

RUTH KNIGHT)
(Widow of CALVIN KNIGHT))
)
 Claimant-Petitioner)
)
 v.)
)
JACKSONVILLE SHIPYARDS,)
INCORPORATED)
)
 and)
)
ACE/INA/ARM INSURANCE) DATE ISSUED: Mar 24, 2005
SERVICES)
)
 and)
)
CNA CASUALTY INSURANCE OF)
FLORIDA)
)
 Employer/Carriers-)
 Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Nathan J. Shafner (Embry & Neusner), Groton, Connecticut, for claimant.

Bonnie J. Murdoch (Taylor, Day & Currie), Jacksonville, Florida, for employer and ACE/INA/ARM Insurance Services.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer and CNA Casualty Insurance of Florida.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2002-LHC-1788) of Administrative Law Judge Robert L. Hillyard 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 from 1969 until 1992 when the shipyard closed. Emp. Ex. A. He died on January 6, 2001, as the result of pneumonia, chronic obstructive pulmonary disease, and lung cancer. Cl. Ex. 1. Thereafter, his widow, claimant, filed a claim for death benefits under Section 9 of the Act, 33 U.S.C. §909, contending decedent's lung cancer and death were the results of his exposure to asbestos at employer's facility.

The administrative law judge found that claimant established a *prima facie* case by showing that decedent suffered lung cancer and by showing that asbestos was present at employer's facility; therefore, conditions existed at work that could have caused decedent's lung cancer and death. Decision and Order at 14. He then found that employer's medical evidence was insufficient to rebut the Section 20(a), 33 U.S.C. §920(a), presumption; however, he determined that the evidence refuting the fact of decedent's exposure to asbestos at work submitted by employer constituted substantial evidence to rebut the presumption. Decision and Order at 15-17. Addressing the evidence on the record as a whole, the administrative law judge found that claimant failed to satisfy her burden of establishing that decedent's death was work-related. The administrative law judge gave greater weight to employer's medical expert, and also to those employees who discussed employer's safety and abatement program¹ and/or who

¹According to two witnesses, upon suspecting an encounter with asbestos, employer evacuated and closed off the area, and workers would not be re-admitted until

worked with decedent and stated they did not see him work in areas where asbestos was present. Decision and Order at 17-22. Accordingly, the administrative law judge denied the claim for death benefits.² Claimant appeals the decision. Employer and its carriers, CNA and ACE, and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

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 asbestos exposure at his workplace. Although the administrative law judge reached his conclusion in a somewhat circuitous fashion, we affirm the denial of benefits as the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law.

In determining whether an injury or death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after she establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that the decedent sustained a harm or pain and that conditions existed or an accident occurred at the decedent's place of employment which could have caused the harm or pain. *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); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the decedent's injury and death to his employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *see also 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 the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *O'Kelley v. Dep't of the*

after a chemist determined the identity of the suspect substance and a contractor removed any asbestos. Emp. Ex. C at 17-20, 23, 32-33; Emp. Ex. G at 6-7, 9.

²The administrative law judge also determined that, had a work-related death been established, then CNA would have been the carrier responsible, as it was the carrier on the risk at the time decedent would have last been exposed to asbestos. Decision and Order at 22-23. Both the Director and ACE argue that this finding is unchallenged on appeal and should be affirmed. As the issue has not been raised before us, and in light of our decision herein, we need not address this issue.

Army/NAF, 34 BRBS 39 (2000); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge invoked the Section 20(a) presumption based on his findings that claimant established a physical harm to decedent, pneumonia, lung cancer and death, and that conditions existed at decedent's work that could have caused the harm. With regard to the latter, the administrative law judge relied on the testimony of three employees, Mr. Combs, Mr. Davis, and Mr. Wheeler, who stated that asbestos was present at the shipyard.³ Decision and Order at 14; Cl. Ex. 4; Emp. Exs. C, G. After invoking the Section 20(a) presumption, the administrative law judge found that it was rebutted by testimony establishing that decedent was not exposed to asbestos at the shipyard.⁴ Specifically, he relied on the testimony of Mr. Wheeler and Mr. Combs in concluding that employer produced evidence that decedent did not work in areas containing asbestos and that employer had a safety and abatement program in place to prevent exposure to asbestos. Decision and Order at 16-17; Emp. Ex. C at 26, 32-33, 39; Emp. Ex. G at 5-6, 10, 14, 16-17. The administrative law judge then weighed all of the evidence in the record as a whole relevant to the issue of asbestos exposure and found claimant failed to establish that decedent was exposed to asbestos at employer's facility. Initially, we need not specifically address claimant's arguments that the administrative law judge erred in finding that employer presented substantial evidence to rebut Section 20(a). It is claimant's burden to establish a *prima facie* case, and thus claimant must prove in the first instance that decedent was exposed to asbestos in the workplace. Any error in the manner in which the administrative law judge weighed the relevant evidence regarding asbestos exposure here is harmless, as the administrative law judge ultimately weighed the relevant evidence, properly allocating the burden of proving decedent's asbestos exposure to claimant.

³The deposition of Mr. Combs was taken in the matter of *McCutcheon v. Jacksonville Shipyards, Inc.*, and does not mention decedent herein. However, it was admitted into evidence because it discussed conditions at employer's facility and employer's procedure for quarantine and abatement following an asbestos encounter. Emp. Ex. C. Claimant's brief on appeal also refers to the deposition testimony of a Mr. Smith; however, there is no such deposition in the record. The record contains two copies of Mr. Combs' deposition. *See* Cl. Ex. 17; *see also* Emp. Ex. C.

⁴The administrative law judge found that employer's medical evidence, specifically the opinion of Dr. Yergin, was insufficient to rebut Section 20(a) as it was equivocal and thus does not constitute substantial evidence. As no party challenges this conclusion, it will not be addressed.

We reject claimant's assertion that the administrative law judge's weighing of the evidence, credibility findings, and inferences are unreasonable. The administrative law judge found that claimant did not credibly establish decedent's exposure to asbestos; in this regard, he discredited or gave less weight to both claimant's testimony and that of her prime witness, Mr. Davis. He found that claimant's testimony was ambiguous as to decedent's exposure to asbestos, as claimant could only testify to a white substance on decedent's clothes. The administrative law judge also found that the testimony of Mr. Davis was of limited value because Mr. Davis was not sure whether the substance he saw was actually asbestos, and his credibility was questionable because of family bias, as he was decedent's uncle, and possible monetary bias, as he had asbestos litigation pending. The administrative law judge also found that Mr. Davis did not seem to know decedent's smoking history, despite his claim of having worked closely with decedent for many years. Decision and Order at 17-18. Consequently, the administrative law judge gave greater weight to the testimony of those witnesses who described employer's safety and abatement program protecting employees from asbestos exposure and who stated they did not see decedent working in areas containing asbestos. *Id.* at 17-19; Emp. Ex. C at 26, 32-33, 39; Emp. Ex. G at 5-6, 10, 14, 16-17.

It is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and has considerable discretion in evaluating and weighing the evidence of record. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *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); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Moreover, the administrative law judge is entitled to draw his own inferences from the evidence, and his selection among competing inferences must be affirmed if supported by substantial evidence and in accordance with law. *See Gallagher*, 219 F.3d at 430, 34 BRBS at 37(CRT); *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79(CRT) (5th Cir. 1995). As the administrative law judge's weighing of the evidence and his inferences therefrom are rational, and as substantial evidence of record supports the administrative law judge's decision, we affirm his conclusion that decedent was not exposed to asbestos at employer's facility.⁵

⁵Based on this conclusion, the administrative law judge rejected medical evidence supportive of a relationship between decedent's employment and death, finding that those opinions were based on an incorrect assumption of asbestos exposure. Claimant does not directly challenge the administrative law judge's weighing of the medical evidence. The administrative law judge gave little weight to the opinions of Drs. Sharpe, Pohl, Krawtz

We also reject claimant's assertion that the administrative law judge erred in failing to apply the provision set forth at Section 23(a) of the Act, 33 U.S.C. §923(a),⁶ to conclusively establish that decedent suffered a work-related injury.⁷ Initially, the Board has held that Section 23(a) assists a claimant in establishing a *prima facie* case, but it does not render a decedent's declarations conclusive proof of a work-related injury. *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171, 173 (2001). Rather, this section permits a decedent's declarations to be admitted into evidence and, if corroborated, they are sufficient to establish injury. In this case, however, the administrative law judge rationally found that any evidence which could corroborate decedent's statements regarding his exposure to asbestos was not credible. Therefore, any error he may have committed in not addressing Section 23(a) is harmless. *Id.* As substantial evidence of record supports the administrative law judge's finding that decedent was not exposed to asbestos at employer's facility, we affirm his conclusion that decedent's lung cancer and death were not work-related. Thus, we affirm his denial of benefits. *See Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

and Daum because they were rendered prior to the development of the lung cancer and did not address the cause of the lung cancer and resulting death. Instead, he relied on the opinion of Dr. Yergin to find that decedent's condition was not work-related but, rather, was related to decedent's 150 pack-years of smoking. His reasons for crediting Dr. Yergin's opinion and rejecting the others are rational. *See Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); Decision and Order at 19-22; Cl. Exs. 6-7, 10-11, 19; Emp. Exs. F, J1 at 16, 23, J2 at 27, 35-36, 39.

⁶Section 23(a) generally provides that formal rules of evidence are not applicable in proceedings under the Act. Relevant to this case, it provides:

Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

⁷Claimant alleges that decedent's description of his work and his purported exposure to asbestos to Dr. Sharpe conclusively establishes he sustained a work-related injury. Cl. Ex. 7.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge