

BRENDA L. LYNCH	)	
(Widow of WILLIE P. LYNCH)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BAE SYSTEMS NORFOLK SHIP REPAIR	)	DATE ISSUED: 03/30/2010
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Death Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Brenda L. Lynch, Chesapeake, Virginia, *pro se*.

Gerard E.W. Voyer, Audrey Marcello, and Dannielle Hall-McIvor (Taylor and Walker, P.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant, appearing without representation, appeals the Decision and Order-Denying Death Benefits (2008-LHC-01557) of Administrative Law Judge Alan L. Bergstrom 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). In reviewing an appeal where claimant is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law in order to determine if they are supported by substantial evidence, are rational, and are in accordance with law; if they are, they must be affirmed. 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 the 1970's until April 2006 in the labor department. He was exposed to asbestos while cleaning up after other workers. Decedent underwent surgery in April 2006 for diverticulitis, during which time peritoneal carcinoma was discovered. Decedent died on July 18, 2006, due to metastatic adenocarcinoma, with respiratory failure and renal failure listed as contributing factors.

CX 1. On September 10, 2006, claimant, decedent's widow, filed a claim for death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909, and employer timely filed a notice of controversion. EXs 1, 3.

The administrative law judge determined that claimant established a *prima facie* case, invoking the Section 20(a), 33 U.S.C. §920(a), presumption, based on evidence that decedent was exposed to asbestos at work, and medical evidence of pleural plaques, asbestos bodies in the lungs, and an abnormal chest x-ray. Decision and Order at 16-18. The administrative law judge applied Section 20(a) to presume that the asbestosis caused or hastened decedent's death from cancer. The administrative law judge found, however, that employer rebutted the Section 20(a) presumption by presenting substantial evidence that work exposure to asbestos did not cause decedent's metastatic cancer and that asbestosis did not contribute to decedent's respiratory and renal failure. *Id.* at 18-21. Based on the record as a whole, the administrative law judge found that claimant failed to establish that asbestosis hastened or caused decedent's death. *Id.* at 21. Accordingly, he denied benefits.

On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's finding that decedent's death was not related to his employment. Employer responds, urging affirmance.

In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that an accident occurred, or conditions existed, at work which could have caused that harm. *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F. App'x 249 (4<sup>th</sup> Cir. 2007); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see generally 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 death to the employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to the employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4<sup>th</sup> Cir. 1997). 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. *Id.*; *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In this case, the administrative law judge found that claimant established both a harm, asbestosis, demonstrated by x-ray and autopsy findings, and working conditions, the presence of asbestos at employer's facility, and he therefore invoked Section 20(a) to

presume that decedent's cancer was related to asbestos exposure. The administrative law judge then discussed all the relevant evidence of record and determined that employer presented substantial evidence to rebut the presumption. In this regard, Dr. Wick opined that decedent's fatal abdominal cancer was not an asbestos-related disease. CX 3; EX 11. The administrative law judge found that this opinion is supported by studies documented in medical texts submitted into evidence. EXs 38, 39. This evidence constitutes substantial evidence rebutting the Section 20(a) presumption, and the administrative law judge's rebuttal finding is therefore affirmed.<sup>1</sup> See *Coffey v. Marine Terminals Corp.*, 34 BRBS 85 (2000); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 89 (1997), *aff'd*, 169 F.3d 615, 33 BRBS 1(CRT) (9<sup>th</sup> Cir. 1999); *Rochester v. George Washington University*, 30 BRBS 233 (1997). Therefore, the issue of whether decedent's death due to metastatic abdominal cancer was related to asbestos exposure at work is properly addressed based on the record as a whole, requiring claimant to prove her claim by a preponderance of the evidence. See *Sistrunk v. Ingalls Shipbuilding, Inc.*, 35 BRBS 171 (2001); *Santoro v. Maher Terminal, Inc.*, 30 BRBS 171 (1996).

In this case, the administrative law judge summarily found that claimant failed to establish that asbestos exposure hastened or caused the decedent's death without additional discussion of the evidence. See Decision and Order at 21. Any error in failing to discuss the evidence on the record as a whole at this point in his analysis is harmless in this case, as in addressing rebuttal, the administrative law judge stated he gave less

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<sup>1</sup> Pursuant to the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5<sup>th</sup> Cir. 1986) (*en banc*); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Following this rule in a death benefits case where the immediate cause of death is not work-related, the Board has applied the maxim that "to hasten death is to cause it." See *Fineman v. Newport News Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); see also *Brown & Root, Inc. v. Sain*, 162 F.3d 813, 32 BRBS 205(CRT) (4<sup>th</sup> Cir. 1998) (applying rule in Section 8(f) context); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993) (applying same rule in a black lung case). Claimant, who was represented by counsel before the administrative law judge, did not allege that asbestosis hastened the death or was otherwise related to the respiratory and renal failure that contributed to death. Tr. at 10-12; Claimant's Post-Hearing Brief at 3-7. Although employer was not required to rebut a theory not raised by claimant, see *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), the administrative law judge nonetheless addressed this issue and credited the opinion of Dr. Heide that decedent's respiratory problems were multi-factorial, but that any pleural plaquing was an incidental finding that had no relationship to decedent's illness and death. CX 7. This evidence is sufficient to rebut the Section 20(a) presumption.

weight to the medical evidence on which claimant relied to establish that the death was related to asbestos exposure. *See generally Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). The administrative law judge first found that there is no objective evidence that decedent had a known asbestos-related cancer, such as mesothelioma or lung cancer.<sup>2</sup> With regard to whether any asbestos-related condition contributed to the development of decedent's abdominal cancer, Dr. Bluemink, who performed an autopsy of the decedent, diagnosed peritoneal cancer compatible with gallbladder origin. CX 2. He opined that this cancer is related to asbestos exposure since persons with such exposure have a higher incidence of carcinoma, including carcinoma below the diaphragm. *Id.* Dr. Harley examined autopsy slides and reported adenocarcinoma of the intestines, stomach and spleen, with peritoneal carcinomatosis. EX 14. Dr. Harley opined that he could not "absolutely exclude the possibility that asbestos exposure contributed to this cancer," but he concluded his report by opining that, "[I] do not believe that asbestos contributed to causing this cancer." *Id.* at 6. Dr. Wick examined autopsy slides and opined that decedent had abdominal adenocarcinomatosis originating in the gastrointestinal tract, biliary tree or pancreas. EX 11. He opined that there is no objective evidence that decedent's cancer was caused by asbestos exposure, and that he was unaware of any "credible, scientific, and generally accepted data" that demonstrated that decedent's type of cancer was caused by asbestos exposure. *Id.*

The administrative law judge found that Dr. Wick's statement is consistent with medical texts by Drs. Oury and Craighead that employer offered into evidence. Dr. Oury reported, in a chapter in Pathology of Asbestos – Associated Diseases, that the existence of an association between asbestos exposure and gastrointestinal cancer has not been definitively established. EX 38 at 6. Dr. Craighead similarly reported, in his chapter in Asbestos and its Diseases, that epidemiological studies do not show that asbestos exposure contributes to the development of gastric, colorectal and kidney cancer. EX 39 at 9-13.

The administrative law judge gave greater weight to the opinions of Drs. Wick and Harley, as supported by the medical textbooks, based on their superior credentials in dealing with asbestos-related diseases, mesothelioma, metastatic tumors, and abdominal cancers, than to the opinion of Dr. Bluemink. The administrative law judge found that although Dr. Bluemink is Board-certified in anatomical and clinical pathology, his curriculum vitae does not indicate a specialization with cancers. CX 4. In contrast, the administrative law judge found that while Dr. Wick and Dr. Harley are Board-certified in pathology, they also have extensively published on subjects relating to asbestos-related

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<sup>2</sup> The administrative law judge found the medical experts agreed that abdominal cancer was the primary cause of death but disagreed on its source.

diseases and cancers. EXs 13, 15. The administrative law judge also found that Drs. Oury and Craighead are experts in the areas of asbestos-related diseases and pulmonary disease. EXs 40, 43.

The administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962). Thus, we affirm the administrative law judge's rational crediting of the opinions of Drs. Wick and Harley, as supported by the medical literature of Drs. Oury and Craighead, over the opinion of Dr. Bluemink. *See Sistrunk*, 35 BRBS 171; *Coffey*, 34 BRBS 85; *see also Hice v. Director, OWCP*, 48 F.Supp.2d 501 (D. Md. 1999); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). Consequently, as the administrative law judge's weighing of the evidence is rational, his conclusion that claimant did not establish that decedent's asbestosis caused or contributed to his fatal abdominal cancer is supported by substantial evidence. Thus, the administrative law judge's finding that claimant is not entitled to death benefits is affirmed.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge