BRB No. 05-0892

AVELINA SHEPPARD (Widow of BARTEMUS SHEPPARD, JR.)	)	
Claimant-Petitioner	)	
v.	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/26/2006
Self-Insured Employer-Respondent	)	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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-LHC-1184) 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 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 spouse (the decedent) worked for employer from 1949 until 1959 as a sheetmetal worker, where he was exposed to airborne asbestos dust fibers. Decedent was diagnosed with lung cancer on March 23, 2000, and died of that disease on November 30,

2000. Claimant filed a claim under Sections 9(a) and (b) of the Act, 33 U.S.C. §909(a), (b), for death benefits.

In his Decision and Order, the administrative law judge found that claimant established that she was entitled to invocation of the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), and that the opinions of Drs. Churg and Wick were sufficient to establish rebuttal of the presumption. Upon weighing the evidence as a whole, the administrative law judge determined that claimant did not establish that decedent's lung cancer was attributable to his asbestos exposure. Accordingly, the administrative law judge denied the instant claim for death benefits.

On appeal, claimant 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.[1] In this case, the administrative law judge invoked the presumption but found it was rebutted by substantial evidence, and claimant does not challenge this finding on appeal. As the presumption has been rebutted, it no longer applies, 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, 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).

Claimant alleges that the administrative law judge misinterpreted the report of Dr. Holter and discredited the diagnosis of asbestosis in Dr. Holter's report based solely on semantics. We disagree. After review of decedent's prior x-rays, in a May 2, 1986, report Dr. Holter wrote that the March 27, 1984, x-ray "is remarkable for diffuse interstitial nodular changes throughout the lungs" and that "on the PA film there is a subtle suggestion of some pleural plaques and a definite area of pleural thickening in the minor fissure, laterally, and pleural thickening on the lateral film, posteriorly." CX 7 at 2. Upon lavaging decedent's right middle lobe, Dr. Holter wrote "the lavage fluid was remarkable for the presence of ferruginous bodies characteristic of asbestosis."[2] *Id.* at 2-3. Dr. Holter stated that his impression is that claimant's "pulmonary symptoms are due to a combination of occupational lung disease and chronic bronchitis secondary to cigarette smoking." *Id.*

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

[2] Dr. Maddox stated that lavage fluid is saline that is put down into the lung through a bronchoscope and used to wash out a segment of the lung. CX 6 at 68.

Noting that *Dorland's Illustrated Medical Dictionary* (28th ed. 1994), defines "ferruginous" as "containing iron or iron rust," the administrative law judge reasoned that having described his findings as "characteristic" of asbestosis, Dr. Holter could easily have diagnosed asbestosis if he was certain that it existed, but that he chose not to make this statement, instead attributing decedent's symptoms to the all-encompassing term of "occupational lung disease." Decision and Order at 12. The administrative law judge concluded that because the term "occupational lung disease" is a generic term which includes a variety of various diseases, and due to the failure of Dr. Holter's other findings to sufficiently indicate the existence of asbestosis, the evidence does not show that Dr. Holter made a clinical diagnosis of asbestosis. *Id.* at 12. Next, the administrative law judge determined that there is no radiological diagnosis of asbestosis in this case. As asbestosis is a progressive disease, the administrative law judge found that Dr. Wheeler would have diagnosed it based on x-rays taken in 2000, had the 1984 x-rays disclosed such a condition. *Id.* Additionally, the administrative law judge cited Dr. Churg's statement that the ferruginous bodies which Dr. Holter described are not diagnostic of asbestosis, but rather only indicate that decedent had been exposed to asbestos. EX 15 at 11.

Addressing the question of whether decedent's lung cancer could be attributed to asbestos exposure without a specific diagnosis of asbestosis, the administrative law judge noted that Dr. Maddox deposed that Dr. Holter's report did not quantify the asbestos fibers he observed, or state how much lavage fluid was contained in the sample he observed, CX 6 at 57, 65, and thus did not conform to the Helsinki criteria that there be one asbestos body per milliliter of bronchoalveolar lavage fluid as measured by laparoscopy in a qualified laboratory.[3] CXs 6 at 57, 63-64; 14; 19; 22. The administrative law judge therefore concluded that Dr. Holter's unmeasured observation of ferruginous bodies is insufficient to establish that decedent had a particular asbestos fiber burden which could serve as a basis for attributing the development of his lung cancer to decedent's occupational asbestos exposure.

It is well established that an administrative law judge is entitled to weigh the medical evidence and draw his own inferences from it 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 (2d Cir. 1961). Moreover, the Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. 33 U.S.C. §921(b)(3); *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *see also Duhagon v.*

[3] Dr. Maddox deposed that the Helsinki criteria were developed at a conference held in Helsinki, Finland, in 1997, by a group of health professionals interested in establishing criteria for attribution of various diseases to asbestos exposure. CX 6 at 55.

Metropolitan Stevedore Co., 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). In his decision, the administrative law judge discussed the relevant evidence in the record as a whole and rationally concluded that Dr. Holter did not unambiguously diagnose decedent with asbestosis. The administrative law judge further found that claimant did not establish either that decedent had asbestosis or that his occupational exposure to asbestos was sufficient to meet established standards for attributing his lung cancer to that exposure. As these findings are supported by substantial evidence, the determination that claimant failed to establish that decedent's lung cancer was causally related to his employment must be affirmed. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Sistruck v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). We therefore affirm the administrative law judge's finding that claimant is not entitled to death benefits under the Act.

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

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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JUDITH S. BOGGS
Administrative Appeals Judge