

LEROY BOONE)
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 Claimant-Petitioner)
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 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: JUN 29, 2004
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order and Order Denying Claimant’s Motion to Reconsider of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Claimant’s Motion to Reconsider (2001-LHC-0544) of Administrative Law Judge Richard E. Huddleston 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, a retiree, alleged that he suffered a 20 percent respiratory impairment caused by asbestosis which resulted from his asbestos exposure at work with employer from 1959-1994. The parties stipulated that claimant has received a diagnosis of asbestosis, but not that claimant actually has asbestosis. The administrative law judge denied the claim for

disability benefits, finding that claimant did not establish that he has asbestosis. The administrative law judge awarded claimant medical benefits for his work-related pleural plaques; he denied disability benefits for this condition because there is no evidence attributing any disability to the pleural plaques. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant challenges the administrative law judge's denial of permanent partial disability benefits on his asbestosis claim. Specifically, claimant alleges the administrative law judge erred in finding he does not have asbestosis. Employer responds in support of the administrative law judge's denial of benefits.

Claimant argues that the administrative law judge erred in not invoking the Section 20(a) presumption. Claimant also argues that the administrative law judge erred in alternatively finding that the Section 20(a) presumption would be rebutted if it were invoked. Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered an injury and that working conditions existed which could have caused the injury. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997). Once claimant establishes a *prima facie* case, Section 20(a) applies to presume that the injury is related to the employment; the employer can rebut this presumption by producing substantial evidence that the injury was not caused or aggravated by the employment. *Id.* 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. *Id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT)(1994).

We affirm the administrative law judge's finding that claimant's evidence was insufficient to invoke the Section 20(a) presumption. To establish an injury, claimant must establish only that something has gone wrong "within the human frame." *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968)(*en banc*). Because claimant alleged in the instant case, that his pulmonary impairment is due to asbestosis which was caused by his asbestos exposure at work, he bears the initial burden of establishing that he has asbestosis. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The administrative law judge discussed the relevant opinions of Drs. Donlan, Foreman, Freeman, and Ross.¹ Both Drs. Foreman and Freeman, who examined claimant, diagnosed

¹ The administrative law judge discussed Dr. Tornberg's opinion on reconsideration but accorded it no weight because the physician used the term "alleged asbestosis," and thus did not indicate whether or not he agreed with the diagnosis of asbestosis. Order on Recon. at 2; Emp. Ex. 7.

asbestosis. Cl. Exs. 1, 2. Dr. Freeman also opined that claimant's asbestosis is the main contributing factor in his 20 percent permanent partial disability. Cl. Ex. 2 at 1. Drs. Ross and Donlan stated that claimant does not have asbestosis. Emp. Exs. 1, 2. Dr. Ross had reviewed claimant's records and Dr. Donlan had examined claimant. Dr. Ross concluded that claimant has chronic obstructive pulmonary disease most likely due to smoking. Emp. Ex. 1d.

The administrative law judge stated that he could find no reason to credit one doctor's opinion over any other's based on the physicians' qualifications and quality of their reports. Decision and Order at 8. The administrative law judge noted that each doctor is Board-certified in internal medicine and pulmonary disease, and that each doctor, except Dr. Ross, is a "B" reader. *Id.* The administrative law judge refused to give less weight to Dr. Ross's opinion on the basis that he did not examine claimant and because it was based in part on a 1999 x-ray taken before claimant was diagnosed with asbestosis. Order on Recon. at 2-3. The administrative law judge observed that Dr. Ross also reviewed an x-ray taken in 2000, and that therefore Dr. Ross's report was more complete than claimant suggested. The administrative law judge further refused to accord less weight to Dr. Donlan's opinion on the ground that Dr. Donlan did not provide an explanation for the mild reduction in lung capacity noted on claimant's pulmonary function study. *Id.* The administrative law judge noted that the absence of this explanation does not aid claimant in affirmatively establishing that he has asbestosis. *Id.* The administrative law judge further stated that Dr. Donlan opined that claimant's vital capacity is essentially normal and his diffusion capacity is borderline normal. Decision and Order at 7. Claimant has raised no error in the administrative law judge's treatment of the competing medical evidence nor is the Board empowered to reweigh the evidence. *See generally Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP [Hess]*, 681 F.2d 938, 14 BRBS 1004 (4th Cir. 1982). Based on the administrative law judge's rational finding that the evidence is in equipoise with regard to whether claimant has asbestosis, the administrative law judge's conclusion that the Section 20(a) presumption is not invoked is affirmed as it is rational, supported by substantial evidence, and in accordance with law.² *See generally Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); Decision and Order at 7-8; Order on Recon. at 2-3; Cl. Exs. 1, 2; Emp. Exs. 1, 2.

We also affirm the administrative law judge's alternative findings that, even if claimant invoked the Section 20(a) presumption, employer established rebuttal and claimant

² The administrative law judge clearly did not invoke the Section 20(a) presumption despite claimant's assertion that it was unclear whether the administrative law judge invoked it. *See* Decision and Order at 7-8; Order Denying Claimant's Motion to Reconsider at 3; Cl. Br. at 7.

did not establish by a preponderance of the evidence that he has asbestosis. The administrative law judge rationally found that the opinions of Drs. Ross and Donlan that claimant does not have asbestosis are sufficient to rebut the Section 20(a) presumption. *Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *see also Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT)(1st Cir. 1998); Decision and Order at 8 n. 8; Emp. Exs. 1, 2. Upon weighing the evidence, the administrative law judge also rationally found that claimant did not establish by a preponderance of the evidence that he has asbestosis because he found the medical evidence is in equipoise. *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see also Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); Decision and Order at 8 n. 8; Cl. Exs. 1, 2; Emp. Exs. 1, 2. Because claimant did not establish by a preponderance of the evidence that he has asbestosis, we affirm the administrative law judge's denial of disability benefits as it is rational, supported by substantial evidence, and in accordance with law. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Accordingly, the administrative law judge's Decision and Order denying benefits and Order Denying Claimant's Motion to Reconsider are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge