

D.S.)	
(Widow of E.S.))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ELECTRIC BOAT CORPORATION)	DATE ISSUED: 06/27/2007
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

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

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-LHC-01916) of Administrative Law Judge Colleen A. Geraghty 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 as a draftsman from November 3, 1952, until February 20, 1992, when he voluntarily retired. Thereafter, he worked in non-maritime employment until 2004. Decedent testified on deposition that he was exposed to asbestos during his employment for employer. Decedent smoked cigarettes from age 18 until 1975. In 1964, decedent was diagnosed with tuberculosis, resulting in removal of part of his right lung. In January 2002, decedent was diagnosed with lung cancer and treated

with heavy doses of radiation and chemotherapy. He died on May 22, 2004. The death certificate listed cardiac arrest as the immediate cause of death, as a consequence of respiratory failure due to pulmonary asbestosis. CX 25 at 1. No autopsy was performed. The administrative law judge had before her decedent's claim for disability benefits and his widow's claim for death benefits.

The administrative law judge found claimant entitled to the Section 20(a) presumption that decedent's lung cancer and resultant death were contributed to by his work-related asbestos exposure. 33 U.S.C. §920(a); Decision and Order at 15. The administrative law judge found the presumption rebutted, noting that, in her post-hearing brief, claimant conceded that employer produced substantial evidence to rebut the Section 20(a) presumption. *Id.*; Cl. Post-Hearing Br. at 25. In addition, the administrative law judge stated that the opinions of Drs. Teiger and Pulde that decedent's cancer was due solely to smoking rebut the Section 20(a) presumption. On weighing the evidence as a whole, the administrative law judge found that claimant failed to establish by a preponderance of the evidence that decedent's cancer and death were due to asbestos exposure. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption and in finding that decedent's lung cancer and death were not related to his employment exposure to asbestos. Employer has not responded to this appeal.

Once, as here, claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury and death to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury and death were not related to the employment. *See, e.g., 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). 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 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).

We reject claimant's contention that the administrative law judge erred in finding that employer established rebuttal of the Section 20(a) presumption based on the opinions of Drs. Teiger and Pulde. Claimant conceded in her post-hearing brief that these opinions are sufficient to rebut the Section 20(a) presumption. Cl. Post-Hearing Br. at 25;¹ *see*

¹ In her post-hearing brief, claimant stated:

generally *Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000). Moreover, the opinions constitute substantial evidence that decedent's cancer and death are not work-related, and thus they rebut the Section 20(a) presumption. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), cert. denied, 540 U.S. 1056 (2003); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998).

Claimant further contends that the administrative law judge erred in finding that decedent's lung cancer and death were not causally related to his asbestos exposure. The administrative law judge found that the parties offered opposing evidence on the subject of the degree of asbestos exposure necessary to implicate that substance as a cause of lung cancer. Dr. Cherniack opined that a diagnosis of asbestosis is not a prerequisite to asbestos-related lung cancer and that, based on the degree of decedent's exposure combined with his smoking history, asbestos contributed to the development of decedent's lung cancer. EX 7 at 47; CX 29 at 23. While the administrative law judge found that Dr. Cherniack's credentials are superior to those of the other doctors, she declined to credit his opinion that exposure to asbestos alone is sufficient to implicate asbestos as a cause of lung cancer. She found that Dr. Cherniack's opinion is based on international studies attributing lung cancer to asbestos exposure based on the degree of that exposure even in the absence of radiological or histological evidence of asbestos-related injury.² EX 7; CX 29. The administrative law judge stated that these studies, in turn, are based in part on policy considerations which have not been adopted by any standard-setting bodies in the United States or by any legislative body. Thus, the

The opinion of Drs. Teiger and Pulde rebut the presumption in that both believe [decedent] had neither clinical radiography or physiological data to support a diagnosis of asbestosis. Both claim asbestosis is a necessary prerequisite to finding lung cancer related to asbestos exposure because it is the scarring which causes lung cancer. (Ex 2-19, Ex. 4 at 60). Therefore, the presumption no longer affects the outcome of the case, and all the evidence in the record must be weighed and resolved based upon the evidence. *Universal Maritime Corp.v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); *Care v. Washington Metro. Area Transit Authority*, 21 BRBS 248 (1988).

Cl. Post-hearing Br. at 25.

² The studies cited by Dr. Cherniack accept that at an asbestos threshold of 25-35 fiber years, lung cancer can be attributed to asbestos exposure. CX 29. Dr. Cherniack opined that, based on decedent's history, he likely had exposure of 140-150 fiber years.

administrative law judge stated that she would not rely on the mere fact of decedent's asbestos exposure to link his cancer to his employment. Decision and Order at 16-17.

The administrative law judge therefore addressed the medical evidence regarding the existence of any asbestos-related condition. Drs. Pulde, Teiger and Cherniack agreed that decedent's right-sided pleural plaque was a consequence of his 1964 lung resection. EX 5 at 22; EX 4 at 28-29; CX 29 at 5, 8. Drs. Pulde and Teiger opined that the fibrosis seen on decedent's CT scans was due to tuberculosis, the 1964 surgery, and the radiation treatment. EX 5 at 35; EX 4 at 32-33. Dr. Cherniack stated that fibrosis due to asbestos exposure is not distinguishable from fibrosis caused by radiation treatment. CX 29 at 6-7. Dr. Cherniack opined that it was more likely than not that decedent's fibrosis resulted from the radiation treatment. CX 29 at 5, 9. The administrative law judge found, based on Dr. Cherniack's opinion that decedent's fibrosis and restrictive lung disease likely were due to radiation treatment and chemotherapy, Tr. at 56-57, CX 29 at 22, that claimant did not meet her burden of establishing that decedent had any asbestos-related condition and thus that his lung cancer and death were due to asbestos exposure.³

It is well established that an administrative law judge is entitled to weigh the evidence of record and to draw reasonable inferences therefrom. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir.1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 f.2d 403 (2^d Cir. 1961). Contrary to claimant's contention, the administrative law judge did not substitute her judgment for that of Dr. Cherniack concerning the effect of asbestos exposure on the development of lung cancer. Rather, the administrative law judge was entitled to reject the premise of Dr. Cherniack's opinion, as she rationally found that acceptance of it would result in a finding of a causal relationship between lung cancer and asbestos exposure in every case in which 25 fiber years of exposure was established regardless of whether there was actual contribution to the development of lung cancer. Therefore, the administrative law judge did not err in requiring that claimant affirmatively demonstrate the existence of some asbestos-related condition that contributed to the development of decedent's lung cancer. *See generally Moore*, 126 F.3d 256, 31 BRBS 119(CRT). Moreover, the administrative law judge's finding that claimant did not establish the existence of such a condition is supported by substantial evidence, and therefore it must be affirmed. *See generally Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002). As the administrative law judge's finding that claimant did not meet her burden of proving that decedent's asbestos exposure contributed to his lung cancer and death therefrom is

³ The administrative law judge noted that Dr. Cherniack stated that, based on radiographic evidence he reviewed, it is not possible to ascertain whether asbestos contributed to decedent's fibrosis, CX 29 at 6-9, and that "the question of whether asbestosis was present cannot be resolved." *Id.* at 8.

rational and supported by substantial evidence, we affirm the denial of benefits. *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge