stated that claimant "has no knowledge of his work other than what [decedent] told her," and that Dr. Romeo's notes are more reliable.² The administrative law judge therefore denied benefits concluding that claimant did not establish that decedent had been exposed to asbestos by virtue of having worked on ships and that no showing had been made that he was exposed to asbestos elsewhere in the shipyards.

Subsequently, claimant filed a Motion for Reconsideration, and also sought to reopen the record so that a letter from Dr. Romeo "clarifying" his understanding of decedent's employment could be admitted. The administrative law judge summarily denied the motion to reopen the record, and he also denied the motion for reconsideration. The administrative law judge stated that decedent

¹ Dr. Romeo recorded the history as follows: "x-ray pneumoconiosis but no hx [history] of same-went over entire life. (Worked at Shipyard but only outside, never in ships.)" Emp. Ex. 18.

² The administrative law judge also rejected the 1988 deposition testimony of Dr. Nakomoto, who stated that decedent told him he worked "within the ships." The administrative law judge noted that the physician's actual recorded history from June 1986 is merely of work "in shipyards." The administrative law judge found that even if that deposition account was correct, decedent's account of his shipyard activities in 1986 is not as reliable as his 1983 account to Dr. Romeo since by June 1986 (as Dr. Nakomoto indicates) decedent was complaining of a slight decrease in his memory. The administrative law judge concluded that all reports by decedent to other physicians that he had worked on ships were subsequent to June 1986. The inference is that all other reports are unreliable for the same reason, although the administrative law judge did not specifically address any other statements decedent may have made to any physician about his work history.

did not work on board ships as a safety inspector and that claimant did not show that conditions of decedent's employment were capable of causing asbestosis, assuming decedent had this condition. Order on Reconsideration at 1.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence is insufficient to establish invocation of the Section 20(a) presumption. Claimant further contends that the administrative law judge erred by not reopening the record for the receipt of Dr. Romeo's letter and in not giving "fair consideration" to her motion for reconsideration. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, we need not address claimant's specific contentions with respect to the administrative law judge's failure to find the evidence sufficient to establish invocation of the Section 20(a) presumption, as the administrative law judge applied too strict a standard in evaluating the evidence.³ The administrative law judge stated:

It is the threshold burden of the widow claimant to come forward with reliable, probative and substantial evidence sufficient to establish that the lung condition which disabled decedent and caused his death was in fact asbestosis *and* that decedent was in fact exposed to such asbestos while in respondent's employ as was capable of having resulted in asbestos."

Decision and Order at 2. (emphasis in original). In effect, the administrative law judge required claimant to prove that decedent had asbestosis caused by his employment.

³ We reject claimant's contention that the administrative law judge erred in crediting Dr. Romeo's chart notes because they are hearsay. Inasmuch as there are no witnesses available in the instant case with direct, personal knowledge concerning the disputed facts, all of the evidence submitted by the parties is hearsay. Moreover, hearsay evidence is generally admissible if considered reliable. *See Richardson v. Perales*, 402 U.S. 389 (1971).

In order to avail herself of the Section 20(a) presumption, claimant must show that decedent sustained an injury, *i.e.*, physical harm, and that an accident took place or working conditions existed that could have caused the harm. Claimant need only establish the presence of working conditions which could have caused the harm alleged; she does not have to prove the causal nexus. *Martin v. Kaiser Company, Inc.*, 24 BRBS 112 (1990); *Everett v. Newport News Shipbuilding and Dry Dock Company*, 23 BRBS 316 (1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

In the instant case, it is undisputed that decedent suffered from a harm, fibrosis, which can be caused by asbestos exposure.⁴ In determining that decedent was not exposed to asbestos, however, the administrative law judge placed too stringent a burden on claimant by requiring her to prove, by substantial evidence, that decedent had asbestosis caused by exposure to asbestos while in employer's employ. Claimant may meet the "minimal requirements" for invocation of the Section 20(a) presumption by adducing some evidence that decedent's working conditions could have caused the harm. *See generally Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT)(D.C. Cir. 1990). If the presumption is invoked, employer may rebut it by producing substantial evidence that decedent's lung condition was not caused by exposure to asbestos. *See generally Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991). If the presumption is rebutted, it falls out of the case, and the administrative law judge must evaluate the evidence as a whole with employer bearing the ultimate burden of persuasion. *Parsons Corp. of California v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980). We therefore vacate the administrative law judge's finding that the Section 20(a) presumption is not invoked and remand the case for consideration of the evidence in light of the correct standard regarding application of the Section 20(a) presumption.⁵

⁴ Employer correctly notes that the claim is for fibrosis allegedly caused by asbestos exposure and not by exposure to silica or any other substance. Tr. at 8.

⁵ We note that since this case was decided, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, held that the coverage provisions of the Act must be applied with reference to the provisions in effect at the time of the manifestation of the injury, rather than with regard to those in effect at the time of the last exposure that caused the injury. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 734, 23 BRBS 113 (CRT)(9th Cir. 1990); *See also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Co. of N. America v. U.S. Dept. of Labor, OWCP*, 969 F.2d 1406, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *Martin*, 24 BRBS at 121-122. Although the claim is for asbestos exposure incurred on board ships, under current law, decedent's asbestos exposure need not have occurred on board ships under construction in order for the employment to be covered under the Act.

Claimant next contends that the administrative law judge erred in failing to grant her motion to reopen the record for the purpose of introducing into evidence a letter from Dr. Romeo suggesting that the administrative law judge had misinterpreted Dr. Romeo's chart notes regarding decedent's employment history. While counsel must prepare her case diligently pre-hearing, it nonetheless remains within the administrative law judge's discretion to reopen the record for the receipt of post-hearing evidence. *See generally Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988); *see also Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 46 (1989); *Sam v. Loffland Brothers Co.*, 19 BRBS 228 (1987); 20 C.F.R. §702.338. In the instant case, however, the administrative law judge summarily denied the motion without providing any rationale.⁶ Inasmuch as the administrative law judge in this case accorded determinative weight to decedent's medical history taken by Dr. Romeo, the administrative law judge's failure to explain his denial renders that decision arbitrary. *See generally Wayland*, 21 BRBS at 180-181. On remand, therefore, the administrative law judge must discuss the rationale for his disposition of claimant's motion to reopen the record.⁷

⁶ The administrative law judge's Order on Reconsideration cannot be read as providing a rationale for denial of claimant's motion to reopen the record.

⁷ We reject claimant's contention that the administrative law judge did not carefully consider her motion for reconsideration simply because counsel received a response to the motion for reconsideration from employer on April 24, 1990 and the administrative law judge's Order on Reconsideration was dated April 25, 1990. Claimant has failed to establish that the administrative law judge abused his discretion. Similarly, we reject claimant's contention that the administrative law judge erred in not allowing her to file a reply brief to the response to the motion for reconsideration. *See generally* 20 C.F.R. §702.339.

Accordingly, the administrative law judge's Decision and Order-Denying Benefits, Order Denying Motion to Reopen the Record and Order Denying Motion for Reconsideration are vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge