

SILVESTRE CABANBAN	)	
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Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: <u>Mar 24, 2005</u>
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Stephen C. Embry (Embry & Neusner), Groton, Connecticut, for claimant.

Edward W. Murphy (Morrison, Mahoney & Miller, LLP), Boston, Massachusetts, for self-insured employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (2003-LHC-00845) 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed as a welder at employer's shipyard from 1980 until 1995, during which time he was exposed to welding and paint fumes and to metal and paint dust. Claimant was hospitalized in 1985 for pneumonia and pleuritis and returned to his regular duties as a welder following his recovery. After retiring from employer's shipyard in 1995, claimant worked for three years as a cook at a casino. Claimant subsequently sought permanent partial disability benefits under the Act, alleging that his current pulmonary impairment arose out of and in the course of his employment with employer.

In her Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), linking his pulmonary impairment, specifically chronic obstructive pulmonary disease (COPD), to his employment with employer. Next, the administrative law judge found that employer rebutted the presumption. The administrative law judge then weighed the evidence of record and concluded that claimant failed to establish a causal relationship between his employment and his pulmonary condition. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's determination that employer's evidence is sufficient to establish rebuttal of the Section 20(a) presumption. Employer responds, urging affirmance of the administrative law judge's decision in its entirety.

Where, as in the case at bar, claimant has established entitlement to invocation of the Section 20(a) presumption, *see Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989), the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2<sup>d</sup> Cir. 2001); *see also Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT)(5<sup>th</sup> Cir. 1999); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT)(7<sup>th</sup> Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1<sup>st</sup> Cir. 1997); *Maher Terminals, Inc. v. Director, OWCP*, 992 F.2d 1277, 27 BRBS 1(CRT) (3<sup>d</sup> Cir. 1993), *aff'd sub nom. Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). If the administrative law judge finds that the Section 20(a) presumption is rebutted, it drops from the case. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997). The administrative law judge must then weigh all of the relevant evidence and determine whether a causal relationship has been established, with claimant bearing the burden of persuasion. *Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996); *see Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT).

In the instant case, claimant avers that the administrative law judge erred in concluding that the opinions of Drs. Barrett and Teiger, who respectively opined that claimant's COPD was caused by cigarette smoking and is unrelated to his employment as a welder with employer, are sufficient to rebut the Section 20(a) presumption. For the reasons that follow, we reject claimant's contention of error and affirm the administrative law judge's finding that these opinions are sufficient to rebut the presumption.

Dr. Barrett, a Board-certified radiologist who examined claimant's medical records and x-ray films, stated in his reports and deposition testimony that there is no relationship between claimant's COPD and his employment as a welder and that claimant's COPD was caused by his history of cigarette smoking. EXs 12, 22; EX 26 at 9-12, 19-20. In support of his contention of error, claimant challenges the foundation underlying Dr. Barrett's opinion.<sup>1</sup> Moreover, claimant asserts that the administrative law judge should have rejected Dr. Barrett's opinion on the basis of that physician's inadequate understanding of claimant's smoking history. Cl. br. at 6-7. We disagree. As recognized by the administrative law judge, claimant's statements regarding his smoking history made during his deposition and hearing testimony are conflicting, as are the accounts of claimant's smoking history recorded in the medical reports of record. Decision and Order at 5-6. In her Decision and Order, the administrative law judge conducted an exhaustive review of the various accounts of claimant's smoking history contained in the record, and her decision contains a thorough and accurate description of this evidence. Decision and Order at 5-10; *see* Tr. at 58-59, 64, 81; CXs 1, 2, 6; CX 7 at 7-9, 13-14, 19; EXs 1, 12, 14-16, 22-25; EX 26 at 10-12, 15-20; EX 27 at 12-13, 20, 29-30; EX 28 at 42-44. In this regard, the administrative law judge found that the opinions of Drs. Keltner, Barrett and Teiger were premised on an understanding that claimant smoked 3-5 cigarettes per day for 20-30 years and quit smoking for good when he was hospitalized for pneumonia in 1985. After weighing all of the relevant record evidence on this issue, the administrative law judge found that claimant began smoking in his teens and continued to smoke at least through September 1998, for a total of more than forty years. Decision and Order at 5-6, 8-9. The administrative law judge's finding regarding the length of claimant's smoking history is affirmed as it is reasonable and supported by substantial evidence. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2<sup>d</sup> Cir. 1997); *John W. McGrath Co. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). Therefore, as Dr. Barrett attributed claimant's COPD to smoking based on his understanding that claimant's smoking history was *shorter*

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<sup>1</sup> Claimant first intimates that Dr. Barrett may not be qualified to render an expert opinion regarding the existence of a causal relationship between claimant's COPD and his employment because he is a radiologist rather than a pulmonologist who clinically treats patients with respiratory diseases. Cl. br. at 6. Additionally, claimant avers that Dr. Barrett's lack of knowledge regarding occupational lung disease renders his opinion insufficient to rebut the Section 20(a) presumption. Cl. br. at 7. Claimant's contentions are without merit, as the administrative law judge expressly considered both Dr. Barrett's professional qualifications and his knowledge of the medical literature regarding occupational lung disease. Decision and Order at 5. Thus, the administrative law judge acted within her discretion as fact-finder in evaluating Dr. Barrett's expertise and the foundation for his medical opinion and reasonably found the physician's opinion to constitute substantial evidence in support of rebuttal. *See American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 65, 35 BRBS 41, 49(CRT) (2<sup>d</sup> Cir. 2001).

in duration than that found by the administrative law judge, claimant's attempt to undermine Dr. Barrett's opinion on the basis of the doctor's understanding of claimant's smoking history is without merit. Additionally, in further support of his argument that Dr. Barrett's opinion is flawed, claimant asserts that Dr. Barrett was the only physician of record to find that claimant did not have interstitial scarring. Cl. br. at 7. Contrary to claimant's assertion, however, Dr. Barrett did find that claimant's x-rays revealed interstitial scarring. EXs 12, 22; EX 26 at 23-24, 33. Moreover, the administrative law judge accurately characterized Dr. Barrett's deposition testimony in which the doctor explained that his opinion that claimant's COPD is not work-related is based on the fact that the amount of interstitial scarring revealed by claimant's x-rays was considerably less than typically shown in individuals with COPD resulting from occupational exposure to welding fumes. Decision and Order at 9; EX 26 at 23-24, 33.

Claimant next challenges the rationale provided by Dr. Teiger for his opinion that claimant's COPD was not related to his employment. Cl. br. at 8-9. Dr. Teiger testified on deposition that there is no evidence that claimant experienced recurrent respiratory symptoms contemporaneous with his occupational exposure to welding fumes as would be expected had his COPD been causally related to his occupational exposure. EX 27 at 7-8, 12-13, 17-18, 26-27. Claimant challenges Dr. Teiger's reasoning on the basis of record evidence that claimant experienced respiratory symptoms during his 1985 bout of pneumonia which occurred during the period in which claimant was exposed to welding fumes. After considering and weighing all of the relevant evidence, the administrative law judge determined that claimant did not experience respiratory symptoms during or close in time to his welding activities except during the period in 1985 in which claimant had pneumonia.<sup>2</sup> The administrative law judge further found, after evaluating the medical opinions regarding the etiology of claimant's pneumonia, that claimant's pneumonia was caused by a routine bacterial infection, and that this pneumonia was unrelated to his occupational exposure to fumes and dust. Decision and Order at 7, 9; *see* CX 7 at 10-11, 18; EX 12; EX 26 at 15; EX 27 at 26, 28, 31-32. As the administrative law judge's conclusion that claimant's episode of pneumonia was not employment-related is reasonable

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<sup>2</sup> The administrative law judge, having acknowledged that claimant made conflicting statements in his deposition and hearing testimony as to whether he had respiratory symptoms during his welding activities, found that the credible evidence supports a finding that, except for his episode of pneumonia, claimant did not experience respiratory symptoms while working. Decision and Order at 6-7. *See* Tr. at 62-63, 71-72; CX 7 at 16-17; EX 27 at 7-8, 12-13, 26-27; EX 28 at 23-29. This finding, which is not directly challenged by claimant on appeal, is upheld as it is reasonable and supported by substantial evidence. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2<sup>d</sup> Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961).

and supported by substantial evidence, the fact that claimant temporarily experienced pneumonia-related respiratory symptoms does not undermine the rationale provided by Dr. Teiger for his medical opinion that claimant's present COPD has no causal relationship to his employment. *See generally Marinelli*, 248 F.3d at 65, 35 BRBS at 49(CRT); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Accordingly, as the credited opinions of Drs. Barrett and Teiger constitute substantial evidence that claimant's present pulmonary impairment is unrelated to his employment with employer, we affirm the administrative law judge's finding that employer established rebuttal of the Section 20(a) presumption. *Id.*; *Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

After finding the Section 20(a) presumption rebutted, the administrative law judge weighed all of the evidence of record and concluded that claimant did not establish a causal connection between his pulmonary impairment and his employment based on the record as a whole. Decision and Order at 8-10. In reaching this conclusion, the administrative law judge accorded determinative weight to the opinions of Drs. Barrett and Teiger rather than to the contrary opinion of Dr. Keltner, finding that the former two physicians provided well-reasoned explanations for their opinions. Although claimant's brief contains arguments regarding the administrative law judge's weighing of the evidence, these arguments are specifically directed to the administrative law judge's finding that the Section 20(a) presumption was rebutted, and have been addressed in our discussion of the administrative law judge's rebuttal finding. Claimant has failed to demonstrate any reversible error made by the administrative law judge in his determination, based on the record as a whole, that claimant's COPD is not causally related to his employment. As the administrative law judge conducted a thorough evaluation of the record evidence and made findings that are supported by substantial evidence, we affirm her conclusion that claimant failed to establish that his pulmonary impairment is related to his employment with employer. *See Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT); *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001).

Lastly, claimant's counsel has requested an attorney's fee of \$1,312.50 for work performed before the Board; employer has filed objections to the fee petition. As claimant has not successfully prosecuted his claim before the Board, his counsel is not entitled to an attorney's fee. *See* 33 U.S.C. §928; 20 C.F.R. §802.203; *Phillips*, 22 BRBS 94.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge