BRB No. 03-0737

LINWOOD L. CAHOON, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 28, 2004
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-0914) of Administrative Law Judge Daniel A. Sarno, 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).

Claimant worked for employer as a marine machinist from 1960 to 1964. CX 3. The parties stipulated that during his employment claimant was exposed to airborne asbestos dust and fibers. JX 1; CX 4. On December 16, 1999, claimant was examined by Dr. Scutero, who diagnosed claimant with asbestosis and assigned a 45 percent impairment of claimant's respiratory system under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). CX 1 at 1, 3. Claimant was examined by several other doctors who diagnosed chronic obstructive pulmonary disease. EX 8 at 1, 3; EX 15 at 6, 8; CX 2 at 2. Claimant sought continuing permanent partial disability benefits beginning on December 16, 1999, for an asbestos-related lung disease resulting from occupational exposure to, and inhalation of, airborne particles, including asbestos.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), based upon evidence that claimant's lung condition could have been caused by asbestos exposure. The administrative law judge then determined that employer rebutted the presumption with evidence that claimant's obstructive lung condition is not related to asbestos exposure. Weighing the evidence as a whole, the administrative law judge concluded that claimant failed to establish that his lung condition arose out of his employment with employer. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's determination that employer's evidence is sufficient to establish rebuttal of the Section 20(a) presumption. In the alternative, claimant avers that the administrative law judge erred in concluding that he failed to establish causation based on the record as a whole. Employer responds, urging affirmance.

Where, as here, claimant has established the two elements of his *prima facie* case, the Section 20(a), 33 U.S.C. '920(a), presumption, applies to link the harm with the claimant's employment.[1] *See U.S. Industries/Federal Sheet Metal, Inc. v. Director,*

[1] In finding claimant invoked the presumption, the administrative law judge found the "working conditions" element met by evidence that claimant was exposed to asbestos at work, and that this exposure could have caused his lung condition. On brief, claimant generally argues that the administrative law judge erred in failing to consider the stipulation that claimant was exposed not only to asbestos but to other fumes and inhalants during his employment. Cl. Brief at 2, 5, 6; *see* JX 1. In response, employer contends that exposure to irritants other than asbestos has never been the basis of the claim. Employer's contention is supported by the record, specifically Claimant's Pre-hearing Statement, dated December 20, 2000, and Claimant's Statement of Contested

OWCP, 455 U.S. 608, 14 BRBS 631 (1982); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991). Upon invocation of the presumption, the burden shifts to employer to produce substantial evidence that claimant's injury was not related to his 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 [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *Manship v. Norfolk & W. Railway Co.,* 30 BRBS 175 (1994). 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 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); *Devine v. Atlantic Container Lines, G.I.E.,* 23 BRBS 270 (1990).

In support of his contention on appeal, claimant avers that the opinions upon which the administrative law judge relied to establish rebuttal are speculative. Specifically, claimant argues that as Drs. Shaw and Martin never examined claimant, their opinions should be given less weight. Additionally, claimant contends that the administrative law judge should have dismissed Dr. Shaw's opinion as irrelevant and premised upon inaccurate data, since employer stipulated that claimant was exposed not only to asbestos but to other airborne fumes and inhalants and Dr. Shaw did not exclude the possibility of causation based on exposure to the other products or address the possibility that such exposure could have caused some lung disease. Claimant's contentions are without merit, as the administrative law judge properly found that the cited opinions are sufficient to rebut the Section 20(a) presumption. *See generally O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Dr. Martin, after reviewing the totality of claimant's medical records, opined that the assertion that asbestos can cause airway obstruction is completely unfounded and that claimant's chronic airflow obstruction could not in any way be related to remote asbestos inhalation. EX 13. Dr. Shaw, who also reviewed claimant's medical records, opined that, based upon the medical literature and his own experiences, asbestos exposure does not cause clinically significant obstructive-airways disease. EX 12. Accordingly, as the opinion of Dr. Martin, supported by the report of Dr. Shaw, severs the causal link between claimant's diagnosed lung impairment and his exposure to asbestos, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption.

Issues, dated January 25, 2001. As Section 20(a) is only invoked on the claim asserted, *U.S. Industries/Federal Sheet Metal, Inc., v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), only claimant's asbestos exposure may be considered in addressing whether his lung condition is work-related.

See Moore, 126 F.3d 256, 31 BRBS 119(CRT); *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that he did not establish causation based on the record as a whole. Specifically, claimant assigns error to the administrative law judge's decision not to rely upon the testimony of Dr. Derring. In support of his contention of error, claimant asserts that the administrative law judge erred in crediting Dr. Martin's report because, as a non-examining physician, his opinion must be disregarded as contrary to credible evidence in the face of the opinion of an examining physician whose assessment is supported by medical literature on the subject. In this regard, claimant asserts that Dr. Derring's opinion was supported and substantiated by a medical article relating obstructive pulmonary disease to asbestos exposure. CX 5; EX 15 at 10-11.

It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences therefrom and is not bound to accept the opinion or theory of any particular medical examiner. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In his decision, the administrative law judge discussed all of the relevant medical evidence contained in the record, and rationally found that Dr. Derring's diagnosis of industrial bronchitis is unsupported by and inconsistent with his physical examination of claimant. The administrative law judge observed that Dr. Derring found no symptoms associated with bronchitis-related diagnosis such as wheezes, rhales or ronchi, chronic cough or sputum production, Decision and Order 10; EX 13, and that while the medical article claimant submitted into evidence arguably provides a theoretical connection between asbestos inhalation and obstructive lung disease, it was unpersuasive in light of Dr. Martin's contrary opinion that claimant's lung impairment is airflow obstruction not related to asbestos exposure. Decision and Order at 10-11; EX 13. The administrative law judge found Dr. Martin's opinion persuasive because Dr. Martin performed a thorough investigation of claimant's medical history; thus, the administrative law judge concluded that Dr. Martin presented the most complete and comprehensive diagnosis and medical opinion of the record, that his analysis and conclusions are well-supported, reasoned and explained, and that they are corroborated by the opinions of Drs. Shaw and Donlan.[2] As the administrative law judge thoroughly addressed the evidence

[2] The administrative law judge noted that Dr. Shaw reported that there is no clinical or pulmonary function study documenting asbestos exposure as the cause of an obstructive disease. Decision and Order at 10; EX 12. He also found that the opinion of Dr. Derring is the only one which supports claimant's contention that he suffers from industrial bronchitis, an obstructive impairment which was caused, in part, by occupational exposure to asbestos. The administrative law judge found Dr. Derring's opinion to be

of record regarding the issue of causation, we affirm the administrative law judge's determination that claimant failed to establish that his lung condition was related to claimant's asbestos exposure, as it is rational and in accordance with law. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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speculative, unsupported and uncorroborated because Dr. Derring did not consider claimant's diagnosed history of asthma and smoking history, and, as noted by Dr. Martin, he failed to review claimant's medical records or solicit a complete medical history. Rather, the administrative law judge determined that Dr. Derring excluded etiological possibilities such as smoking, prior diagnosis and treatment of asthma, and possible heart condition, without a proper basis for such exclusion. The administrative law judge lastly found that Dr. Derring agreed that asbestosis is generally considered a restrictive impairment, and that claimant does not have restrictive changes on pulmonary function testing. Decision and Order at 9; CX 2 at 3.