BRB No. 03-0619

JEANETTE HALL (Widow of JASPER HALL) Claimant-Respondent v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: JUN 10, 2004 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (02-LHC-1548) 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 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 1941 until 1945, where his job duties exposed him to airborne asbestos fibers. On November 19, 1996, decedent was diagnosed with lung cancer. At the time of his death from lung cancer on July 7, 2002, the decedent was self-employed. 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.

The parties agreed, and the administrative law judge found, that claimant is entitled to invocation of the Section 20(a) presumption that decedent's death is due at least in part to his asbestos exposure.[1] The administrative law judge found that employer did not establish rebuttal of the Section 20(a) presumption, and therefore that decedent's death was work-related as a matter of law. The administrative law judge awarded claimant death benefits and funeral expenses. 33 U.S.C. §909. The administrative law judge also found that Section 8(f)(3) of the Act, 33 U.S.C. §908(f)(3), serves as an absolute bar to employer's obtaining relief from continuing compensation liability pursuant to Section 8(f).

On appeal, employer argues that the administrative law judge erred in finding the opinions of Drs. Churg and Wick insufficient to establish rebuttal of the Section 20(a) presumption. Therefore, employer requests that the Board reverse the administrative law judge's 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 here, claimant establishes a *prima facie* case, Section 20(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) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997);

[1] Dr. Legier opined that decedent's cancer was caused by occupational exposure to asbestos. CX 2.

see also Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In the instant case, employer avers that the administrative law judge erred in concluding that the opinions of Drs. Churg and Wick are insufficient to establish rebuttal of the Section 20(a) presumption. Dr. Churg, a pathologist, reviewed decedent's medical records and lung tissue slides from 1985 and 1994. Dr. Churg stated that the slides do not show evidence of asbestosis. He stated that he believes that a diagnosis of asbestosis is needed before asbestos exposure contributes to the development of lung cancer. Thus, he opined that asbestos exposure played no role in the genesis of decedent's lung cancer and that the cancer was due entirely to smoking. EX 2. Dr. Churg stated that claimant smoked for "many years" and that his ventilatory studies showed a severe obstructive defect. *Id.*

Dr. Wick, also a pathologist, reviewed the same slides as Dr. Churg, as well as some additional slides. He stated that the slides do not show asbestosis, "which is a necessary prerequisite to link lung cancer to asbestos in an etiological fashion." EX 3. Dr. Wick linked claimant's cancer solely to smoking to a reasonable degree of medical certainty, based on "pathologically-defined ARB and centrilobular emphysema" which are conditions restricted to passive or active smokers. *Id.* In a deposition Dr. Wick gave in another case,[2] he explained the basis for his opinion that a diagnosis of asbestosis is necessary to link lung cancer to asbestos exposure. EX 18 at 11-13.

The administrative law judge gave several reasons for finding these opinions insufficient to rebut the Section 20(a) presumption. For the reasons that follow, we cannot affirm the administrative law judge's conclusions and we must remand the case for further findings as to whether one or both of these opinions rebut the Section 20(a) presumption. First, the administrative law judge stated that employer cannot rebut the Section 20(a) presumption with evidence of the absence of asbestosis, because Section 20(a) presumes that it was the asbestos exposure, and not asbestosis *per se*, that contributed to the development of decedent's lung cancer. While both doctors stated that decedent did not have asbestosis, they also stated that, as a result, decedent's lung cancer was not due to asbestos exposure.[3] Thus, if the opinions of Drs. Churg and Wick are

[2] The administrative law judge admitted the deposition solely for the purpose of addressing Dr. Wick's general opinion with regard to the necessity of a diagnosis of asbestosis.

[3] Both physicians found evidence of asbestos exposure on the specimens they examined. EX 2, 3.

otherwise "substantial evidence to the contrary" they rebut the presumed causal connection between decedent's cancer and his asbestos exposure. *See generally Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

The administrative law judge also found the opinions of Drs. Wick and Churg insufficient to rebut the Section 20(a) presumption "as the opinions are generic, non-specific, unexplained and undocumented," and because merely suggesting another causative agent cannot rebut the presumption. Decision and Order at 6. We must remand the case for the administrative law judge to make explicit findings as to why he finds these medical opinions "generic, non-specific, unexplained and undocumented." *See generally Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48(CRT) (4th Cir. 1998). Each pathologist relied on decedent's tissue samples for his opinion that decedent did not have asbestosis, and each stated he reviewed decedent's medical records. Moreover, the record contains Dr. Wick's deposition testimony as to why he believes a diagnosis of asbestosis is required for asbestos exposure to contribute to the development of lung cancer, EX 18, and Dr. Wick also specifically stated why he believed smoking was the sole cause of decedent's cancer.[4] EX 3. These physicians did not merely suggest another causative agent, *see, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), but attributed decedent's cancer solely to smoking and stated that asbestos exposure did not play a role in the development of the lung cancer which is evidence sufficient to establish rebuttal of the Section 20(a) presumption. *See Leone v. Sealand Terminal Corp.*, 19 BRBS 100 (1986).

The administrative law judge also found that these doctors' opinions could not establish rebuttal because neither Dr. Churg nor Dr. Wick discussed in his report an accurate smoking history. An administrative law judge may reject an opinion offered in rebuttal if it reflects an inaccurate supposition about the decedent's medical or employment history. *See American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Dr. Churg stated that decedent had smoked for "many years," EX 2, and Dr. Wick stated that decedent's condition was restricted to those with passive or active smoking exposure. *See* n. 4, *supra.* In his decision, the administrative law judge accepted the assertion in claimant's brief that it is unknown whether the smoking history provided to these physicians was accurate, and that decedent's smoking history was very limited based on Dr. Leiger's pathology report that decedent "smoked scant pipe and cigarettes in 1985." CX 2; Cl. Post-Hearing Br. at

[4] Dr. Wick linked claimant's cancer solely to smoking, based on "pathologically-defined ARB and centrilobular emphysema" which are conditions restricted to passive or active smokers. EX 3.

7. The administrative law judge, however, did not discuss Dr. Leake's 1988 report wherein he reported that "Mr. Hall is a 60 year old gentleman who smoked until July 1985 when it was discovered that he had cancer. . . ," EX 1 at 5, nor did the administrative law judge make a definitive finding regarding decedent's smoking history. On remand, the administrative law judge must determine the extent of decedent's smoking history and reevaluate the opinions of Drs. Churg and Wick in light of that finding.

Finally, the administrative law judge rejected employer's rebuttal evidence on the ground that the medical community is split over the issue of whether a diagnosis of asbestosis is necessary before it can be said that asbestos exposure contributes to the development of lung cancer. Both parties submitted medical literature to support their respective positions on this issue, and the administrative law judge stated that it appears that "neither view reflects a majority opinion within the medical community." Decision and Order at 7 n.7. Because, however, employer did not provide an "in-depth analysis" of its literature, the administrative law judge found the opinions of Drs. Churg and Wick insufficient to rebut the presumption.

This basis for rejecting employer's evidence also cannot be affirmed. Employer's burden on rebuttal is one of production, not persuasion. *See Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). The fact that there is no definitive medical study regarding the relationship between asbestos exposure and lung cancer cannot preclude a finding of rebuttal where employer offers medical opinions, given to a reasonable degree of medical certainty, that there is no causal relationship between this decedent's occupational exposure to asbestos and his lung cancer. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986); *see also Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988). If employer meets its burden of production, then the administrative law judge must weigh the evidence as a whole. 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. *See, e.g., Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1988), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999) (table); *see also Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

Consequently, we vacate the administrative law judge's finding that employer did not present substantial evidence to establish rebuttal of the Section 20(a) presumption and we remand the case to the administrative law judge to reconsider this issue in light of this opinion. If the administrative law judge finds the Section 20(a) presumption rebutted, he must weigh the evidence as a whole in order to determine whether decedent's cancer was work-related. *See generally Meehan Seaway Service, Inc. v. Director, OWCP*, 125 F.3d 1163, 31 BRBS 114(CRT) (8th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998).

Accordingly, the administrative law judge's Decision and Order is vacated, and the case remanded to the administrative law judge for findings 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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BETTY JEAN HALL
Administrative Appeals Judge