

EDITH H. TAYLOR)
(Widow of KENNETH L. TAYLOR))
)
 Claimant-Petitioner)
)
 v.)
)
 NEWPORT NEWS SHIPBUILDING) DATE ISSUED: JUN 3, 2004
 AND DRY DOCK COMPANY)
)
 Self-Insured)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Motions to Reopen the Record and for Reconsideration of Richard K. Malamphy, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Order Denying Motions to Reopen the Record and for Reconsideration (2002-LHC-2004) of Administrative Law Judge Richard K. Malamphy 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=s husband (the decedent) worked for employer from April 1964 to January 2, 2000, during which time he was exposed to airborne asbestos dust fibers. The decedent was diagnosed as suffering from lung cancer on January 6, 1999, and he

succumbed to this illness on January 2, 2000. An autopsy performed on the decedent revealed a carcinoma of the right upper lung lobe, *see* Emp. Ex. 4, and the decedent's death certificate listed the cause of death as squamous cell cancer of the lung. *See* Emp. Ex. 1.

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), but determined that employer rebutted the presumption. The administrative law judge then concluded that claimant failed to establish that the decedent's condition arose out of his employment with employer. Accordingly, the administrative law judge denied the instant claim for benefits.

Claimant subsequently filed a motion for reconsideration of the administrative law judge's decision, averring that the administrative law judge erred in his evaluation of the medical testimony of record. This motion was denied by the administrative law judge in an Order dated July 1, 2003.

On appeal, claimant challenges the administrative law judge's determination that employer's evidence is sufficient to establish rebuttal of the invoked presumption and she asserts that the administrative law judge erred in concluding that she failed to establish causation based on the record as a whole. Employer responds, urging affirmance.

In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *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). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the death to the employment,¹ and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to the 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,*

¹ In this regard, Section 9 of the Act, 33 U.S.C. §909, provides benefits to certain survivors "if the injury causes death."

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 the present case, the administrative law judge found that claimant established both a harm, decedent's lung cancer, and working conditions, decedent's exposure to asbestos while working for employer, and he properly invoked the Section 20(a) presumption. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001). The administrative law judge then determined that the opinions of Drs. Churg and Wick were sufficient to establish rebuttal of the presumption.² In addressing the issue of causation, Dr. Churg attributed decedent's lung cancer entirely to his cigarette smoking. Emp. Ex. 5. Similarly Dr. Wick opined that the sole cause of decedent's lung cancer was tobacco smoke inhalation. Emp. Ex. 6.

In support of her contentions on appeal, claimant avers that the opinions of Drs. Churg and Wick are unreliable and are therefore insufficient to support employer's position because they are based on negative evidence, *i.e.*, they fail to take into consideration the fiber counting report of Dr. Maddox.³ Contrary to claimant's argument, however, the administrative law judge could find these opinions sufficient to rebut the invoked presumption, as they establish that the decedent's death was not related to his employment. *See generally O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000). Dr. Churg reviewed the decedent's medical records and autopsy slides. Based upon a determination that the decedent exhibited no evidence of asbestosis, Dr. Churg attributed decedent's lung cancer entirely to his cigarette smoking. *See* Emp. Ex. 5. Dr. Wick also performed a pathological examination of the decedent's autopsy specimens and found no support for a diagnosis of asbestosis. Rather, Dr. Wick found the presence of classical radiation pneumonitis, centrilobular emphysema and anthracosis; pursuant to these findings, Dr. Wick, to a reasonable degree of medical certainty, concluded that the sole cause of the decedent's lung cancer was tobacco smoke inhalation. *See* Emp. Ex. 6. Accordingly, as the opinions of Drs. Churg and Wick sever the causal link between the decedent's diagnosed lung cancer and his employment with employer, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *See Moore*, 126 F.3d 256, 31 BRBS 119(CRT); *Sistrunk*, 35 BRBS 171; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Claimant also challenges the administrative law judge's finding that she 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. Maddox. In support of her contention of error, claimant asserts that Dr. Maddox performed a more

² Both Drs. Churg and Wick are pathologists. *See* Emp. Exs. 15, 17.

³ In this regard, claimant correctly avers that Dr. Wick was in error when he stated in his report that a digestion study had not been performed to measure the decedent's actual pulmonary asbestos burden. *See* Clt. Exs. 3, 4.

extensive study of the decedent's condition than either Dr. Churg or Dr. Wick, and that the administrative law judge on reconsideration applied an inappropriate standard to claimant's evidence when he considered the relationship between fiber counting and a causal connection between asbestos exposure and lung cancer. We reject claimant's assertions of error. It is well-established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences there from 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 (2^d Cir. 1961). In his decision, the administrative law judge discussed all of the relevant medical evidence contained in the record, and rationally found that the opinion of Dr. Maddox that the decedent's exposure to asbestos contributed to the development of his primary lung cancer⁴ did not overcome the contrary opinions of Drs. Churg and Wick that the decedent exhibited no evidence of asbestosis and that his lung cancer is attributable solely to his cigarette smoking. We therefore affirm the administrative law judge's determination that claimant failed to establish that the decedent's condition was related to his employment with employer. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Sistruck*, 35 BRBS 171; *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 Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ All parties agree that decedent was not diagnosed with asbestosis. *See* Clt. Ex. 6 (autopsy report); Emp. Ex. 2 (Dr. Maddox's report); Emp. Ex. 5 (Dr. Churg's report); Emp. Ex. 6 (Dr. Wick's report).