

JAMES B. BUFFINGTON)	
)	
Claimant-Petitioner)	
)	
v.)	
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ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>July 28, 2004</u>
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Melissa M. Olson (Embry & Neusner), Groton, Connecticut, for claimant.

James T. Hornstein and Tracey McPeak Morel (Higgins, Cavanagh & Cooney, LLP), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (2001-LHC-2575) of Administrative Law Judge Daniel F. Sutton 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).

Claimant worked in various jobs for employer beginning in 1958; he voluntarily retired in 1981. In 2001, Dr. Agrawal diagnosed claimant as suffering from a severe, work-related pulmonary impairment. Thereafter, claimant filed a claim for benefits alleging that his pulmonary impairment is causally related to his employment with employer, specifically to his exposure to asbestos, welding fumes, grinding dust, and other harmful lung irritants. The parties stipulated that claimant has a permanent lung impairment.

In his Decision and Order, the administrative law judge found the evidence sufficient to invoke the Section 20(a) presumption, 33 U.S.C. §920(a), that claimant's pulmonary condition is work-related. However, he found that Dr. Gerardi's opinion that none of claimant's respiratory impairment is related to workplace exposures is sufficient to establish rebuttal. Therefore, the administrative law judge weighed the evidence as a whole and credited Dr. Gerardi's opinion over that of Dr. Agrawal, because he found that Dr. Agrawal's opinion is not supported by the objective evidence of record and is not as well-reasoned as Dr. Gerardi's. Accordingly, the administrative law judge concluded that claimant failed to establish that his workplace exposure caused or contributed to his pulmonary impairment. Thus, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that employer produced sufficient evidence to establish rebuttal of the Section 20(a) presumption. Claimant also argues that the administrative law judge erred in crediting the opinion of Dr. Gerardi, a non-treating physician, over the opinion of Dr. Agrawal, claimant's treating physician.

Once, as here, the Section 20(a) presumption is invoked, employer may rebut it by producing substantial evidence that claimant's employment did not cause or contribute to his injury. *See American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). If 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 claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

We reject claimant's contention that the administrative law judge erred in finding that employer produced substantial evidence to rebut the Section 20(a) presumption. The administrative law judge rationally found that the opinion of Dr. Gerardi rebuts the presumption.¹ Dr. Gerardi examined claimant, administered pulmonary function studies, reviewed claimant's chest x-rays and a CT scan, and concluded that none of claimant's respiratory impairment is related to his workplace exposures.² Dep. Ex. 1 at 7; EX 1 at

¹ Dr. Gerardi is Board-certified in internal medicine, pulmonary disease, and critical care medicine, and is the Director of Occupational Lung Disease at St. Francis Hospital in Hartford, Connecticut. Dep. Ex. 2.

² Although employer need not produce evidence of an alternative cause for claimant's condition in order to rebut the Section 20(a) presumption, *see Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001), Dr. Gerardi opined that claimant's

16-19. As Dr. Gerardi's opinion constitutes substantial evidence severing the relationship between claimant's pulmonary disorders and his workplace exposures, we affirm the administrative law judge's finding that employer rebutted the Section 20(a) presumption. See *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir.1999).

Claimant also contends that the administrative law judge erred in crediting the opinion of Dr. Gerardi over that of his treating physician Dr. Agrawal in weighing the evidence as a whole. Contrary to a claimant's contention, an administrative law judge is not required to find determinative the opinion of claimant's treating physician if he finds that it is outweighed by substantial evidence to the contrary. See *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2^d Cir. 1997). In this case, the administrative law judge found that the CT scan reading does not support Dr. Agrawal's opinion that claimant's pulmonary impairment is due to his workplace exposures. Specifically, the Dr. Agrawal stated that claimant has bilateral asbestos-related pleural thickening based on, *inter alia*, a chest CT scan. CX 3. The administrative law judge properly found, however, that the radiologist read the CT scan as indicating the absence of asbestos plaques and as demonstrating that claimant's pleural scarring is due to the aneurysm repair. CX 5 at 3. The administrative law judge further found that Dr. Agrawal also failed to account for claimant's significant smoking history.³ Thus, the administrative law judge found that Dr. Agrawal's opinion is not supported by objective test results and is not as well-reasoned as Dr. Gerardi's opinion. Decision and Order at 9. Consequently, the administrative law judge accorded determinative weight to Dr. Gerardi's opinion and found that claimant failed to carry his burden of proving that his pulmonary impairment is work-related.

The administrative law judge is entitled determine the weight to be accorded to the evidence of record, and the Board must respect his findings of fact if they are rational and supported by substantial evidence. See *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). To the extent that claimant is seeking a re-weighing of the evidence, such is beyond the Board's scope of review. See *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). As the administrative law judge's

chronic obstructive pulmonary disease is due to smoking, that his impairment is due in part to a repair of a thoraco-abdominal aortic aneurysm, and that his pleural effusion is most likely parapneumonic, *i.e.*, due to infection. Dep. Ex. 1 at 6-7; EX 1 at 14-16.

³ Claimant testified that he smoked a pack of cigarettes a day for 40 years, quitting in 1996. Tr. at 48-49.

weighing of the evidence is rational and as his finding that claimant's impairment is not work-related is supported by substantial evidence, we affirm the administrative law judge's denial of benefits. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge