

ROBERT K. GOODSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: 03/29/2006
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard E. Huddleston,  
Administrative Law Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.),  
Newport News, Virginia, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2001-LHC-2188) of Administrative Law Judge Richard E. Huddleston 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case is before the Board for the second time. To reiterate, claimant, a voluntary retiree, worked in shipbuilding and repair for employer from August 3, 1942

through August 30, 1979, as a welder and was exposed to airborne asbestos dust and fibers. He was diagnosed with lung cancer on August 2, 1999, and filed a claim alleging his disease is due to his occupational exposure to asbestos.

In his first Decision and Order, the administrative law judge found that claimant invoked the Section 20(a), 33 U.S.C. §920(a), presumption of causation based on the existence of lung cancer and the parties' stipulation that claimant was exposed to asbestos during his work with employer. Finding that employer failed to rebut the presumption, the administrative law judge found that claimant's lung cancer is work-related. Consequently, he awarded claimant total disability compensation and further found employer entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

The Director, Office of Workers' Compensation Programs, filed a motion for reconsideration arguing that because claimant is a voluntary retiree, he is limited to an award of permanent partial disability benefits based on the degree of his permanent impairment. 33 U.S.C. §§902(10), 908(c)(23). Moreover, as a consequence, the Director contended that employer's eligibility for relief under Section 8(f) must be determined under the permanent partial disability standard rather than that applicable to permanent total disability. In response, the parties submitted two additional stipulations: (1) claimant is a voluntary retiree; and (2) claimant suffers from a 75 percent pulmonary impairment.

Based on the additional stipulations, the administrative law judge vacated his award of permanent total disability benefits and awarded claimant permanent partial disability benefits based upon a 75 percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed.). 33 U.S.C. §908(c)(23). Additionally, the administrative law judge re-evaluated the evidence submitted by employer to determine its entitlement to relief pursuant to Section 8(f) under the standards for a voluntary retiree with a permanent partial disability. The administrative law judge determined employer failed to meet the criteria under this standard and denied employer Section 8(f) relief.

Employer appealed to the Board, arguing that the administrative law judge erred in finding that the opinion of its expert, Dr. Churg, was insufficient to rebut the Section 20(a) presumption of causation, and, therefore, erred in awarding claimant compensation benefits. Dr. Churg stated that, in the circumstance of this case, *i.e.*, the absence of a diagnosis of asbestosis and claimant's heavy smoking history, "that this [claimant's] lung cancer was caused entirely by cigarette smoking and not by asbestos exposure." EX 2 at 2. The Board reversed the administrative law judge's finding and held that Dr. Churg's opinion is sufficient to establish rebuttal, as a matter of law, because employer's burden is one of production not persuasion. Consequently, the Board remanded the case to the administrative law judge to weigh the evidence as a whole, without the benefits of the

Section 20(a) presumption, to determine whether claimant met his burden of establishing that his lung cancer is work-related. *Goodson v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 03-0722 (July 23, 2004) (unpub.).

On remand, in considering the evidence on the record as a whole, the administrative law judge found that claimant failed to establish that his lung cancer is related to his employment exposure to asbestos. Claimant appeals the denial of benefits. Employer has not responded to this appeal.

Once, as here, the Section 20(a) presumption is invoked and rebutted, it drops from the case. The administrative law judge must weigh the evidence as a whole and claimant bears the burden of establishing by a preponderance of the evidence the work-relatedness of his lung cancer. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant contends that the administrative law judge erred in giving determinative weight to the opinion of Dr. Churg on the issue of whether claimant has asbestosis. Claimant, however, fails to address on appeal the central basis for the denial of benefits. Specifically, the administrative law judge found that claimant did not offer into evidence a medical opinion stating that lung cancer can be caused by asbestos exposure in the absence of diagnosed asbestosis or a medical opinion stating that claimant's lung cancer is due even in part to asbestos exposure, irrespective of whether a diagnosis of asbestosis is required. Decision and Order on Remand at 5-6.

The administrative law judge's findings in this regard are supported by substantial evidence. Several pathologists reviewed the microscopic biopsy slides. Dr. Maddox stated that claimant has a very high "asbestos burden" and that there is enough asbestos and interstitial fibrosis to support a diagnosis of asbestosis. CX 9. Dr. Legier also reviewed the specimens and stated that claimant has "numerous asbestos bodies" and mild fibrosis. CX 12 at 7. Dr. Roggli stated that claimant has a "pulmonary asbestos burden which is within the range of that seen in patients with asbestosis." CX 13. Dr. Churg, in contrast, stated that claimant's tissue sample shows numerous asbestos bodies, but that whether claimant has asbestosis cannot be determined from a transbronchial biopsy. He therefore looked to claimant's x-rays and opined that they do not show evidence of asbestosis. Dr. Churg stated his opinion that a diagnosis of asbestosis is required for lung cancer to be attributed to asbestos exposure. As such is lacking in this case, Dr. Churg stated that claimant's lung cancer is caused entirely by cigarette smoking. EX 2.

As there is no medical evidence of record linking claimant's lung cancer to asbestos exposure, the administrative law judge properly denied benefits.<sup>1</sup> Claimant failed to satisfy his burden of establishing a causal connection between his injury and his employment. *Universal Maritime Corp.*, 126 F.3d 256, 31 BRBS 119(CRT); *Rochester v. George Washington Univ.*, 30 BRBS 233 (1997). We reject claimant's contention that the administrative law judge irrationally credited Dr. Churg's opinion on remand when he found it "hostile to the Act" in his first decision. In his first decision the administrative law judge found Dr. Churg's opinion insufficient to rebut the Section 20(a) presumption, a finding the Board reversed as a matter of law. On remand, therefore, the administrative law judge was entitled to re-evaluate the weight to be accorded Dr. Churg's opinion. Indeed, on remand the administrative law judge did not whole-heartedly accept Dr. Churg's opinion, but rather credited it because Dr. Churg was the only physician to render an opinion as to the cause of claimant's lung cancer. Decision and Order on Remand at 5.<sup>2</sup> Moreover, the administrative law judge is entitled to determine the weight to be accorded to the evidence and claimant has not established that the administrative law judge's decision in this regard is irrational. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2<sup>d</sup> Cir. 1961). As claimant has failed to raise any error in the administrative law judge's finding that he did not establish the work-relatedness of his lung cancer, the denial of benefits is affirmed. *See generally Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *see also Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997), *aff'd* 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999).

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<sup>1</sup> Contrary to claimant's contention there was no "medical literature" offered into evidence by either party in this case.

<sup>2</sup> The administrative law judge stated, "Admittedly, Dr. Churg's opinion is not completely persuasive . . . Nonetheless, Dr. Churg offers the only unequivocal opinion on the issue of causation in the present case." Decision and Order on Remand at 5.

Accordingly, we affirm the administrative law judge's Decision and Order on Remand denying benefits.

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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BETTY JEAN HALL  
Administrative Appeals Judge