

BRB No. 03-0668

JEAN D. BIRNIE)	
(Widow of JAMES L. BIRNIE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: <u>JUN 22, 2004</u>
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of William J. Cowan, Administrative Law Judge, United States Department of Labor.

Amy M. Stone (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison, Mahoney & Miller, L.L.P.), Boston, Massachusetts, for self-insured employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2002-LHC-1001) of Administrative Law Judge William J. Cowan 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).

The facts of this case are undisputed. Decedent worked for employer from 1980 until his death in 2001. On June 9, 2001, a Saturday on which he was not scheduled to

work, decedent went to employer's premises to use the fitness center.¹ Tr. at 34, 40. He died at the fitness center of a presumed myocardial infarction due to hypertension and obesity. Emp. Ex. 1c. No autopsy was performed.

Claimant, decedent's widow, filed a claim for death benefits and funeral expenses. 33 U.S.C. §909. She presented two theories of recovery. First, she alleged that decedent's death occurred during the course of his employment because the fitness center is on employer's premises and is controlled, sponsored, financed, *etc.*, by employer. Secondly, she argued that decedent's exposure to asbestos and other industrial fumes, dusts and smoke contributed to his obstructive and restrictive lung conditions, which contributed to a decreased supply of oxygenated blood to his heart, which limited his ability to exercise, which played a role in causing his de-conditioned state, including obesity, which was a factor in causing the heart attack, which resulted in his death.² The administrative law judge credited the medical opinion offered in support of claimant's contention of causation. He invoked the Section 20(a), 33 U.S.C. §920(a), presumption, found that employer rebutted the presumption, and based on the record as a whole, credited the opinion of Dr. Bigos, who expressed the above theory of causation, and concluded that decedent's death was work-related. Decision and Order at 25-29. Additionally, the administrative law judge found that the fitness center was an inherent part of the conditions of decedent's employment, such that decedent's death occurred within the course of his employment. Decision and Order at 30-37. Accordingly, the administrative law judge awarded claimant funeral expenses and death benefits pursuant to Section 9. Employer appeals, arguing that neither conclusion is correct. Claimant responds, urging affirmance.

¹In the late 1990's, decedent began dieting to lose weight. He succeeded in losing approximately 60 pounds, but was still considered obese. Decedent's family physician, Dr. Beason, gave decedent medical permission to begin exercising at employer's fitness center in June 2000. Emp. Ex. 31. Decedent began doing so in August 2000. Emp. Exs. 1, 24-26.

²Decedent had well-established pre-existing conditions of hypertension, coronary artery disease, obesity, and obstructive and restrictive lung diseases, including pleural thickening in the base of his left lung. He also had a 30-year history of smoking, ceasing in 1991, and continued exposure thereafter to the second-hand smoke from his wife's cigarettes, and he had exposure to asbestos, fumes, dust and smoke during the course of his employment with employer. Decedent underwent a stress test and coronary catheterization in 1995, and he underwent pulmonary function tests in 1996 and 1998. Cl. Exs. 2-4; Emp. Exs. 6-17, 23, 31-32; Tr. at 61.

Initially, employer contends the administrative law judge erred in concluding that decedent's death was work-related because claimant's theory of causation is too attenuated. It argues that claimant is not entitled to invocation of the Section 20(a) presumption because the exposure to industrial irritants like fumes, dust, asbestos and smoke, which may or may not have contributed to decedent's lung condition, is too distant from the heart attack, which is presumed to be the cause of death. Employer also challenges the weighing of the evidence on the record as a whole and argues that the administrative law judge should have credited the opinions of Drs. Beason and Godar who stated that decedent's death was related to his pre-existing obesity, coronary artery disease and high blood pressure.

In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that the decedent sustained a harm or pain *and* that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the death was not related to the employment. *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998); *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also 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). 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. *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).

In this case, there is no dispute that decedent suffered a harm, as he had pleural thickening and he suffered a myocardial infarction resulting in his death. There is also no dispute that, during the course of his employment, he was exposed to asbestos and industrial fumes, smoke and dust. Relying on Dr. Bigos's opinion that the industrial exposures could have caused decedent's problematic lung condition, which led to a decreased ability to oxygenate blood, and the decreased supply of oxygenated blood could have contributed to the myocardial infarction and death, the administrative law judge properly invoked the Section 20(a) presumption linking decedent's death to his employment. *See generally Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *Peterson v. Columbia Marine Lines*, 21 BRBS 299 (1988). Similarly, the administrative law judge

properly found that employer rebutted the presumption, as Dr. Godar testified that decedent's death was not related to his industrial exposures but, rather, was due to his obesity, history of smoking, continued exposure to his wife's second-hand smoke, and his history of coronary artery disease and high blood pressure. *See Harford*, 137 F.3d 673, 32 BRBS 45(CRT); *Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 138 (1986). Thus, the administrative law judge correctly stated that the resolution of the issue must be determined on the record as a whole, with claimant bearing the burden of persuasion.

As set forth above, the parties' positions rest on the differing opinions of the medical experts. The administrative law judge conducted a thorough review of the record and credited the opinion of Dr. Bigos. Decision and Order at 29. Dr. Bigos, to whom claimant was referred by his treating physician, Dr. Beason, saw claimant approximately four times between 1996 and 1998. He examined claimant, obtained a history and reviewed claimant's pulmonary function tests and x-rays. He opined that the x-rays are consistent with asbestos plaque and that the pulmonary function tests are consistent with obstructive and restrictive lung defects which are consistent with interstitial lung disease and probable asbestosis. Cl. Ex. 1. Although he noted that the lung scarring was unilateral and not typical of asbestos exposure, which generally results in bilateral scarring, he rejected, as unsupported by decedent's medical history, Dr. Godar's suggestion that the unilateral thickening was due to trauma, a congenital defect or pneumonia; absent another reason for such plaquing, Dr. Bigos concluded it must be due to asbestos. Cl. Ex. 17 at 13-15, 54-57. He also concluded that decedent's exposure to industrial fumes, smoke and dust contributed to his obstructive lung disease, combining with decedent's smoking history and exposure to second-hand smoke. *Id.* at 31-32, 39.

Dr. Bigos explained that decedent's obstructive and restrictive lung diseases were two significant factors limiting the amount of blood decedent's body could oxygenate at any given time, independent of his heart condition, and would affect decedent's ability to exercise. Cl. Ex. 17 at 29-30. Thus, in conjunction with decedent's cardiac condition, excessive weight and high blood pressure, decedent's lung problems contributed to his inability to exercise or engage in "meaningful exertion" and to his de-conditioned state. *Id.* at 33; Cl. Ex. 5. This, Dr. Bigos opined, led to further cardiac problems and to decedent's ultimate demise. *Id.*; Cl. Ex. 5. On the other hand, Dr. Godar concluded that decedent's mild pulmonary restriction was due to his central obesity, the asymmetrical pleural thickening was atypical of asbestos exposure and therefore was due to an infection or trauma, the obstructive disease was related to smoking, the death was due to a heart attack caused by decedent's hypertension and obesity, and except for some minimal pleural thickening, nothing disabling was work-related. Emp. Exs. 11, 33.

It is within the administrative law judge's authority to credit and weigh the testimony of the witnesses, including medical testimony. *Calbeck v. Strachan Shipping*

Co., 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In this instance, the administrative law judge was not persuaded by Dr. Godar's opinion that decedent's death was not work-related, in part because decedent had no history of infection or trauma and in part because Dr. Godar admitted that the unilateral scarring could be an early stage of asbestos disease. Decision and Order at 27-29. We hold that the administrative law judge rationally weighed and credited the medical opinions. *See id.*; Cl. Ex. 17 at 56-57; Emp. Ex. 14 at 3, 10; Tr. at 130-131. The administrative law judge addressed employer's challenges to Dr. Bigos's opinion and concluded they did not render his opinion unreliable. Decision and Order at 29. Further, the administrative law judge clearly set forth deficiencies he found in Dr. Godar's opinion that led him to reject it. The opinion of Dr. Bigos, therefore, constitutes substantial evidence supporting the administrative law judge's decision that, although decedent's lung disease was not a direct cause of his death, it was a contributing factor, making the death compensable. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Consequently, we affirm the administrative law judge's determination that decedent's death was work-related.³

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

³In light of our decision, we need not address employer's remaining argument concerning the administrative law judge's finding that decedent's death arose within the course of his employment irrespective of his lung condition.