

BRB No. 02-0505

RUSSELL K. BARBER, SR.)	
)	
Claimant-Petitioner)	DATE ISSUED: <u>MAR 25, 2003</u>
)	
v.)	
)	
GENERAL DYNAMICS/ELECTRIC)	
BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Daniel F. Sutton,
Administrative Law Judge, United States Department of Labor.

Melissa M. Olson (Embry & Neusner), Groton, Connecticut, for claimant.

Peter A. Clarkin (McKenney, Jeffrey & Quigley), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (00-LHC-3082) of Administrative Law Judge Daniel F. Sutton 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 retired welder, alleges that he suffers from a lung disease which is due in part to his exposure to asbestos and other irritants during the course of his 35 years of employment with employer. He sought compensation for permanent partial disability pursuant to 33 U.S.C. §908(c)(23). In his decision, the administrative law judge found claimant entitled to invocation of the presumption of causation at Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer rebutted the presumption. Upon weighing the evidence as a whole, the administrative law judge concluded that claimant did not establish that his lung impairment is due even in part to his workplace exposures. Accordingly, the administrative law judge denied the claim.

Claimant appeals, contending that the administrative law judge erred both in finding that employer established rebuttal of the Section 20(a) presumption and in his weighing of the evidence. Employer responds, urging affirmance.

Claimant suffers from severe chronic obstructive pulmonary disease (COPD), hypoxemic respiratory failure, and severe chronic bullous emphysema. CXs 3, 4. He requires supplemental oxygen. The administrative law judge determined that claimant is entitled to invocation of the Section 20(a) presumption based upon his lung disease and his exposure during the course of his employment to asbestos as well as to welding fumes, smoke, and industrial dust. In order to rebut the Section 20(a) presumption, employer must produce substantial evidence that claimant's condition was neither caused by the working conditions nor aggravated, accelerated, or rendered symptomatic by them. *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^d Cir. 2001); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), cert. denied, 528 U.S. 1187 (2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998).

In finding rebuttal established, the administrative law judge relied upon the opinion of Dr. Pulde that claimant's COPD and other pulmonary conditions are the result of his long history of smoking and that there is no evidence that claimant suffers from asbestosis or that his lung disease was caused or aggravated by his work exposures. On appeal, claimant does not contend that Dr. Pulde did not conclude that claimant's lung condition was unrelated to his work exposures but rather asserts that this conclusion is equivocal and unsupported by the objective medical record. Therefore, claimant posits that it was irrational for the administrative law judge to rely upon it to find the Section 20(a) presumption rebutted. We disagree.

Claimant contends that Dr. Pulde's opinion is hypothetical and speculative as well as contradictory as he admits that exposure to irritants in the workplace, i.e., ozone and metal oxides, may cause structural changes in the lungs and cause accelerated loss of lung function, and that welding may cause or exacerbate the disease suffered by claimant. Claimant also points to Dr. Pulde's statement that anyone with evidence of airway reactivity should not have continued exposure and his acknowledgment that although he based his conclusion in part on claimant's suffering no symptoms prior to retirement, in fact, claimant was having shortness of breath in the mid-1980s. Claimant also contends that Dr. Pulde's finding that claimant does not have an asbestos-related component to his impairment is incorrect in light of other objective medical evidence.

Although Dr. Pulde acknowledged that the welding process could result in exposure to irritants which may cause or aggravate occupational asthma, he unequivocally concluded, based on the pulmonary function test results demonstrating a lack of reversibility as well as

x-rays, that claimant did not exhibit the criteria necessary for a diagnosis of occupational asthma or industrial bronchitis but rather that the findings were consistent with emphysema and COPD secondary to tobacco use. EX 9 at 15, 26-29. A doctor need not rule out the possibility that claimant's work exposures contributed to his condition; in order to constitute substantial evidence sufficient to rebut the Section 20(a) presumption, the opinion need only be given to a reasonable degree of medical certainty. *See Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT); *Bath Iron Works Corp. v. Director, OWCP [Harford]*, 137 F.3d 673, 32 BRBS 45(CRT) (1st Cir. 1998). In response to claimant's question whether his conclusion would differ if claimant had suffered shortness of breath prior to his retirement, Dr. Pulde responded that his condition was probably related even then to his tobacco use, EX 9 at 30, and that without having examined and/or tested him at that time he could render no conclusion. EX 9 at 30-31. With regard to his opinion regarding the absence of an asbestos-related component to claimant's condition, Dr. Pulde based his opinion upon his review of x-rays,¹ CT scans, bronchoscopy test results, and pulmonary function studies, and concluded that none of the objective tests confirmed or supported a diagnosis of an asbestos-related disorder or any occupational lung disease. EX 9 at 11-12. Dr. Pulde thus concluded, based upon the objective testing, that claimant's pulmonary condition is unrelated to his employment because he did not meet the criteria for diagnosis of asbestosis based on his history of minimal and indirect exposure to asbestos, objective studies which did not demonstrate a restrictive component to claimant's lung disease which is common in those with asbestos exposure, as well as chest x-rays which showed no diffuse interstitial or pleural disease typical of asbestosis, CX 5, and CT findings which were inconsistent with lung disease secondary to asbestosis. EX 9 at 16. Therefore, contrary to claimant's contention, Dr. Pulde's opinion is neither equivocal nor unsupported by objective evidence. Accordingly we affirm the administrative law judge's reliance upon Dr. Pulde's opinion to establish rebuttal of the Section 20(a) presumption. *See Harford*, 137 F.3d 673, 32 BRBS 45(CRT).

Once the administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole with claimant bearing the burden of persuasion. *See Universal Maritime Corp. v.*

¹Although claimant makes much of the fact that all readings of the x-rays note interstitial fibrosis, the record reveals that such fibrosis was found to be consistent with emphysema and no mention is included on any x-ray report of findings consistent with asbestosis. CX 3.

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). On appeal, claimant argues that it was error for the administrative law judge to credit the opinion of Dr. Pulde over that of Dr. McCormack. Dr. McCormack opined that 25 percent of claimant's impairment is due to asbestos exposure. EX 11 at 13-16.

In reaching his conclusion, the administrative law judge afforded deference to Dr. McCormack's opinion as that of the treating physician, although he noted that Dr. McCormack had treated claimant for only six months and had been in pulmonary practice for only one year at that time.² Decision and Order at 11. He concluded that Dr. McCormack's opinion was too equivocal and lacking of sufficient objective support to be persuasive. Specifically, the administrative law judge noted Dr. McCormack's acknowledgment that claimant's x-rays did not reveal pleural plaques consistent with lung disease related to asbestos exposure and that his pulmonary function studies did not demonstrate the presence of restrictive lung disease indicative of such exposure. The administrative law judge concluded that unlike Dr. Pulde, who based his opinion on specific findings in claimant's medical record, Dr. McCormack offered no objective basis for his conclusion that claimant's history of asbestos exposure is responsible for the fibrotic changes in claimant's lungs. He thus found that Dr. McCormack's opinion that asbestosis contributed to claimant's pulmonary impairment was based primarily on claimant's exposure history and the presence of unspecified fibrosis. The administrative law judge thus found Dr. McCormack's opinion entitled to less weight than that of Dr. Pulde, and that therefore claimant failed to establish that his pulmonary impairment is work-related based on the evidence as a whole.

It is well established that the administrative law judge is entitled to determine the weight to be accorded to the evidence of record, and the administrative law judge's decision to credit the opinion of Dr. Pulde over that of Dr. McCormack is rational. *See Meehan Seaway Service, Inc. v. Director, OWCP*, 4 F.3d 633, 27 BRBS 108(CRT) (8th Cir. 1993); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999). Thus, as the administrative law judge's finding that claimant's pulmonary condition is not work-related is supported by substantial evidence, we

²The administrative law judge noted that Dr. McCormack did not address whether any exposure other than that to asbestos could have affected claimant's condition and therefore, Dr. McCormack's opinion cannot support claimant's claim that his pulmonary condition is due to other exposures. Decision and Order at 12.

affirm the administrative law judge's denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge